

Voices from Inside:
The Role of Soft Civil Oversight in Regulating Prisons
in Japan and the Australian Capital Territory

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Declaration

I, Carol Lawson, declare that this thesis is my own work, except where otherwise acknowledged and cited.

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A handwritten signature in blue ink, reading "Carol Lawson".

May 2023

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This comparative empirical mixed-methods study was made possible by both the Japanese and ACT prisons administrations extending consistently generous cooperation and practical support over three research phases that spanned more than five years, for which I am deeply appreciative.

Without this steadfast goodwill and professionalism, this project would have been impossible.

I am also deeply indebted to the study participants in Japan and the Australian Capital Territory.

Nearly 2,700 people gave this project their time, candidly sharing their lived experience of soft civil prison oversight. For corrections officers, policymakers and civil overseers, this meant a selfless decision to accept disruption – allowing a stranger to observe them and sacrificing their time to be interviewed or to answer a long and detailed survey questionnaire. For prisoners, I know that participation required courage, despite the safeguards in the research design.

My hope is that the findings will inform future regulatory policy in ways that are useful for all participants, but particularly for the two communities inside prisons: prisoners and staff. Wherever possible, I have prioritised their perspectives – as ‘voices from inside’ that have often been overlooked when decisions are made about soft civil prison oversight.

~~~~~

In Memory of

Prof. Mikio Kawai (1960-2023)

and

Aunty Tracey Whetnall (1963-2019)

## **Abstract**

States increasingly respond to public demands for scrutiny of prisons by establishing civilian monitoring bodies. This regulatory trend began after World War II, when European human rights advocates argued that civil oversight prevents abuses and promotes prison reform. Their sincere belief and the mechanism's rhetorical appeal led to rapid diffusion, aided by the 2002 Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT).

This thesis examines 'soft' civil oversight, the simplest, purely persuasive form of the mechanism. Soft oversight bodies are included in the National Preventive Mechanism (NPM) networks that OPCAT state parties must establish. As soft mechanisms rely on dialogue and voluntarism, they seem to fit at the base of Ayres and Braithwaite's 'regulatory pyramid' (1992). However, theorists like Hood (2004) have warned that inspection and monitoring bodies are ineffective against risky government activity – and there has been almost no evidence of their efficacy in prisons.

This mixed methods empirical study put soft civil oversight's commendable aims respectfully aside to investigate its nature and impact. It gathered data on the lived experience of 2,700 prisoners, staff, and overseers who animate these mechanisms at 50 prisons in Japan and the Australian Capital Territory (ACT). The study analysed these data using Valerie Braithwaite's social alignments and motivational postures theories (2017), which establish that persuasive mechanisms 'run on goodwill'. Regulatees – here prison staff – tend to cooperate with persuasive mechanisms when they see them as legitimate, beneficial, fair, and worthy – and otherwise resist, disengage, or 'game' their response.

Japan's design emerged as rigid, minimalist and relying on community norms, while the ACT's flexible, expansive, human rights-oriented design seemed exemplary. Yet empirical analysis of the nature of both mechanisms in prisons revealed a shared defect that excluded both from the regulatory pyramid: they were designed to police, not to persuade. The findings on impact were also discomfiting. Putting symbolic benefits aside, staff perceptions of benefits were greater in Japan and limited to public relations gains. No staff or prisoner cohort had experienced human rights protection or improved prison conditions. Only overseers – the least well informed of the three cohorts – perceived a wide range of benefits for prisons, prisoners, staff, and the public.

There were also unintended consequences: excessive, frustratingly pointless workloads for staff and overseers; and negative psychological impacts for all three cohorts. Most notably, staff found the mechanisms intrusive and disrespectful, while they generated distrust and disillusionment in prisoners. Crucially, staff in both jurisdictions saw soft civil oversight as lacking credibility, fairness, and moral resonance – and expressed resistant, disengaged or 'game-playing' responses.

These sobering findings confound our expectations and will dismay those who advocate for human rights in prisons. Fifteen years after Japan and the ACT introduced soft civil prison oversight, it seems that it may be more provocation than panacea – with Japan’s minimalist design indicating a prudent, not laggard, state.

The study concludes by offering a pathway forward: a collaborative, co-regulatory approach to soft civil prison oversight that will suit jurisdictions wanting to achieve useful, cost-effective regulation. This approach would include public interest groups, secure compliance in many cases, and achieve public relations gains – without alienating staff and prisoners. What is more, optimising soft mechanisms in this way will bring them within the regulatory pyramid and facilitate escalation to more resource-intensive and coercive measures in cases of non-compliance – including ‘smart’ networked arrangements that leverage ‘hard’ mechanisms.

## List of Abbreviations

|               |                                                                                                       |
|---------------|-------------------------------------------------------------------------------------------------------|
| ACT           | Australian Capital Territory                                                                          |
| ALRC          | Australian Law Reform Commission                                                                      |
| AMC           | Alexander Maconochie Centre                                                                           |
| APT           | Association for the Prevention of Torture                                                             |
| BoV           | Boards of Visitors                                                                                    |
| CARC          | Correctional Administration Reform Council                                                            |
| CAT           | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment              |
| CMA           | Corrections Management Act 2007 (ACT)                                                                 |
| CPT           | European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment     |
| ECPT          | European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment    |
| ECHR          | European Convention on Human Rights                                                                   |
| ECtHR         | European Court of Human Rights                                                                        |
| HMIP          | His Majesty's Inspectorate of Prisons (previously Her Majesty's Inspectorate of Prisons)              |
| HRA           | Human Rights Act 2004 (ACT)                                                                           |
| HRC           | ACT Human Rights Commission                                                                           |
| ICCPR         | International Convention on Civil and Political Rights                                                |
| ICS           | ACT Inspectorate of Custodial Services                                                                |
| IMB           | Independent Monitoring Boards                                                                         |
| JACS          | ACT Directorate of Justice and Community Safety                                                       |
| JFBA          | Japan Federation of Bar Associations                                                                  |
| JSRC          | Justice System Reform Council                                                                         |
| Mandela Rules | United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) 2016  |
| MDSD          | 'Most Different Systems' Design                                                                       |
| MoJ           | Ministry of Justice                                                                                   |
| NPM           | National Preventive Mechanism                                                                         |
| NSW           | New South Wales                                                                                       |
| OVA           | Official Visitor Act 2012 (ACT)                                                                       |
| RCADIC        | Royal Commission on Aboriginal Deaths in Custody                                                      |
| SCJACS        | ACT Legislative Assembly Standing Committee on Justice and Community Safety                           |
| SMR           | United Nations Standard Minimum Rules for the Treatment of Prisoners 1955                             |
| SPT           | Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment   |
| UDHR          | Universal Declaration of Human Rights                                                                 |
| UNAFEI        | United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders |
| UNHR          | United Nations Human Rights                                                                           |

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## Chapter 1 Introduction

### 1.1 Overview

Civil prison oversight is a persuasive mechanism for regulating prisons,<sup>1</sup> which means that it relies solely on dialogue. It has spread across the globe in recent decades in what we regard as an international human rights success. However, all may not be as it seems. There has been almost no empirical evidence that civil prison oversight works as advertised. This study tests the effects of the simplest form of the mechanism in prisons in two jurisdictions, then interprets the results in light of what we already know from regulatory theory and evidence from other domains about successful persuasive regulation.

#### 1.1.1 Outline and research questions

*What is this study about?*

At a practical level, this thesis is about the merits of a persuasive regulatory mechanism thought to enforce human rights norms in prisons: civil oversight. In this study, ‘civil oversight’ refers to mechanisms where selected members of civil society are tasked with monitoring or inspecting public services to enforce their compliance with given social standards.<sup>2</sup>

This study divides civil oversight systems into ‘hard’ designs, which are marked by higher levels of intrusiveness, expertise and authority<sup>3</sup> and ‘soft’ designs, which are less intrusive, with overseers having less expertise and authority.<sup>4</sup> In soft versions of civil oversight, which are the focus of this study, overseers typically report internally to the prisons administration and the responsible

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<sup>1</sup> This study focuses on civil oversight in the context of prisons. However, this regulatory mechanism is also used in other ‘closed environments’. This term is understood to mean ‘places where people are deprived of their liberty’ under art 1 of UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237. Art 4(2) defines such a place as ‘a public or private custodial setting which that person is not permitted to leave at will, by order of any judicial, administrative or other authority’. Closed environments include criminal justice and immigration detention facilities and some medical and welfare settings.

<sup>2</sup> ‘Oversight’ is used as a collective term to indicate a range of inspection and monitoring processes. The distinctions between them have blurred. See James Downe and Steve J Martin, ‘Regulation Inside Government: Processes and Impacts of Inspection of Local Public Services’ (2007) 35(2) *Policy & Politics* 215, 216-217.

<sup>3</sup> See, for example, Office of the Correctional Investigator of Canada, ‘Who We Are: Roles and Responsibilities’ (*Office of Correctional Investigator*, 16 September 2013) [www.oci-bec.gc.ca/cnt/roles-eng.aspx](http://www.oci-bec.gc.ca/cnt/roles-eng.aspx) accessed 2 April 2023.

<sup>4</sup> See, for example, New South Wales Inspector of Custodial Services, ‘Official Visitor Program’ (*Inspector of Custodial Services*, 16 June 2022) [www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/official-visitor-program.html](http://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/official-visitor-program.html) accessed 2 April 2023.

Minister – not publicly. The relevant Ministry or the prisons administration itself then publishes its own periodic summary of overseers’ activities and opinions, often in an annual report.

In contrast, in hard oversight mechanisms, overseers have a wealth of corrections and other relevant expertise and experience. They issue media releases and hold press conferences in their own right, as well as publishing their own reports at the time of their choice.<sup>5</sup> These expert reports are tabled in the relevant legislature, inform policy processes and are submitted as evidence in courts and used in formal international proceedings.<sup>6</sup>

This study adopts Valerie Braithwaite’s expansive definition of ‘regulation’, in which regulation is more than ‘rules or standards’ used to ‘control or direct’ others;<sup>7</sup> it is a ‘social activity that includes persuasion, learning, praise, emulation, self-regulation, influence’ and ‘voluntary compliance’.<sup>8</sup>

Civil prison oversight involves civilians visiting prisons, speaking with prisoners and engaging in dialogue with staff to persuade them to improve their compliance with certain norms. Proponents claim that mechanisms like this are ideally suited to achieving the ‘social regulation’ of prisons.

‘Social’ regulation, in contrast to ‘economic’ regulation refers to efforts to control qualitative aspects of an activity, meaning how it is carried out, with a view to protecting health, safety, security or the environment.<sup>9</sup> In this case, it means preventing human rights abuses and promoting reforms that make qualitative improvements in prison conditions.<sup>10</sup>

However, in recent decades, scholars and even some oversight practitioners have expressed scepticism about civil prison oversight’s efficacy. A lack of robust empirical studies means we do not actually know how civil oversight systems operate in practice, or influence prisons – for better or for worse. This study aims to address this gap in our knowledge, focusing on soft civil oversight,

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<sup>5</sup> See, for example, His Majesty’s Inspectorate of Prisons for England and Wales, ‘Media’ (His Majesty’s Inspector of Prisons for England and Wales, 21 March 2023). [www.justiceinspectorates.gov.uk/hmiprison/media/press-releases/](http://www.justiceinspectorates.gov.uk/hmiprison/media/press-releases/) accessed 2 April 2023.

<sup>6</sup> See, for example, Office of the Inspector of Custodial Services of Western Australia, ‘What We Do – Inspections’ (Office of the Inspector of Custodial Services, 20 October 2022) [www.oics.wa.gov.au/about-oics/what-we-do/](http://www.oics.wa.gov.au/about-oics/what-we-do/) accessed 2 April 2023.

<sup>7</sup> Valerie Braithwaite, ‘Closing the Gap between Regulation and the Community’ in Peter Drahoš (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 25.

<sup>8</sup> *ibid.*

<sup>9</sup> Susan E Dudley and Jerry Brito, *Regulation: A Primer* (2nd edn, George Mason University and George Washington University 2021) 8. The economic impact of civil prison oversight is outside the scope of this study

<sup>10</sup> See, for example, Anne Owers, ‘Comparative Experiences of Implementing Human Rights in Closed Environments: Monitoring for Rights Protection’ in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (The Federation Press 2014); Anne Owers, ‘Inspection as a Catalyst for Penal Reform’ (Paper presented at Howard League for Penal Reform Conference Justice and Penal Reform: Reshaping the Penal Landscape, Keble College Oxford, 16 March 2016).

by answering two research questions in relation to these mechanisms in Japan and the Australian Capital Territory (ACT):

What is the nature of soft civil prison oversight in Japan and the ACT?

What is the impact of soft civil prison oversight in Japan and the ACT?

At a theoretical level, the study is framed by pyramidal regulatory enforcement, which we explore in Chapter 2.<sup>11</sup> We will see that persuasive regulatory mechanisms like civil prison oversight evoke the dialogic, educational and voluntary mechanisms that populate the base layer of the pyramid. At a more granular level, the study uses three specific lenses from regulatory theory. The first two are Donald Black's theory of 'relational distance'<sup>12</sup> and the 'regulatory intermediaries' theory developed by Abbot, Levi-Faur and Snidal.<sup>13</sup> The third lens is Valerie Braithwaite's intertwined theories of 'social alignments and motivational postures',<sup>14</sup> which offer empirically-derived criteria for predicting whether a given persuasive regulatory mechanism is likely to induce cooperation.

*What design and methods did the study use?*

Practical and theoretical reasons prompted the choice of Japan and the ACT as comparative sites. The practical reasons centred on ease of access, as well as existing expertise and corrections contacts. The theoretical reasons included the opportunity to use a 'Most-Different-Systems' research design, which sharpens the focus on differences while revealing hidden commonalities.<sup>15</sup> The two systems are 'most different' because the Japanese model is unusual. We will see in Chapters 3 and 4 that it sidesteps contemporary human rights-based standards, relying instead on a 19th century German template. In contrast, the ACT model, introduced in Chapter 5, exceeds postwar European-origin human rights-based norms for soft civil prison oversight systems.

The study adopted a three-phase sequential mixed methods design incorporating exploratory and explanatory elements. As civil oversight systems lack objective performance criteria, it drew on 'voices from inside': the lived experience of the prison staff, civil overseers and prisoners who

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<sup>11</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 35. See Figure A.

<sup>12</sup> Donald Black, *The Behaviour of Law* (Academic Press 1976) 40-41.

<sup>13</sup> Kenneth W Abbott, David Levi-Faur and Duncan Snidal, 'Theorising Regulatory Intermediaries: The RIT Model' (2017) 670 *The Annals of the American Academy of Political and Social Science* 14, 15-17.

<sup>14</sup> Valerie Braithwaite, 'Closing the Gap between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 30-35.

<sup>15</sup> Jeroen van der Heijden, 'Selecting Cases and Inferential Types in Comparative Public Policy Research' in Isabelle Engeli and Christine C. Rothmayr (eds), *Comparative Policy Studies: Conceptual and Methodological Challenges* (Palgrave Macmillan 2014).



animate each system.<sup>16</sup> The exploratory phase involved visits to prisons in Japan and the ACT to conduct quiet observation of oversight activities, along with semi-structured interviews of senior staff and overseers. The second phase consisted of mixed methods surveys of all three participant cohorts in both jurisdictions: prison staff, overseers, and prisoners. Finally, semi-structured interviews of corrections leaders in Canberra and Tokyo completed the data collection phases.

#### *Why did Japan and the Australian Capital Territory introduce civil prison oversight?*

Japan implemented its soft civil oversight system across 2005-2006 as part of the first substantive prison reforms in nearly a century. A Ministry of Justice (MoJ) prison reform agenda had been stymied by a 50-year political battle for control over the content of the reforms. Finally, a scandal in 2002 at Nagoya Prison proved decisive. Eight corrections officers were arrested for abuses leading to the deaths of two prisoners and permanent injury to a third.<sup>17</sup> Japan's acclaimed prison system faced a stunning loss of legitimacy, which prompted a compromise.<sup>18</sup>

The MoJ announced 'radical reform' to Japan's 1908 penal system.<sup>19</sup> A deliberative body made up of selected prominent citizens, the Correctional Administration Reform Council (CARC), made recommendations in December 2003, adopting language empathizing with prisoners' 'human rights' and 'humanity'.<sup>20</sup> However, the new legislation enacted across 2005-2006 did not have an overt human rights orientation.<sup>21</sup> Moreover, CARC favoured a minimalist version of a German civil prison oversight model, the *Anstaltsbeiräte* advisory boards system, which dates from the 19<sup>th</sup> century – before modern human rights discourse. Chapters 3 and 4 explore these developments.

The study shows that this was primarily a pragmatic strategy aimed at stabilising prisons, not a wholesale rejection of human rights precepts. A minimalist model would silence domestic and international critics, while preventing further disruption to a traumatised, outdated prison system.

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<sup>16</sup> I received ethics approval from the Australian National University Human Research Ethics Committee under Expedited Protocol 2015/160, applying to civil overseers and managerial corrections officers in Japan and the ACT; and Full Protocol 2016/288, applying to custodial officers and prisoners in Japan and the ACT.

<sup>17</sup> See further Carol Lawson, 'Reforming Japanese Corrections: Catalysts and Conundrums' in Leon Wolff, Luke Nottage and Kent Anderson (eds), *Who Rules Japan: Popular Participation in the Japanese Legal Process* (Edward Elgar 2015); Sylvia Croydon, *The Politics of Police Detention in Japan: Consensus of Convenience* (Oxford University Press 2016a).

<sup>18</sup> *ibid.*

<sup>19</sup> Dating from the enactment of the *Kangoku hō* (Prison Act) 1908 late in the Meiji era of 1867-1912. Correctional Administration Reform Council, *Gyōkei kaikaku shingikai teigen: kokumin ni rikai sare, sasaeraru keimusho e* (Correctional Administration Reform Council Proposal: Towards Prisons that are Understood and Supported by the People) (Correctional Administration Reform Council, 22 December 2003) [www.moj.go.jp/content/000001612.pdf](http://www.moj.go.jp/content/000001612.pdf) accessed 2 April 2023, 8.

<sup>20</sup> *ibid.* There are 28 mentions of these terms in the 59-page CARC Proposal (2003) in all.

<sup>21</sup> *Keiji shūyo shisetsu oyobi shūyōsha to no shōgū ni kansuru hōritsu* (Act on Penal Detention Facilities and the Treatment of Inmates and Detainees) 2005 (Penal Detention Act 2005).

It secured the lengthy period needed to prepare for fundamental reforms and implement them incrementally, in a penal system unprepared for change.

The ACT's soft civil prison oversight system emerged at around the same time,<sup>22</sup> but took a dramatically different approach. The ACT eagerly embraced contemporary European norms for soft civil oversight, in the genuine belief that this would protect prisoners' human rights. In the ACT's case, the previous 50 years had seen a local vision for a human rights-oriented, rehabilitative prison gain traction. While other Western jurisdictions experienced cyclical growth and decline in belief in rehabilitation from the 1970s to the 1990s, the ACT commitment to these principles held firm.<sup>23</sup> In addition, the ACT had enshrined key international human rights provisions in local law in 2004 – the first Australian jurisdiction to do so.<sup>24</sup> The first ACT corrections legislation, passed in 2007, built on this foundation.<sup>25</sup> As a young jurisdiction building its first prison, the ACT staked a firm, widely-publicised claim to the moral high ground in all aspects of its prison project. Stakeholders saw civil prison oversight as key to success, with the first overseer taking office a year before the first prisoners arrived.<sup>26</sup> We will examine these developments in Chapter 5.

### *Why does this study matter?*

Our empirical knowledge of the nature and impact of soft civil oversight in prisons remains scant. This leaves policymakers who are considering whether to adopt or how to reform these mechanisms with little guidance on design options and the potential consequences of their choices.

This study makes a significant, novel contribution to the field of regulation in three ways, beginning with its empirical contribution. As we will see below in this chapter, it is among the first empirical studies of civil prison oversight globally in the 250-year history of the mechanism. As Chapter 6 outlines, it is also the first study to examine the nature and impact of soft prison civil

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<sup>22</sup> In the Corrections Management Act 2007 (ACT) (CMA 2007).

<sup>23</sup> This interest pre-dated self-government in 1989. See generally Anita Mackay, 'The Road to the ACT's First Prison (the Alexander Maconochie Centre) Was Paved with Rehabilitative Intentions' (2012) 11 *Canberra Law Review* 33, 48-52.

<sup>24</sup> Australia ratified the UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) on 23 November 1980. However, international treaties do not expressly enter Australian law unless incorporated in legislation. Accordingly, ss 10 and 19 of the Human Rights Act 2004 (ACT) (HRA 2004) had adopted most of ICCPR arts 7 and 10.

<sup>25</sup> CMA 2007.

<sup>26</sup> Geoffrey Potts served across April-September 2008. The first prisoners arrived in March 2009.

oversight in the ACT and Japan. It gained a historically unprecedented level of access to both systems and gathered a large, mixed methods data set, with very high response rates.<sup>27</sup>

Secondly, it is methodologically innovative. It thoroughly ‘triangulates’ a story that has mostly been told through overseers’ eyes, by adding two more perspectives inside a single study. These are firstly the voices of staff – the regulatees whom civil prison oversight mechanisms aim to regulate and secondly, those of prisoners – the third-party beneficiaries who serve as whistleblowers in these mechanisms.

Finally, the study’s theoretical contributions include identifying new patterns in the roles played by regulatory intermediaries in regulatory mechanisms, as well as the previously unexplained role of intermediary and regulatee rank or status in the ‘social alignments’ that oil the gears of persuasive regulatory mechanisms – as we will see in Chapter 2. In this case, overseers serve as regulator-side intermediaries, while designated prison staff act as regulatee-side intermediaries.

Its practical contributions include establishing: a basic taxonomy for civil prison oversight systems outlined above; a validated methodology for assessing how soft civil oversight systems operate in practice and influence prisons; and evidence-based recommendations for regulators who wish to implement persuasive regulatory mechanism in prisons in future. Chapter 11 discusses these theoretical and practical contributions further.

### **1.1.2 Prisons as a regulatory dilemma**

Concern about prison conditions has fluctuated across history. As early as the third century, the lawyer Ulpian wrote that prisons ought to be places of confinement not punishment.<sup>28</sup> After a period of relative disuse, imprisonment emerged again as a criminal penalty in the late thirteenth century in England,<sup>29</sup> and concern about conditions reappeared. By early in the fourteenth century, Pope John Clement V is said to have been troubled enough to send a ‘commission of inspectors’ to reform harsh conditions in France’s southern inquisitorial prisons.<sup>30</sup>

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<sup>27</sup> The lowest response rate was 69.4% for oversight committee chairs, and the highest 95.4% for prison staff, in both cases in Japan.

<sup>28</sup> *Digest of Justinian* Book 48 19 8: 9, *ad continendos homines non ad puniendos haberi*, cited in Kaspar K Riemschneider, ‘Prison and Punishment in Early Anatolia’ *Journal of the Economic and Social History of the Orient* (1977) 20(1) Special Issue on the Treatment of Criminals in the Ancient Near East 114, 114; see generally Tony Honoré, *Ulpian: Pioneer of Human Rights* (2<sup>nd</sup> edn, 2002, Oxford University Press).

<sup>29</sup> Edward M Peters, ‘Prison Before the Prison – the Ancient and Medieval Worlds’ in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 3, 31.

<sup>30</sup> *ibid* 29.

Historians often regard an Amsterdam workhouse that opened in 1654 as the first modern European prison.<sup>31</sup> German and French prisons followed,<sup>32</sup> and unease about conditions was not far behind.<sup>33</sup> Provisions condemning 'cruel', 'inhuman' or 'degrading' punishment or treatment are found in the English Bill of Rights 1688, the Eighth Amendment to the United States Constitution 1791 and the French *Déclaration des droits de l'homme et du citoyen* 1789.<sup>34</sup> Modern British prison development also dates to this period<sup>35</sup> and Japan established its first workhouse-style prison in Edo at the same time.<sup>36</sup>

When early British penal reformers like John Howard called for a dedicated prison oversight body during the 18<sup>th</sup> century,<sup>37</sup> prisons were relatively open institutions. Prisoners interacted with their families and local providers to obtain their daily needs.<sup>38</sup> However, the rapid diffusion of Bentham's Panopticon model, with its vision of perfect carceral power, ended this relative normalcy.<sup>39</sup> Western prisons gravitated towards the 'total institution' model typified by the

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<sup>31</sup> Marvin E Wolfgang and Thorstein Sellin, *Pioneering in Penology: The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries* (University of Pennsylvania Press 1944).

<sup>32</sup> Pieter Spierenberg, 'The Body and the State: Early Modern Europe' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 44, 65-68.

<sup>33</sup> Dirk van Zyl Smit (2010) 39(1) 'Regulation of Prison Conditions' *Crime and Justice* 503, 506-507.

<sup>34</sup> Bill of Rights (Act) 1689 (England) 1688 c.2 (1 Will and Mar Sess 2) An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown; Constitution of the United States of America Amendment VIII 1791; *Déclaration des droits de l'homme et du citoyen* (Declaration of the Rights of Man and the Citizen) 1789; see Dirk van Zyl Smit, 'Regulation of Prison Conditions' *Crime and Justice* (2010) 39(1) 503, 507.

<sup>35</sup> Having been delayed by the practice of penal transportation: Spierenberg (1998) 68-69.

<sup>36</sup> The *ninsoku yoseba* (Stockade for Laborers) was established in 1790. Edo was within modern-day Tokyo. See Daniel Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005) 101-104.

<sup>37</sup> See generally Eric Stockdale, 'A Short History of Prison Inspection in England' (1983) 23(3) *British Journal of Criminology* 209. See also John Howard, *The State of the Prisons in England and Wales With Preliminary Observations and an Account of Some Foreign Prisons* (Warrington 1777) <https://play.google.com/books/reader?id=4EhNAAAAAYAAJ&pg=GBS.PP14&hl=en> accessed 2 April 2023; Leonard J Hume, *Bentham and Bureaucracy* (Cambridge University Press 1981) 49-52.

<sup>38</sup> Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (Penguin Books 1978) 34-38. This model is still in use in many parts of the Global South.

<sup>39</sup> Bentham's model is based on constant surveillance. See Jeremy Bentham, *Panopticon: or the Inspection House* Vols I and II (Thomas Payne 1791); Michel Foucault, *Discipline & Punish: The Birth of the Prison* (Alan Sheridan tr, 2<sup>nd</sup> edn Vintage Books 1995) 200-204.

Pennsylvania and Auburn prison systems.<sup>40</sup> Gradually separating from society, prisons became places of dehumanising deprivation, bodily punishment, and hard labour.<sup>41</sup>

The contemporary prison's mandate is quite different. Broadly speaking, the unanimously adopted United Nations Standard Minimum Rules for the Treatment of Prisoners 1955 (SMR) expanded Ulpian's original principle.<sup>42</sup> The SMR contemplating four ideal attributes – that prisons should be safe, respectful, well-resourced institutions, which actively reduce recidivism.<sup>43</sup> More recently, these ideas have been elucidated as four 'healthy prisons standards' relating to 'safety', 'respect', 'purposeful activity' and 'resettlement'.<sup>44</sup> These ideals remain aspirational in the Global South, but are reasonable goals for the affluent, industrialised jurisdictions covered by this study.

Yet here lies the regulatory dilemma. Policymakers must know which regulatory mechanisms will deliver values like 'respect'. As we will see below, civil oversight has had increasingly global appeal as a mechanism that is both necessary and effective in achieving these goals.

## 1.2 Civil Prison Oversight as a Regulatory Ideal

In the early versions of civil prison oversight in Britain, judicial officers scrutinised conditions, although social reformers soon campaigned for a dedicated central inspectorate.<sup>45</sup> This development was part of the mid-19th century Benthamite impetus towards administrative reforms, in which Ireland had moved first in 1786.<sup>46</sup> Proponents' arguments are still in use: honest gaolers would welcome an inspectorate; it would prevent abuses and improve conditions;<sup>47</sup> and inspection would

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<sup>40</sup> Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and other Inmates* (Transaction Publishers 1961) 16-22; David J. Rothman, 'Perfecting the Prison: United States, 1789-1865' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998) 100, 105-111; Foucault (n 39) 195-228. See also Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Polity Press 1985) 16-17 for a concise tabulation of this transition in the nature and role of the prison in industrialising societies.

<sup>41</sup> Randall McGowen 'The Well-Ordered Prison: England, 1780-1865' in Norval Morris and David J. Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1998); Foucault (1995) 231-256.

<sup>42</sup> UN Economic and Social Council, Standard Minimum Rules for the Treatment of Prisoners (UNESCO Res 663 C (XXIV) (31 July 1957) and UNESCO Res 2076 (LXII) (13 May 1977) 1955) clause 57; later updated and expanded as UNGA, Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (8 January 2016) UN Doc A/RES/70/175 (Mandela Rules) Rule 3. See Riemschneider (1977); Honoré (2002). See also Alexander Patterson and SK Ruck (1951) *Patterson on Prisons*, 23.

<sup>43</sup> See for example, in the Mandela Rules: Rule 11 on the separation of prisoner categories; Rule 41 on due process in the case of disciplinary offences; Rules 24-35 on health care; and Rule 87 on pre-release preparation for reintegration.

<sup>44</sup> See Anne Owers (2014) 212, 217-225.

<sup>45</sup> Notably John Howard: McGowen (1998) 78-80. See also Howard (1777).

<sup>46</sup> Stockdale (1983) 214-215; Greg Heylin, *Evaluating Prisons, Prisoners and Others* (The Policy Institute 2001) 19.

<sup>47</sup> Stockdale (1983) 209-216.

boost the state's soft power abroad, as British parliamentarian Thomas Fowell Buxton articulated in 1818. His vision was that:<sup>48</sup>

... Great Britain [would] become in this, as in so many other branches of political wisdom, an example to the surrounding nations; instead of being ... an instructive warning of principles to be rejected, and practices to be avoided....

While a dedicated inspectorate was established in 1835 and volunteer visiting committees followed in 1877,<sup>49</sup> there is no evidence that either was effective. The volunteer bodies received heavy criticism in an official 1895 review, which expressed 'great dissatisfaction with [their] lack of performance' while holding 'the principle of independent inspection ... to be exceedingly important'.<sup>50</sup> Historians charge both these iterations of civil oversight with variable inspector quality, vague duties, questionable independence, weak authority, and inadequate resourcing.<sup>51</sup>

### **1.2.1 Convergence with human rights regulation: reputational gains<sup>52</sup>**

Nonetheless, demands for civil oversight persisted. Interest rose in the aftermath of World War II when a weary international community agreed on the 1948 Universal Declaration on Human Rights (UDHR).<sup>53</sup> Tackling torture and 'cruel, inhuman or degrading treatment or punishment' was a renewed priority,<sup>54</sup> with the first postwar prohibition emerging in the regional European Convention on Human Rights 1950 (ECHR).<sup>55</sup> In 1955, the SMR became the first international instrument to mention a generic system of prison inspection.<sup>56</sup>

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<sup>48</sup> *ibid* 213.

<sup>49</sup> The inspectorate was the forerunner of today's hard civil prison oversight body in England and Wales, now known as His Majesty's Inspectorate of Prisons (HMIP). See Heylin (2001) 19; Stockdale (1983) 214-215, 225.

<sup>50</sup> Ruth Draycott, *A Brief History of the Boards of Visitors 1898-1998* (The Stationery Office 1998) 5. See also Herbert J Gladstone, *Report (Minutes of Evidence) from the Departmental Committee on Prisons* (House of Commons 1895).

<sup>51</sup> See Heylin (2001) 19 concerning the performance of the Inspectorate at this time. See also Peter WJ Bartrip, 'British Government Inspection, 1832-1875: Some Observations' (1982) 25(3) *The Historical Journal* 605. The 1895 review led to their replacement by Boards of Visitors in 1898. These bodies were in turn replaced by Independent Monitoring Boards in 2003. See James A Roffee, 'Accountability and Oversight of State Functions: Use of Volunteers to Monitor Equality and Diversity in Prisons in England and Wales' (2017) 7(1) *Sage Open* <https://journals.sagepub.com/doi/epub/10.1177/2158244017690792> accessed 2 April 2023.

<sup>52</sup> This discussion is confined to the major international monitoring instruments and institutions.

<sup>53</sup> UNGA, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

<sup>54</sup> See UDHR arts 1-3, 5. See Helen Johnstone, 'Prison Histories, 1770s-1950s: Continuities and Contradictions' in Yvonne Jewkes, Ben Crewe and Jamie Bennett (eds), *Handbook on Prisons* (Routledge 2016) for a concise history of United Kingdom, European and American prisons up to the aftermath of World War II.

<sup>55</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR) art 3. European prisoners became able to seek relief from the European Court of Human Rights (ECtHR) under the ECHR. See generally Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011) 60-67.

<sup>56</sup> Inspections under the 1955 SMR could be internal, run by the prisons administration. See Rules 36(2)-(4) and 55.

The 1970s saw three developments. The first was the European Prison Rules 1973 (EPR),<sup>57</sup> which like the SMR are purely hortatory, but for the first time mandated both internal and external inspections.<sup>58</sup> The second was in early 1976, when the International Covenant on Civil and Political Rights 1966 (ICCPR) came into force as the first international treaty to guarantee the rights of ‘persons deprived of their liberty’.<sup>59</sup> Thirdly, also in 1976, anti-torture activist Jean-Jacques Gautier published a call for civil prison oversight that would become a widely accepted template, based on International Committee of the Red Cross prison visits to places of detention to prevent torture.<sup>60</sup> Gautier was an archetypal ‘norm entrepreneur’ in Sunstein’s terms, meaning a person who is ‘interested in challenging social norms’.<sup>61</sup> Gautier proposed a convention, relying on the simple logic that ‘Torture happens in secret. Allowing outside scrutiny and unannounced visits to places of detention will make it unlikely’.<sup>62</sup>

### *Europe’s regional prison inspection system emerges*

In 1984, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment established the Committee Against Torture (CAT).<sup>63</sup> CAT responds to periodic reports by state parties, conducts prison visits of its own motion, hears complaints by individual prisoners and

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<sup>57</sup> Council of Europe Committee of Ministers, Recommendation Rec (2006) 2-rev of the Committee of Ministers to Member States on the European Prison Rules, 1 July 2020 (EPR). The EPR localised the SMR for the EU and were revised in 1987 and 2006. See EPR Preamble; Easton (2011) 54-56. Further revisions were made in 2020 in response to the Mandela Rules.

<sup>58</sup> EPR Part V Rules 92-93.7.

<sup>59</sup> ICCPR art 10(1). Prisoners can cite its provisions in the courts of state parties – who agree to a periodic reporting and review process. From 1976, prisoners in state parties to the first Optional Protocol to the ICCPR also became able to complain directly to the United Nations Human Rights Committee (UNHRC) (then ‘Council’). See UNGA, Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2. Australia became a state party to the Optional Protocol on 25 September 1991. Japan has taken no action.

<sup>60</sup> Jean-Jacques Gautier, ‘Contre la torture une arme nouvelle’ (A New Weapon Against Torture) (1976) *La Vie Protestante* (Geneva October 1976). Daems traces Gautier’s activism to 1974: Tom Daems, ‘Slaves and Statutes: Torture Prevention in Contemporary Europe’ *British Journal of Criminology* (2017) 57(3) 627, 628-629. See Hans Haug, ‘Efforts to Eliminate Torture through International Law’ [1989] 268 *International Review of the Red Cross* 9; Association for the Prevention of Torture, ‘Who We Are – Our History’ (Association for the Prevention of Torture 2019) [www.ap.t.ch/en/who-we-are/our-history](http://www.ap.t.ch/en/who-we-are/our-history) accessed 2 April 2023 for concise accounts of Gautier’s advocacy.

<sup>61</sup> Cass R Sunstein, ‘Social Norms and Social Roles’ (1996) 96(4) *Columbia Law Review* 903, 909. Sunstein explains his terminology concerning how social norms change as follows:

... norm entrepreneurs [are] people interested in changing social norms... If successful, they produce ... norm bandwagons and norm cascades. Norm bandwagons occur when small shifts lead to large ones, as people join the ‘bandwagon’; norm cascades occur when there are rapid shifts in norms.

<sup>62</sup> Association for the Prevention of Torture, ‘What We do – Achievements’ (Association for the Prevention of Torture 2019) [www.ap.t.ch/en/what-we-do/achievements/opcat-torture-prevention-practice](http://www.ap.t.ch/en/what-we-do/achievements/opcat-torture-prevention-practice) accessed 2 April 2023.

<sup>63</sup> UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

states and can oblige state parties to implement remedies.<sup>64</sup> Then, in 1987, a version of Gautier's proposal appeared as the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).<sup>65</sup> The ECPT founded Europe's regional prison inspection system by establishing the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).<sup>66</sup> Members are often from the medical and legal professions or have prisons expertise. State parties agree to unlimited access, without notice, to all detention facilities for periodic and unannounced CPT visits, which include private interviews with prisoners, although reports remain confidential until state parties agree to publication.<sup>67</sup>

#### *OPCAT prompts a 'norm cascade'*

In 2002, the UN General Assembly adopted the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).<sup>68</sup> This catapulted Gautier's preventive concept onto the global stage, producing what Sunstein would call a 'norm cascade'.<sup>69</sup> As of February 2023, there were 91 state parties and 13 signatories.<sup>70</sup> OPCAT is a geographic and procedural expansion of the ECPT model, which takes a 'radical twin pillar' approach that mandates access to prisons by both international and national bodies – the first being the Subcommittee on Prevention of Torture (SPT).<sup>71</sup> The second is a National Preventive Mechanism (NPM) established by each state party, which can include soft civil prison oversight bodies.<sup>72</sup> While

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<sup>64</sup> State parties can opt out of visits under art 28. See generally Easton (2011) 53-54.

<sup>65</sup> Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126. For a detailed history of the ECPT, see Malcolm D Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press 1998).

<sup>66</sup> See ECPT art 1. All 47 member states of the Council of Europe are signatories, each contributing one independent CPT member. See generally Easton (2011) 57-60.

<sup>67</sup> See generally Daems (2017). For a summary of recent CPT activity, see European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 32<sup>nd</sup> *General Report of the CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1 January - 31 December 2022)* (Council of Europe March 2023) 7, 13 <https://rm.coe.int/1680aabe2b> accessed 2 April 2023. In 2022, 16 visits to state parties were carried out: seven periodic; and nine unannounced. Each visit involves inspection of numerous prisons and other detention facilities. As of 31 December 2022, 445 of a total of 483 visit reports had been published.

<sup>68</sup> UNGA, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237.

<sup>69</sup> Meaning circumstances where there are 'rapid shifts in norms': Sunstein (1996) 909. See also Malcolm D Evans and Claudine Haenni-Dale, 'Preventing Torture: The Development of the Optional Protocol to the UN Convention Against Torture' (2004) 4 *Human Rights Law Review* 19.

<sup>70</sup> States that had taken no action numbered 93. See UNHR Office of the High Commissioner, 'Status of Ratification Interactive Dashboard - Optional Protocol to the International Covenant on Civil and Political Rights' (UNHR Office of the High Commissioner 21 February 2023) <http://indicators.ohchr.org> accessed 2 April 2023.

<sup>71</sup> The SPT comprises 25 independent experts elected by state parties, assisted by external experts approved by state parties. See OPCAT art 13(3).

<sup>72</sup> Evans and Haenni-Dale (2004) 28.



Japan has taken no action, Australia ratified OPCAT on 21 December 2017 and is now preparing an NPM,<sup>73</sup> which will combine soft and hard oversight bodies.<sup>74</sup>

The most recent development in the normative European-origin civil prison oversight framework is the enhanced SMR adopted in late 2015 as the Nelson Mandela Rules (Mandela Rules).<sup>75</sup> These Rules raise expectations of prison transparency and accountability. Rule 83 requires both internal and external inspections.<sup>76</sup> Rule 84 clarifies inspectors' authority, including to make unannounced visits and requires them to be 'qualified and experienced', while Rule 85 mandates written reports to the competent authorities after visits – and timely responses, with 'due consideration' given to making these reports public.<sup>77</sup>

Overall, there has been dramatic growth since 1955 in international law instruments promoting civil prison oversight, as well as in the number and types of bodies created to implement it.

### 1.2.2 Amplification by 'norm entrepreneurs': moral resonance

Inspired by the Gautier vision, prominent civil oversight practitioners have taken up his 'norm entrepreneur' role,<sup>78</sup> authoring or contributing to influential works arguing that civil oversight – typically hard versions – prevents abuses and improves conditions. Notable European works in

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<sup>73</sup> Australia missed a 20 January 2023 deadline to complete its NPM. See Australian NPM, 'Joint Statement: Subcommittee on Prevention of Torture Decides to Terminate Visit to Australia' (*Commonwealth Ombudsman* February 2023) [www.ombudsman.gov.au/data/assets/pdf\\_file/0023/290372/NPM-Network-Joint-Statement-21-February-2023.pdf](http://www.ombudsman.gov.au/data/assets/pdf_file/0023/290372/NPM-Network-Joint-Statement-21-February-2023.pdf) accessed 2 April 2023; Commonwealth Ombudsman, 'Monitoring Places of Detention: OPCAT' (*Commonwealth Ombudsman* 2023) [www.ombudsman.gov.au/industry-and-agency-oversight/monitoring-places-of-detention-opcat](http://www.ombudsman.gov.au/industry-and-agency-oversight/monitoring-places-of-detention-opcat) accessed 2 April 2023. It remains incomplete as of February 2024, with no coverage in Queensland, New South Wales or Victoria. See Ombudsman NT, 'Australian NPM Network' <https://ombudsman.nt.gov.au/opcat/australian-npm-network> accessed 21 February 2024.

<sup>74</sup> See Rebecca Minty, 'Involving Civil Society in Preventing Ill Treatment in Detention: Maximising OPCAT's Opportunity for Australia' (2019) 25(1) *Australian Journal of Human Rights* 91, 103; Bronwyn Naylor, 'Human Rights Oversight of Corrections Institutions in Australia' (2021) 18(1) *European Journal of Criminology* 52, 62-66 regarding the patchwork nature of the Australian NPM. The Commonwealth Ombudsman identified 55 separate organisations involved in monitoring closed environments around Australia with potential to be included: Michael Manthorpe, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) *Baseline Assessment of Australia's OPCAT Readiness Report No. 3* (Commonwealth Ombudsman 2019) [www.ombudsman.gov.au/data/assets/pdf\\_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf](http://www.ombudsman.gov.au/data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf) accessed 2 April 2023. As of February 2024, the Australian NPM includes several 'Official Visitor' type soft civil oversight bodies: Ombudsman NT, 'Australian NPM Network' accessed 21 February 2024 <https://ombudsman.nt.gov.au/opcat/australian-npm-network>. The United Kingdom NPM also includes soft civil oversight bodies, such as Independent Monitoring Boards and Custody Visitors <https://nationalpreventivemechanism.org.uk/members/> accessed 21 February 2024.

<sup>75</sup> Mandela Rules.

<sup>76</sup> Under Rule 83 of the Mandela Rules, the external mechanism may be national, regional or international.

<sup>77</sup> *ibid.*

<sup>78</sup> Sunstein (1996) 909.

English in this vein include those by Evans and Morgan,<sup>79</sup> Ramsbotham,<sup>80</sup> Owers,<sup>81</sup> Delaplace and Pollard<sup>82</sup> and van Zyl Smit.<sup>83</sup>

Scholars around the world have found civil oversight inspiring and added their support, creating what in Sunstein's terms is a 'norm bandwagon'.<sup>84</sup> Many repeat European oversight practitioners' efficacy claims; Pierce's work on the first five years of New Zealand's NPM is illustrative.<sup>85</sup> Although she acknowledges that NPMs have limitations, she relies on a claim by the Special Rapporteur on Torture to the effect that an NPM-driven change from a 'paradigm of opacity to a paradigm of transparency' is the 'best way of preventing torture'.<sup>86</sup>

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<sup>79</sup> See, for example, Rod Morgan and Malcolm Evans, 'Inspecting Prisons: The View from Strasbourg' (1994) *British Journal of Criminology: Special Issue* 34, 141; Rod Morgan and Malcolm Evans (eds), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (Oxford University Press 1999); Rod Morgan and Malcolm Evans, *Combating Torture in Europe: The Work and Standards of the European Committee for the Prevention of Torture* (Council of Europe Press 2001). Rod Morgan is a criminal justice scholar who was Her Majesty's Chief Inspector of Probation across 2001-2004; Malcolm Evans is an international law scholar who served on the SPT across 2011-2020, including as chair.

<sup>80</sup> See David Ramsbotham, *Prisongate: The Shocking State of Britain's Prisons and the Need for Visionary Change* (Free Press 2003). Ramsbotham led HMIP from 1995 to 2001.

<sup>81</sup> See, for example, Anne Owers, 'Prison Inspection and the Protection of Human Rights' (2004) 2 *European Human Rights Law Review* 107; Anne Owers, 'The Protection of Prisoners' Rights in England and Wales' (2006) 12 *European Journal on Criminal Policy and Research* 85; Anne Owers, *Imprisonment in the Twenty-first Century: A View from the Inspectorate* (Routledge 2007); Anne Owers, 'Reforming Prisons: The Role of Inspection' (2009) 77(1) *Criminal Justice Matters* 16; Anne Owers, 'The Regulation of Criminal Justice Inspectorates' in Hannah Quirk, Toby Seddon and Graham Smith (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge University Press 2010); Anne Owers (2014); Anne Owers (2016). Owers led HMIP from 2001 to 2010 and currently serves as the National Chair of the Independent Monitoring Boards of England and Wales.

<sup>82</sup> See Edouard Delaplace and Matt Pollard, 'Visits by Human Rights Mechanisms as a Means of Greater Protection for Persons Deprived of their Liberty' (2005) 87(857) *International Review of the Red Cross* 69; Edouard Delaplace and Matt Pollard, 'Torture Prevention in Practice' (2006) 16(3) *Torture* 220. Delaplace and Pollard were affiliated with the Association for the Prevention of Torture (APT) at the time of writing.

<sup>83</sup> See Dirk van Zyl Smit, 'Regulation of Prison Conditions' (2010) 39(1) *Crime and Justice* 503. Van Zyl Smit is a prominent comparative and international penal law scholar. Early comparative empiricism

<sup>84</sup> Sunstein (1996) 909.

<sup>85</sup> See Natalie Pierce, 'Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience' (2014) 31 *Law in Context* 154.

<sup>86</sup> *ibid* 162-163.

In Australia, works that reinforce these claims include publications by or including authors who are either civil overseers or academics engaged on research grants promoting civil oversight or both, including Harding,<sup>87</sup> Fletcher,<sup>88</sup> Barnett,<sup>89</sup> Naylor,<sup>90</sup> Mackay<sup>91</sup> and Minty.<sup>92</sup>

In Japan, scholars who call for European-style reform of the minimalist civil prison oversight system on the grounds that this will improve efficacy include Uchida and Kuzuno,<sup>93</sup> Doi,<sup>94</sup> Ishizuka,<sup>95</sup>

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<sup>87</sup> See Richard Harding, 'Are Prison Inspections Effective' (2006) 167 *Prison Service Journal* 15; Richard Harding and Neil Morgan, 'OPCAT in the Asia-Pacific and Australasia' (2009) 6(2) *Essex Human Rights Review* 99. Richard Harding was Inspector of Custodial Services for Western Australia across 2000-2008; Neil Morgan served in that position from 2009 to 2019.

<sup>88</sup> Adam Fletcher, 'Australia and the OPCAT' (2012) 37(4) *Alternative Law Journal* 233.

<sup>89</sup> Jane Barnett and others, 'The Role of Civil Society in Monitoring and Overseeing Closed Environments' (2013) Monash University Law Faculty Australian Research Council Linkage Grant, Applying Human Rights Legislation in Closed Environments: A Strategic Framework for Managing Compliance Working Paper No. 2, [www.monash.edu/data/assets/pdf\\_file/0013/140332/working-paper-2-final-online-version.pdf](http://www.monash.edu/data/assets/pdf_file/0013/140332/working-paper-2-final-online-version.pdf) accessed 2 April 2023.

<sup>90</sup> See, for example, Bronwen Naylor, 'Protecting the Human Rights of Prisoners in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013); Bronwen Naylor, 'Human Rights and Respect in Prisons: The Prisoners' Perspective' (2014a) 31 *Law in Context* 84; Bronwen Naylor, 'Protecting Human Rights in Detention: Rights, Monitoring and OPCAT' (2016) 41(3) *Alternative Law Journal* 151; Naylor (2021); Bronwen Naylor, Julie Debeljak and Anita Mackay, *Human Rights in Closed Environments* (eds) (The Federation Press 2014); Bronwen Naylor, Julie Debeljak and Anita Mackay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41(1) *Monash University Law Review* 218.

<sup>91</sup> See, for example, Anita Mackay (2012); Anita Mackay, 'Operationalising Human Rights Law in Australia: Establishing a Human Rights Culture in the New Canberra Prison and Transforming the Culture of Victorian Police' (2014) 31 *Law in Context* 261; Anita Mackay, *Towards Human Rights Compliance in Australian Prisons* (Australian National University Press 2020).

<sup>92</sup> Minty (2019). Minty is the newly appointed ACT Inspector of Custodial Services.

<sup>93</sup> Mariko Uchida and Hiroyuki Kuzuno, "Daisansha kikan: kangoku' wa tōzakareta sekai de yoi no ka (Independent Oversight Bodies: Should Prisons be Closed-Off from Society?)" in Keiji Rippō Kenkyūkai (ed), *Nyūmon Kangoku Kaikaku: Beyond the Prison* (Introduction to Prison Reform: Beyond the Prison) (Nihon Hyōronsha 1996).

<sup>94</sup> Masakazu Doi, 2003 'Nihon ni okeru keimusho kaikaku to tenbō' (Japan's Prison Reforms: Prospects) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003); Masakazu Doi, 'Keiji hishūyōsha shōgū hō jō no shomondai' (Issues concerning the Penal Detention Act) in *Maeno Ikuzō Sensei koki shukuga ronbunshū: Keiji seisaku no taikei* (The Structure of Criminal Justice Policy: Festschrift in Honour of Professor Ikuzō Maeno) (Hōritsu Bunkasha 2008).

<sup>95</sup> Shin'ichi Ishizuka, *Keiji shisetsunai shōgū no shiminteki kontorōru* (Community Control of Treatment in Prisons) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003).

Fukushima,<sup>96</sup> Hori,<sup>97</sup> Honjō,<sup>98</sup> Midori,<sup>99</sup> Iguchi,<sup>100</sup> Kuwayama,<sup>101</sup> and Satomi.<sup>102</sup> Some of these works emerged from Japanese participation in European events promoting civil prison oversight or visits to Japan by British norm entrepreneurs.<sup>103</sup>

### *Lack of empiricism*

Nonetheless, there has been surprisingly little empirical research on the merits of the mechanism. Proponents have tended to repeat *a priori* efficacy claims. Positioning oversight as a moral imperative, these works often claim that aggressive features, including unannounced inspections, are indispensable. Authors typically have legal backgrounds and emphasise the inherent value of

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<sup>96</sup> Itaru Fukushima, 'Keiji shisetsu ni okeru NGO no yakuwari' (The Role of NGOs in Penal Institutions) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003).

<sup>97</sup> Yū Hori, 'Keiji Rippō Kenkyūkai teian e no komento to shinseiki no hishūyōsha shōgū e no kitai' (Comments on the Society for Prison Reform Proposal and Expectations concerning Prisoner Treatment in the New Century) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003). Hori was a former Deputy-Director General of the Correction Bureau and chair of the Japanese Correctional Association.

<sup>98</sup> Takeshi Honjō, 'Keiji shisetsu no akauntabiritei to daisansha kikan no yakuwari' (Penal Institution Accountability and the Role of Independent Oversight Bodies') in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003).

<sup>99</sup> Daisuke Midori, 'Shimin ni yoru shisetsu kanshi to komyunitē no tōgi minshū shugi' (Civil Prison Oversight and Community Deliberative Democracy) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003).

<sup>100</sup> Katsuhiko Iguchi, 'Bengoshi kara mita daisansha kikan' (Independent Bodies from a Lawyer's Perspective) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003).

<sup>101</sup> Aya Kuwayama, 'Kōkinshisetsunai ni okeru gōmontō bōshi no igi – Nihon ni okeru kokunai bōshi mekanizumu no jitsugen o saguru (The Significance of Torture Prevention in Detention Facilities: Exploring the Possibility of a National Preventive Mechanism in Japan)' [2009] *Ryūkoku University Corrections and Rehabilitation Research Centre Research Journal* 6 (also in English as Aya Kuwayama 'Exploring the Possibility of Designating a National Preventative Mechanism in Japan' (2010) 6 *Essex Human Rights Review* 125); Aya Kuwayama, 'OPCAT in Japan' *APT Global Forum on the OPCAT* (Geneva, 10-11 November 2011). Kuwayama was a member of the Centre for Prisoner Rights public interest group in Japan.

<sup>102</sup> Yoshika Satomi, 'Ōshū gōmontō bōshi i'inkai Eikoku ōritsu keiji shisetsu shisatsu i'inkai to Nihon no keiji shisetsu shisatsu i'inkai seido' (The European Committee for the Prevention of Torture, Her Majesty's Inspectorate of Prisons in England and Japan's Penal Institution Visiting Committees) (2015) 13 *Keiwa Gakuen Daigaku Jinbun Shakai Kagaku Kenkyūsho Nenpō* (Keiwa Gakuen University Humanities and Social Sciences Annals) 79.

<sup>103</sup> For example, Rod Morgan contributed a chapter on European civil prison oversight to the 2003 volume in which many of these Japanese works appeared: Rod Morgan, 'Keiji shihō ni okeru shimin sankā to hikōkinsha no gurōbaru sutanda-do' (Civil Participation in Criminal Justice and Global Standard for Prisoners) (Hikaru Tokunaga tr) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003); Kuwayama (2011) was given at an APT event in Geneva; HMIP sends a small delegation to Japan each February to lobby the MoJ and speak with concerned public interest groups. This sometimes generates local press coverage. See, for example, Tomohiro Osaki, 'Immigration Detention Centres like Prisons, UK Inspectors Say' *The Japan Times* (Tokyo, 6 February 2015) [www.japantimes.co.jp/news/2015/02/06/national/immigration-detention-centers-like-prisons-u-k-inspectors-say/](http://www.japantimes.co.jp/news/2015/02/06/national/immigration-detention-centers-like-prisons-u-k-inspectors-say/) accessed 2 April 2023.

human rights standards and their recognition at international law, then adduce objective evidence of prison abuses. Finally, authors reproduce eminent civil overseers' views that civil oversight embeds human rights in prisons, preventing abuses and promoting reforms.

These publications seldom engage with the well-developed literatures on criminal justice inspection, in the fields of criminology, public administration or regulation and global governance. They report no empirical data and do not mention the possibility of confirmation bias.<sup>104</sup>

Murphy and Whitty argue that the responsibility for the weakness of this norm entrepreneur and norm bandwagon literature rests with law's rigid disciplinary boundaries.<sup>105</sup> They note that lawyers lack the interdisciplinarity that would alert them to relevant theoretical literatures and inherit a weak empirical tradition, while international human rights law is familiar territory.<sup>106</sup> Seddon adds that prison inspection has historically been seen as too distinctive to learn from other public service inspection bodies.<sup>107</sup>

Overall, this narrow gaze, focussed on the pernicious nature of the harm and the moral resonance and legal authority of human rights standards, has meant that public interest groups and governments involved in civil oversight have made policy choices in a theoretical and empirical vacuum. As we will see below, there has been no validation of the mechanism in light of regulatory theory, no taxonomy of regulatory designs and no rubric for understanding their impact. Yet these choices matter. It is unlikely that all designs deliver the same outcomes to a uniform degree in all cases – and as Sieber's classic study of calamitous outcomes from well-intentioned social interventions shows – both beneficial and unintended consequences are possible.<sup>108</sup> Sieber outlines seven ways social regulation can backfire, three of which will be of particular interest in this study: 'functional disruption', 'provocation', and 'placation'.<sup>109</sup>

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<sup>104</sup> *Encyclopedia Britannica* defines 'confirmation bias' as:

people's tendency to process information by looking for, or interpreting, information that is consistent with their existing beliefs. This biased approach to decision making is largely unintentional, and it results in a person ignoring information that is inconsistent with their beliefs. These beliefs can include ... their predictions about a particular outcome. People are especially likely to process information to support their own beliefs when an issue is highly important or self-relevant.

See *Encyclopedia Britannica*, 'Dictionary - confirmation bias' (*The Britannica Dictionary*, 2023) [www.britannica.com/science/confirmation-bias](https://www.britannica.com/science/confirmation-bias) accessed 2 April 2023.

<sup>105</sup> Therese Murphy and Noel Whitty, 'Risk and Human Rights in UK Prison Governance' (2007) 47(5) *The British Journal of Criminology* 798.

<sup>106</sup> *ibid.*

<sup>107</sup> Toby Seddon, 'Rethinking Prison Inspection: Regulating Institutions of Confinement' in Hannah Quirk, Toby Seddon and Graham Smith (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge University Press 2010) 261, 267-268.

<sup>108</sup> Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981).

<sup>109</sup> *ibid.* 'Functional disruption' imposes crippling burdens on regulatees; 'provocation' generates counterproductive ill will; 'placation' takes a problem off the regulatory agenda when it is not actually solved,

### 1.3 Civil Prison Oversight as a Regulatory Reality

In the early 1980s, a few works that turned a sceptical eye toward civil prison oversight began to appear in the United Kingdom. However, this evaluative literature remains remarkably slim in comparison to ‘norm bandwagon’ publications. Moreover, many contributions go no further than articulating disquiet or reporting dysfunction.

#### 1.3.1 Critics and sceptics emerge: empirical vacuum

The mid-1980s saw systematic critiques by Maguire and Vagg. They studied the UK’s soft civil oversight model, then known as Boards of Visitors (BoV), in 11 types of penal institutions between 1981 and 1983.<sup>110</sup> The authors found that overseers were mostly aged 50 or above, middle class, passive regarding prisoners’ concerns and deferential towards wardens.<sup>111</sup> Maguire concluded that ‘virtually all the evidence available’ suggested that these bodies had ‘consistently failed to fulfil their potential’.<sup>112</sup> Despite reforms,<sup>113</sup> when Martin and Godfrey interviewed 140 adult male prisoners in 1994, they found that prisoners saw these oversight bodies as ‘invisible’, passive, powerless, unapproachable, captured by the prisons administration due to their middle-class respectability and part-time civil servant status – and ‘ineffective’ in preventing abuses.<sup>114</sup>

#### *Early comparative empiricism*

In 1994, Vagg published an empirical study of the broader concept of accountability in prisons in England, France, Germany and the Netherlands.<sup>115</sup> He drew on prison visits and interviews with 27 prison staff and 14 prisoners, also conducting informal interviews of policymakers, public interest

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embittering intended third party beneficiaries: chs 3, 6 and 9. The others are ‘exploitation’, ‘goal displacement’, ‘classification’ and ‘over-commitment’: chs 4, 5, 7 and 8.

<sup>110</sup> Boards of Visitors are classified here as a soft mechanism because their reports, although made public, were prepared by local volunteers with no prisons expertise, so do not constitute expert evidence.

<sup>111</sup> Mike Maguire and John Vagg, ‘Who are the Prison Watchdogs? The Membership and Appointment of Boards of Visitors’ [1983] *Criminal Law Review* 238; Mike Maguire and John Vagg, *The Watchdog Role of Boards of Visitors* (Home Office 1984).

<sup>112</sup> Mike Maguire, ‘Prisoners Grievances: The Role of the Board of Visitors’ in Mike Maguire, Jon Vagg and Rod Morgan (eds), *Accountability and Prisons: Opening up a Closed World* (Tavistock Publications 1985) 143.

<sup>113</sup> Significant reforms had been recommended in the mid-1970s. See John Martin, *Boards of Visitors of Penal Institutions (The Jellicoe Report)* (Barry Rose 1974).

<sup>114</sup> Carol Martin and David Godfrey, ‘Prisoners’ Views of Boards of Visitors: A Question of Credibility’ [1994] 34 *British Journal of Criminology* 358. ‘Capture’ here refers to the situation where regulators serve the interests of regulatees or their industry, rather than the public interest. See generally John Braithwaite and Peter Grabosky, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press 1986) 198-200; see also Toni Makkai and John Braithwaite, ‘In and Out of the Revolving Door: Making Sense of Regulatory Capture’ (1992) 12(1) *Journal of Public Policy* 61. ‘Reverse capture’ is also possible, where regulators persuade regulatees to abandon their industry’s interests in favour of the regulatory agency’s interests. See Ian Ayres and John Braithwaite, ‘Tripartism: Regulatory Capture and Empowerment’ (1991) 16(3) *Law and Social Inquiry* 435, 457 at n 53.

<sup>115</sup> Jon Vagg, *Prison Systems: A Comparative Study of Accountability in England, France, Germany and The Netherlands* (Clarendon Press 1994).

group representatives and other stakeholders.<sup>116</sup> Vagg concluded that the emphasis on making oversight agencies like Her Majesty's Inspectorate of Prisons (HMIP) and BoV independent had isolated them, too far from the 'centre of administrative power' to be effective advocates for reform.<sup>117</sup> Even HMIP had 'had limited success in pushing reforms forward,' despite its expert reports.<sup>118</sup> He noted that BoV flailed helplessly in the face of 'recurrent, major' problems, with members often feeling their work was 'only marginally more useful than shuffling deck chairs on the Titanic'.<sup>119</sup> In 1998, Stern confirmed that for centuries, accounts of overseer ritualism, prisoner distrust and staff retaliation had dogged civil prison oversight mechanisms, which had often legitimised prisons instead of protecting prisoners.<sup>120</sup>

A 1999 study by Hood and others found the crowded UK regulatory landscape incorporating the HMIP, CPT, Prisons Ombudsman and BoV incoherent and wasteful.<sup>121</sup> The authors speculated that the presence of multiple regulators, each operating at a different 'relational distance' from regulatees, whether low or high, might make capture less likely.<sup>122</sup> However, they also noted that while all these regulatory mechanisms engage in intrusive activities to detect wrongdoing, they have no coercive powers. The authors felt that mere dialogue and occasional public shaming had produced unreliable results.<sup>123</sup>

Dünkel and Rossner evaluated the German version of soft prison oversight, the *Anstaltsbeiräte* advisory boards in 2001.<sup>124</sup> These boards, dating from the late 19th century, consist of prominent local citizens who oversee prison operations and prisoner welfare and promote public engagement with prisons and prisoners.<sup>125</sup> Overseers, who serve on an *ex officio* basis for three to five years, may conduct unannounced inspections and speak with prisoners. The authors found it problematic that the warden could control the local legislature's nomination of potential members, excluding those

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<sup>116</sup> *ibid* Appendix A.

<sup>117</sup> *ibid* 47.

<sup>118</sup> *ibid* 201-205, 205.

<sup>119</sup> *ibid* 47.

<sup>120</sup> Vivien Stern, *A Sin Against the Future: Imprisonment in the World* (Northeastern University Press 1998) 225-231.

<sup>121</sup> Christopher Hood and others, *Regulation Inside Government: Waste-Watchers, Quality Police and Sleaze-Busters* (Oxford University Press 1999) 116-119, 137-138

<sup>122</sup> See Donald Black, *The Behaviour of Law* (Academic Press 1976) 40-41.

<sup>123</sup> Hood (1999) 137-138.

<sup>124</sup> Frieder Dünkel and Dieter Rossner, 'Germany' in and Dirk van Zyl Smith and Frieder Dünkel (eds), *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* (2nd edn, Kluwer Law International 2001) 318. See also Vagg (1994) 37 for an assessment of the *Anstaltsbeiräte* advisory boards as of the late 1980s.

<sup>125</sup> The legislative basis for these bodies was originally provided by ss 162-165 of the federal Prison Act 1977. Responsibility for prisons was devolved to the German *Länder* (federal states) in 2006, which have all passed similar legislation: Frieder Dünkel and Christine Morgenstern, 'The Monitoring of Prisons in German Law and Practice' (2018) 70 *Crime Law and Social Change* 93, 93-94, 99.

with strongly critical views. They also felt that the variability of members' skills and commitment invited ritualism, with these bodies primarily serving to keep the relevant ministry informed.<sup>126</sup>

In 2001, the Lloyd review found that privileged, older, middle-class Caucasians who knew little of prisons still dominated these bodies, their dependence on prison staff making it easy to recruit them to prison agendas.<sup>127</sup> Reforms led to a 2003 relaunch as the Independent Monitoring Boards (IMB).<sup>128</sup>

### *Comparison across domains and jurisdictions*

A landmark 2004 study involving Hood and 16 others<sup>129</sup> drew on archival rather than empirical research, but compared regulatory mechanisms in three domains – prisons, universities and the senior ranks of public servants – across eight jurisdictions, including the UK, Germany, Japan and Australia.<sup>130</sup> Viewed against universities, they found prisons still largely immune from scrutiny, due to the intermittent nature of external monitoring, the vague nature of the standards applied,<sup>131</sup> and the intractable 'information asymmetry' found in closed environments.<sup>132</sup>

'Information asymmetry' is a term from economics and contract theory, derived from George A Akerlof's theory of market dysfunction, which describes situations where one party has an advantage due to having more or better information than their counterparty.<sup>133</sup> In civil prison oversight, overseers may have little or no knowledge about how prisons operate, an area in which the prison staff whom they oversee have deep, broad knowledge.

The authors concluded that dialogue and producing reports – positive or negative – were questionable control mechanisms.<sup>134</sup> They found periodic human rights-based oversight inadequate and expressed distrust of 'oversight gurus'.<sup>135</sup> In their view, the growing emphasis on oversight, despite the international human rights regime's relative impotence, had led to 'accountability overload without guaranteeing service quality or robustness'.<sup>136</sup> They felt that prisons, like schools or

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<sup>126</sup> Dünkel and Rossner (2001) 318.

<sup>127</sup> Peter Lloyd, *Review of the Boards of Visitors: A Report of the Working Group Chaired by Rt Hon Sir Peter Lloyd MP* (Home Office 2001).

<sup>128</sup> See generally Nicola Padfield, 'Monitoring Prisons in England and Wales: Who Ensures the Fair Treatment of Prisoners?' (2018) 70 *Crime Law and Social Change* 57, 64-66.

<sup>129</sup> Mostly specialists in public administration.

<sup>130</sup> Hood and others (eds), *Controlling Modern Government: Variety, Commonality and Change* (Edward Elgar 2004). The other countries were the United States, Norway, The Netherlands and France.

<sup>131</sup> 'Social regulation' is defined above.

<sup>132</sup> Hood and others (2004) 27, Table 2.2.

<sup>133</sup> See Encyclopedia Britannica, 'George A Akerlof – American economist' (*Encyclopedia Britannica*, 2023) [www.britannica.com/biography/George-Akerlof#ref749262](https://www.britannica.com/biography/George-Akerlof#ref749262) accessed 2 April 2023.

<sup>134</sup> *ibid* 189-190.

<sup>135</sup> *ibid* 201, 203-204.

<sup>136</sup> *ibid* 204.



hospitals, would achieve better compliance under creative hybrid controls that combined oversight with mechanisms that fostered healthy competition.<sup>137</sup>

Morgan and Liebling's 2007 work raised further doubts about the efficacy of the UK IMB,<sup>138</sup> before Crewe's 2009 empirical study in England found that prison staff can feel pressured and hamstrung by oversight, while prisoners feel distrust, trepidation and despair.<sup>139</sup> By 2010, Seddon was lamenting the lack of comparative empirical research and calling for a 'rigorous programme of research on prison inspection, exploring ... compliance' in light of interdisciplinary studies of similar mechanisms for other public services and pyramidal regulatory theory.<sup>140</sup>

Van Zyl Smit's 2010 survey of global trends in external civil prison oversight adopted the term 'regulation' as a collective term for oversight, including that by courts, legislatures and non-government organisations (NGOs).<sup>141</sup> While accepting accounts of HMIP's success at face value, he showed less confidence in the IMB's merits,<sup>142</sup> and highlighted the absence of efficacy studies correlating different oversight systems with, for example, trends in prison homicide and suicide rates.<sup>143</sup> Van Zyl Smit noted that a review of South African bodies emulating the IMB and HMIP had found 'little evidence that either ... had succeeded' in improving 'prison conditions generally or ... substantially', speculating that diverse local models 'sensitive' to local traditions were needed.<sup>144</sup>

In 2011, Whitty noted a hidden risk of civil oversight is negative consequences for staff and prisoners when published findings generate sensationalised media coverage that discredit prisons – an outcome that in Sieber's analysis could both disrupt prison operations and provoke staff.<sup>145</sup> Whitty argued that human rights regulation is more likely to gain traction with prison leaders through the 'risk management' rubric that is now fundamental to prisons administration.<sup>146</sup> This suggestion is

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<sup>137</sup> *ibid* 203-204.

<sup>138</sup> Rod Morgan and Alison Liebling, 'Imprisonment: An Expanding Scene' in Rodney Morgan, Mike Maguire and Robert Reiner (eds), *The Oxford Handbook of Criminology* (4th edn, Oxford University Press 2007). Both authors are criminologists.

<sup>139</sup> Ben Crewe, *The Prisoner Society: Power, Adaptation, and Social Life in an English Prison* (Oxford University Press 2009) 70-71, 157-158. Crewe is a criminologist.

<sup>140</sup> Seddon (2010) 279-80, 279. Seddon is a criminologist with some knowledge of regulatory theory.

<sup>141</sup> Dirk van Zyl Smit, 'Regulation of Prison Conditions' (2010) 39(1) *Crime and Justice* 503. Van Zyl Smit is a veteran legal scholar and penal reform activist.

<sup>142</sup> *ibid* 532.

<sup>143</sup> *ibid* 557.

<sup>144</sup> *ibid* 547, 556.

<sup>145</sup> See Sieber (1981) chs 3 and 6.

<sup>146</sup> See Noel Whitty, 'Human Rights As Risk: UK Prisons and the Management of Risk and Rights' (2011) 13(2) *Punishment & Society* 123.

consistent with the principle of regulating in accordance with ‘the grain of things’, along the path of least resistance, which we will explore further in Chapter 2.<sup>147</sup>

### *Voices from outside the oversight industry*

This sceptical literature that emerged from the mid-1980s was often authored by people who were outside the oversight industry, such as criminologists with empirical prisons research experience. Other authors include a serving prison warden,<sup>148</sup> a life peer who is a veteran international prisons activist<sup>149</sup> and experts in public administration or public policy.<sup>150</sup> All sense that proponents’ accounts may not be the best evidence of whether civil prison oversight mechanisms work as advertised.<sup>151</sup>

Ironically, an industry insider’s observation is useful at this point. Owers has noted that the ‘virtual’ prison running in the warden’s mind can differ sharply from what prisoners actually experience.<sup>152</sup> This insight might also apply to civil prison overseers. Their impressions of the impact of their activities in prisons might differ sharply from what staff and prisoners actually experience.

### **1.3.2 Empiricism gains momentum: voices from inside**

From 2013, publications that integrate some of the regulatory, criminological, public administration and international human rights law approaches to evaluating civil prison oversight began to emerge, sometimes including fresh empirical studies.

Shute’s contributions mark this turning point.<sup>153</sup> His overall charge was that the independence of the UK’s five hard criminal justice inspectorates – including HMIP – is muddy, mythic and unnecessary; none having ever had absolute political, financial or operational independence.<sup>154</sup> He argued that civil prison oversight is necessarily in a parasitic relationship with the public service that it

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<sup>147</sup> Graham Burchell, ‘Peculiar Interests: Civil Society and Governing ‘The System of Natural Liberty’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester-Wheatsheaf 1991) 119, 127.

<sup>148</sup> Namely David Godfrey. See Martin and Godfrey (1994).

<sup>149</sup> Namely Vivien Stern. See Stern (1998)

<sup>150</sup> Namely Christopher Hood and others. See Hood and others (1999); (2004).

<sup>151</sup> Sunstein (1996) 909.

<sup>152</sup> Owers (2007) 16-17; 2016.

<sup>153</sup> Stephen Shute, ‘On the Outside Looking In: Reflections on the Role of Inspection in Driving Up Quality in the Criminal Justice System’ (2013a) 76(3) *The Modern Law Review* 494; Stephen Shute, ‘Different Histories, Different Cultures, Common Cause: The Rocky Road to Joint Inspection of the Criminal Justice System’ (2013b) 10 *The Criminal Law Review* 789; Stephen Shute, ‘Serving their Political Masters: The Development of Criminal Justice Inspection in England and Wales - Prisons and Police’ (2013c) 11 *The Criminal Law Review* 889. Shute has interdisciplinary expertise in law, criminology and public administration.

<sup>154</sup> *ibid.* The five inspectorates are HMIP and those monitoring the police, the probation service, the courts and the Crown Prosecution service. Inspectors have industry expertise and authority to publish their findings.

regulates,<sup>155</sup> and that the only independence that overseers need is ‘independence of judgment’.<sup>156</sup> He debunked the idea that civil prison oversight is qualitatively different from other kinds of criminal justice inspection, arguing that it differs only in emphasis,<sup>157</sup> and that international human rights is no more than one aspect of the standards that criminal justice inspectors apply.<sup>158</sup>

Shute added that an unpublished independent economic analysis completed in 2003 found ‘little convincing evidence that criminal justice inspection had had a demonstrable effect on the quality of service delivery’.<sup>159</sup> This event study correlated improvements in key performance indicators with inspection ‘events’ then compared the findings with those from agencies that had not been inspected, finding that the cost of criminal justice inspection in the UK was not justified.<sup>160</sup> Despite acknowledging the lack of any empirical basis for making recommendations, Shute reasoned from faith in civil oversight as a ‘canary in the coal mine’<sup>161</sup> to argue that unannounced, risk-based, thematic inspections might reduce the ritualism and wastefulness of regular full inspections.<sup>162</sup>

Naylor reported on semi-structured interviews of 11 prisoners in Victoria and Western Australia in 2014,<sup>163</sup> which primarily concerned soft oversight processes by volunteer prison monitors. While largely uncritical of civil prison oversight’s efficacy,<sup>164</sup> she noted the barriers of entrenched prisoner scepticism and the unenforceable nature of even potentially life-saving recommendations, such as to introduce air conditioning, as well as the infrequency of oversight visits.<sup>165</sup> She cites a prisoner comment that civil overseers provide prisoners with only a ‘whisper, not really a loud voice’.<sup>166</sup>

#### *Prison managers’ voices*

Bennett published ethnographic studies of UK prison managers’ working lives in 2014 and 2016, including their experience of civil prison oversight by both IMBs and HMIP.<sup>167</sup> His data collection was

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<sup>155</sup> Shute (2013a) 527.

<sup>156</sup> *ibid* 513-520 at 520.

<sup>157</sup> *ibid* 500-505.

<sup>158</sup> *ibid* 507.

<sup>159</sup> *ibid* 524-525 citing OXERA Consulting Ltd, 2003, *Comparative Study of Inspection / Regulation of the Criminal Justice System in England and Wales and Three Other Countries – Final Report* (unpublished), which was commissioned by the UK Cabinet Office.

<sup>160</sup> *ibid*.

<sup>161</sup> *ibid* 497.

<sup>162</sup> *ibid* 510, 528.

<sup>163</sup> The overall study involved 65 prisoners in Victoria and Western Australia: Bronwen Naylor, ‘Human Rights and Respect in Prisons: The Prisoners’ Perspective’ (2014) 31 *Law in Context* 84, 87. Naylor is a legal academic who has been a prominent author of works promoting civil prison oversight in Australia.

<sup>164</sup> *ibid* 117-121.

<sup>165</sup> *ibid* 98, 118-121.

<sup>166</sup> *ibid* 118.

<sup>167</sup> Bennett’s fieldwork was completed while on leave from his role as a warden, known as a prison ‘Governor’ in the UK. Jamie Bennett, ‘Resisting the Audit Explosion: The Art of Prison Inspection’ (2014) 53(5) *Howard Journal of Criminal Justice* 449; Jamie Bennett, *The Working Lives of Prison Managers: Global Change, Local*

iterative: he observed prison managers for 62 days and conducted 60 semi-structured interviews with these officers at two medium-security men's prisons in 2007 and 2008, 'shadowed' a week-long HMIP visit to a multi-site prison in 2012, and returned to one site for five days across 2014-2015.<sup>168</sup>

IMB are the current iteration of the UK's soft civil oversight bodies. Staffed by local volunteers, they report to the warden weekly and send annual reports to the relevant Secretary of State that are made public.<sup>169</sup> He found that prison managers believed that IMBs 'had a protective and preventative role' concerning human rights.<sup>170</sup> Managers also felt that prisons could harness IMBs' soft power, using them to communicate with prisoners, the warden and the relevant minister in ways that facilitated managerial agendas, for example by providing leverage for better resourcing.<sup>171</sup>

Yet prison managers saw IMBs as a risk due to their ability to garner negative media attention that would 'shape community perceptions'.<sup>172</sup> Managers mocked IMBs in private, noting the dominance of older, privileged cohorts who knew little of the lives of staff and prisoners.<sup>173</sup> Meanwhile, IMB members relied on prisons and each other instead of their formal resources and training, making them prone to staff capture and prisoner manipulation. Some held overtly racist or retributive views and their amateurism compromised any methodological rigour.<sup>174</sup>

Bennett's ethnographic account of an HMIP inspection is more positive. It reveals a process similar to an intensive, interdisciplinary field study,<sup>175</sup> with a collaborative ethos.<sup>176</sup> Interactions were methodologically flexible and diverse,<sup>177</sup> cultivating trust through sensitivity to staff and prisoner views and the tensions between them.<sup>178</sup> Bennett saw the dialogic inspection process as equipping prisons with knowledge 'anchored' in prisoners' lived experience<sup>179</sup> and facilitating self-regulation.<sup>180</sup>

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*Culture and Individual Agency in the Late Modern Prison* (Palgrave Macmillan 2016a). Bennett has expertise in criminology and regulatory theory.

<sup>168</sup> Bennett (2014) 454.

<sup>169</sup> See Independent Monitoring Boards, 'Annual Reports & Ministerial Responses' (*Independent Monitoring Boards*, 2023) <https://imb.org.uk/documents/> accessed 2 April 2023. IMBs are soft civil oversight bodies, as their annual reports, while made public, do not comprise expert evidence. IMBs replaced Boards of Visitors in 2003.

<sup>170</sup> Bennett (2016) 102.

<sup>171</sup> *ibid* 102.

<sup>172</sup> *ibid*.

<sup>173</sup> *ibid* 102-103.

<sup>174</sup> *ibid* 103-106.

<sup>175</sup> Bennett (2014) 456-463.

<sup>176</sup> *ibid* 458-459.

<sup>177</sup> *ibid* 459-460.

<sup>178</sup> *ibid* 458-459.

<sup>179</sup> *ibid* 461.

<sup>180</sup> *ibid* 458-459.

He felt that some HMIP reports that addressed thematic concerns across the prison estate had an influence on policy.<sup>181</sup>

However, as with IMBs, prison managers often responded to HMIP in opportunistic ways. Reformist managers saw HMIP processes as attracting ministerial, media and public attention that prisons needed.<sup>182</sup> Managerial mistrust was also common and some staff tried to influence HMIP inspectors, even though they were often knowledgeable peers.<sup>183</sup> Some managers found HMIP inspectors too idealistic and elitist,<sup>184</sup> charging them with exaggerating unfavourable findings to suit larger HMIP agendas.<sup>185</sup> Traditionalist staff felt the HMIP focus on prisoners' views was illegitimate and some feared career repercussions from unfair HMIP reports.<sup>186</sup> Public statements by successive HMIP leaders had taken an unhelpfully adversarial tone,<sup>187</sup> with one later describing civil prison oversight as 'sending knights to kill a dragon'.<sup>188</sup>

In 2016, Rogan launched a major empirical study on European prison oversight bodies, which has just concluded.<sup>189</sup> It examined whether 'accountability' is a distinctive norm of the European legal system, what European prison law and policy requires regarding the oversight of prisons and how prisoners, prison staff and overseers experience accountability.<sup>190</sup> At launch, she noted that while civil oversight had become an indispensable part of legitimising prison systems, the impact on 'flows of power in prisons' were unknown, and that it was a 'trap' to see civil oversight as a preventive 'panacea', given that oversight mechanisms often miss even 'egregious' human rights violations.<sup>191</sup>

In 2017, Daems demonstrated how easily state parties to the ECPT could sidestep inconvenient CPT recommendations, using archival analysis of nearly two decades of CPT interactions with Belgium to

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<sup>181</sup> *ibid* 462-463. See also Padfield (2018) 63-64, 73; Vagg (1994) 201-205.

<sup>182</sup> Bennett (2014) 456, 461; Bennett (2016) 111-112.

<sup>183</sup> Bennett (2014) 450 citing Louise Falshaw, 'Inspecting Secure Institutions' in Carol A Ireland and Martin J Fisher (eds), *Consultancy and Advising in Forensic Practice: Empirical and Practical Guidelines* (BPS Blackwell 2010). See also Bennett (2016) 110-112.

<sup>184</sup> Bennett (2016) 111.

<sup>185</sup> *ibid* 110.

<sup>186</sup> *ibid* 110-112.

<sup>187</sup> Chief Inspectors Ramsbotham, Owers and Hardwick who led HMIP for the period spanning 1995 to 2016.

<sup>188</sup> Owers (2016).

<sup>189</sup> Mary Rogan, 'Accountability and Prisons: A New Frontier for Human Rights?' *Howard League for Penal Reform Conference: Justice and Penal Reform – Reshaping the Penal Landscape* (Oxford, 18 March 2016). Rogan, the lead investigator, is a practicing barrister and legal academic. The project concluded in late 2022.

<sup>190</sup> See generally Prisons, the Rule of Law, Accountability and Rights, 'Experiencing Prison Oversight: Interviews with NPMs and Oversight Bodies' (*Trinity College Dublin PRILA*, 7 September 2022) [www.tcd.ie/law/research/PRILA/](http://www.tcd.ie/law/research/PRILA/) accessed 2 April 2023.

<sup>191</sup> Rogan (2016) 3, 16.

identify ten different strategies of deflection<sup>192</sup> and query the CPT's efficacy in Belgium.<sup>193</sup> He also identified persistent retaliation against prisoners who speak to the CPT.<sup>194</sup> These outcomes map to the unintended consequences of placation and provocation in Sieber's analysis.<sup>195</sup> Visschers and Daems then mined 25 years of CPT dialogue to identify similar patterns of deflection in Norway, Poland and Spain.<sup>196</sup>

Also in 2017, Roffee drew upbeat conclusions from 280 IMB annual reports for 2009 and 2010.<sup>197</sup> While asserting that some IMBs performed well in evaluating prisons' 'moral performance',<sup>198</sup> he accepted that others failed, misunderstood or reinforced dated stereotypes,<sup>199</sup> speculating that this was due to insufficient training and guidance, coupled with a lack of member diversity.<sup>200</sup> Overall, Roffee saw IMBs as 'humanis[ing]' prison oversight by constructing and communicating informal knowledge.<sup>201</sup> He cited an IMB leadership suggestion that IMBs' impact should not be judged by measuring 'their power to do things' but by imagining 'what might happen if they were not there'.<sup>202</sup>

### *Gaps still dominate*

In 2019, Tomczak and Buck argued for 'far greater attention from academics, policymakers and practitioners' for the large populations of criminal justice volunteers and voluntary organisations globally.<sup>203</sup> They highlighted a lack of interdisciplinarity in the literature,<sup>204</sup> noting that voluntary activity is in fact 'regulatory' activity.<sup>205</sup> They pose useful research questions, including whether this

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<sup>192</sup> Tom Daems, 'Slaves and Statues: Torture Prevention in Contemporary Europe' (2017) 57(3) *British Journal of Criminology* 627. See also Tom Daems and Katerina Sechidou, 'Monitoring Prisons: A Study of the Ongoing Dialogue Between the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and Belgium' in Clara Burbano Herara and Yves Haeck (eds), *Human Rights Behind Bars* (Springer 2022).

<sup>193</sup> Daems (2017) 639-640.

<sup>194</sup> *ibid* 629-631.

<sup>195</sup> Sieber (1981) chs 6 and 9.

<sup>196</sup> Jonas Visschers and Tom Daems, 'Monitoring the Implementation Gap: A Comparative Perspective' in Tom Daems and Luc Robert (eds), *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems* (Palgrave Macmillan 2017) 293, 307-311.

<sup>197</sup> Roffee JA, 'Accountability and Oversight of State Functions: Use of Volunteers to Monitor Equality and Diversity in Prisons in England and Wales' (2017) 7(1) *Sage Open* 1 <https://journals.sagepub.com/doi/epub/10.1177/2158244017690792> accessed 2 April 2023.

<sup>198</sup> *ibid* 2, referring to Alison Liebling, *Prisons and their Moral Performance: A Study of Values, Quality and Prison Life* (Oxford University Press 2004).

<sup>199</sup> Roffee (2017) 10.

<sup>200</sup> *ibid*.

<sup>201</sup> *ibid* 5.

<sup>202</sup> *ibid* 10.

<sup>203</sup> Philippa Tomczak and Gillian Buck (2019) 'The Criminal Justice Voluntary Sector: Concepts and an Agenda for an Emerging Field' *The Howard Journal* 58(3) 276-297 at 276. The authors' expertise is in sociology, social policy and social work.

<sup>204</sup> *ibid* 278.

<sup>205</sup> *ibid* 289.

voluntarism is a 'shift away from State power' or a 'change in its nature'; whether these voluntary organisations increase 'oversight and accountability, bridging the democratic deficit' between society and criminal justice; and whether they promote 'alienation, marginalisation and/or inclusion'.<sup>206</sup>

Naylor's 2021 work raises the 'limitations of monitoring', including known problems with the funding, resourcing and authority of the various civil oversight bodies slated to be part of Australia's NPM.<sup>207</sup> She accepts that oversight efficacy can vary depending on 'political factors' and their 'perceived legitimacy', as well as their 'capacity to persuade and negotiate changes'.<sup>208</sup> Naylor mentions works that show the ineffectiveness of CPT inspections in the EU,<sup>209</sup> but uncritically repeats the claim that oversight bodies that replicate requirements like 'independence' and having 'full access – with or without notice' will be 'effective'.<sup>210</sup>

Rogan's 2021 article finds that prisoners typically see civil prison oversight as important in the abstract sense but feel 'deep scepticism' about whether it improves conditions.<sup>211</sup> She underscores the still parlous state of empirical data on the inner workings of these mechanisms:

We know almost nothing about the resources [that] prison oversight bodies have or need, about how those who work for such organizations experience interactions with staff ... with prison authorities and with prisoners. We do not yet have extensive research on the extent to which those bodies get to see the true picture in prisons....<sup>212</sup>

Nonetheless, she concludes by arguing for a new European Union instrument dedicated to providing minimum standards for civil prison oversight and makes specific recommendations for the content of those standards, favouring increased authority for civil oversight bodies.<sup>213</sup>

Van der Valk and Rogan's 2021 article reports on an empirical study of 45 Irish prisoners' views of the Irish Inspector of Prisons, based on interviews at three men's prisons in 2018 and 2019.<sup>214</sup> They cite numerous works confirming prisoners' 'rights scepticism' and distrust of civil oversight,<sup>215</sup> and

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<sup>206</sup> *ibid* 277.

<sup>207</sup> Bronwen Naylor, 'Human Rights Oversight of Correctional Institutions in Australia' (2021) 18(1) *European Journal of Criminology* 52, 66-67, 66.

<sup>208</sup> *ibid* 66-67, 67.

<sup>209</sup> *ibid* 67.

<sup>210</sup> *ibid* 61.

<sup>211</sup> Mary Rogan, 'Prison Inspection and Monitoring: The Need to Reform European Law and Policy' (2021) 27 *European Journal of Criminal Policy and Research* 285 (2021) 289.

<sup>212</sup> *ibid* 289.

<sup>213</sup> *ibid* 296-303.

<sup>214</sup> Sophie van der Valk and Mary Rogan, 'Experiencing Human Rights Protections in Prisons: The Case of Prison Monitoring in Ireland' (2021) 18(1) *European Journal of Criminology* 101, 104-105. (Rogan's sole author 2021 article was first published online in 2019, making it earlier than this 2021 joint article, first published in 2020).

<sup>215</sup> *ibid* 105.

find that prisoners believe that oversight is vital, but were either unaware of this oversight body or distrusted it and felt it was ineffective.<sup>216</sup>

Morgenstern and Rogan's working paper, also in 2021, reports on 24 interviews with managerial staff across four prisons in two German *Länder* (federal states). The authors conclude that the largely unstudied experience of prison staff is crucial when evaluating oversight, as staff are the actors whom we expect to embed a 'culture of rights' in prisons.<sup>217</sup> Two more works that emerged from Rogan's project in 2022 are particularly noteworthy. O'Connell and Rogan reported on interviews with a total of 30 prisoners and 21 staff in two prisons, one in Scotland and one in Norway, concerning the CPT and its recommendations.<sup>218</sup> They conclude that it is crucial to triangulate evaluations of efficacy using the views of people living and working in prison, as these cohorts can experience implementation of some CPT recommendations as detrimental.<sup>219</sup> Aizpurua and Rogan's work reports on a survey of a total of 28 soft and hard oversight bodies in EU NPMs.<sup>220</sup> They identify deficiencies in these bodies' 'financial independence', staffing and diversity in staff backgrounds, as well as a lack of protections against reprisals for prison staff and prisoners who speak to overseers and speculate that their efficacy would rise if these deficits were remedied.<sup>221</sup> Finally, Quinn, Tomczak and Buck's 2022 work again focuses on the large numbers of people who volunteer in prisons,<sup>222</sup> which includes overseers in soft mechanisms. The authors highlight the personal costs of volunteers' labour 'amidst ... significant barriers, chronic limitations, and difficult emotions', including frustration and despair.<sup>223</sup>

### *Growing methodological rigour*

This post 2013 literature shows a growing rigour. Each work is somewhat sceptical concerning civil prison oversight's efficacy, with several speculating as to causes and consequences of the dysfunction they observe. Many have either sought proxy data or collected their own and all call for further empirical studies on how civil oversight operates in practice and influences prisons.

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<sup>216</sup> *ibid* 108-112.

<sup>217</sup> Mary Rogan and Christine Morgenstern, "'One Always Looks for a Compromise ...' Senior Prison Managers Views of Law, Human Rights and Oversight in Germany' (2021) Freie Universität Empirical Legal Studies Center Working Paper No. 9, [www.jura.fu-berlin.de/en/forschung/fuels/Research-Output/Working-Papers/FUELS\\_WP\\_Prisons\\_Human\\_Rights.pdf](http://www.jura.fu-berlin.de/en/forschung/fuels/Research-Output/Working-Papers/FUELS_WP_Prisons_Human_Rights.pdf) accessed 2 April 2023.

<sup>218</sup> Ciara O'Connell 'Monitoring Prisons in Europe: Understanding Perspectives of People in Prison and Prison Staff' (2022) 00 *Law & Social Inquiry* 1.

<sup>219</sup> *ibid* 26-27.

<sup>220</sup> Eve Aizpurua and Mary Rogan, 'Correctional Oversight Bodies' Resources and Protections across the European Union: Are their Hands Tied?' (2022) 22(3) *Criminology & Criminal Justice* 383.

<sup>221</sup> *ibid* 399-400.

<sup>222</sup> Kaitlyn Quinn, Philippa Tomczak and Gillian Buck, "'How You Keep Going': Voluntary Sector Practitioners' Storylines as Emotion Work' (2022) *British Journal of Sociology* 1.

<sup>223</sup> *ibid* 1, 14-15.



A number have prioritised the lived experience of staff and prisoners. Bennett's works provide an informed, innovative baseline evaluation of oversight bodies through the eyes of staff.<sup>224</sup>

Intriguingly, he offers a glimpse of expert HMIP overseers working respectfully with prison staff in a process that staff see as beneficial, fair and worthwhile – a possibility that is one of this study's central concerns. Yet, this glimpse sits uneasily with other HMIP practices that he describes, including unannounced visits, where inspectors swoop early in the morning, as in a police raid.<sup>225</sup>

The empirical works now emerging from Rogan's study of accountability in EU prisons are a clear advance. While they do not interrogate the regulatory validity of civil prison oversight, the complexity and rigour of their comparative methodological is notable, particularly in their triangulation of different cohorts' perspectives, and use of both thematic and inferential analysis.

These studies have confirmed Martin and Godfrey's 1994 findings that prisoners believe in the oversight ideal but are disillusioned in practice;<sup>226</sup> built on Bennett's contributions to return the experiences of prison staff to the centre of the research agenda,<sup>227</sup> and identified unintended consequences of civil prison oversight,<sup>228</sup> reinforcing contributions made by Whitty and Daems.<sup>229</sup>

This last contribution is particularly important, given that recent works by Bicknell and Evans<sup>230</sup> and Padfield<sup>231</sup> have expressed scant sympathy for prisons burdened by oversight processes.

#### *Europe's reverse Panopticon*

So far, we have seen little evidence that civil prison oversight delivers as promised. However, if we focus on hard forms of the mechanism in the EU, the outlook is more positive. As early as 1998, Stern accepted that the layered, powerful civil prison oversight processes in Europe had provided unprecedented information on prison conditions, in some cases assisting reforms there.<sup>232</sup>

Two recent works provide useful insights. The first is Cliquennois and Snacken's 2018 article,<sup>233</sup> which does not assert that hard oversight has itself prevented abuses or promoted reform. Rather,

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<sup>224</sup> Bennett (2014) and (2016).

<sup>225</sup> Follow up visits to prisons where concerns have been flagged during routine five-year inspections: Bennett (2016) 112; Owers (2016).

<sup>226</sup> Van der Valk and Rogan (2021). See also Martin and Godfrey (1994).

<sup>227</sup> Morgenstern and Rogan (2021); O'Connell and Rogan (2022). See also Bennett (2014); (2016).

<sup>228</sup> See generally Sieber (1981).

<sup>229</sup> Aizpurua and Rogan (2022); O'Connell and Rogan (2022). See also Whitty (2011); Daems (2017).

<sup>230</sup> Christine Bicknell and Malcom Evans, 'Monitoring Prisons: The Increasingly Complex Relationship between International and Domestic Frameworks' in Tom Daems and Luc Robert (eds), *Europe in Prisons* (Palgrave MacMillan 2017) 26-28.

<sup>231</sup> Padfield (2018) 74.

<sup>232</sup> Stern (1998) 244-247.

<sup>233</sup> Gaëtan Cliquennois and Sonja Snacken, 'European and United Nations Monitoring of Penal and Prison Policies as a Source of an Inverted Panopticon?' (2018) 70 *Crime Law and Social Change* 1. See also Gaëtan Cliquennois (ed), *The Evolving Protection of Prisoners' Rights in Europe* (Taylor & Francis 2022).

the authors show that hard oversight bodies had sent new flows of expert information on prison conditions into the public domain.<sup>234</sup> Meanwhile, UN bodies had enhanced and expanded their monitoring and standard setting practices.<sup>235</sup> This, coupled with determined NGO lobbying, had prompted robust standard setting by a web of political bodies: the Council of the EU; the European Parliament; the European Council and the European Commission.<sup>236</sup> The same NGOs then helped prisoners to use these new flows of information and tightened standards to obtain powerful judicial oversight of prisons by the ECtHR and Court of Justice of the European Union.<sup>237</sup>

All these mutually reinforcing interactions had formed a dense, effective 'regulatory network'. This is a regulatory technique we explore in Chapter 2. It refers to situations where a desired outcome is achieved by diverse public and private regulatory actors deploying different regulatory mechanisms in concert or sequence. The authors argue that this network regulation of EU prisons is now so comprehensive that it forms an 'inverted Panopticon',<sup>238</sup> where prisoners can have every carceral decision scrutinised.<sup>239</sup> Prisoners now correct deviant prisons, not the other way around.

The second work is Dünkel and Morgenstern's 2018 assessment of the entire landscape of prison oversight in Germany – whether public interest group, political, scholarly and judicial – as well as the oversight performed by the *Anstaltsbeiräte* advisory boards, Germany's NPM, the CPT and the SPT.<sup>240</sup> The authors do not attribute the exemplary reputation of German prison conditions to these four layers of civil prison oversight. Instead, they note the chronic under-resourcing of Germany's NPM and empirical evidence of the 'indifferent... stance' of prisons officials due to heavy over-monitoring. For Dünkel and Morgenstern, decades of CPT and SPT reports are no more than a source of information, which has consistently identified weak and blind spots in German carceral conditions.<sup>241</sup>

The authors instead attribute improvements in conditions to judicial review under German jurisprudence interpreting the landmark 1977 *Prison Act*, which introduced a comprehensive procedure for prisoner complaints, a dedicated, expert district court bench to hear them and appeals to Higher Courts in each *Land* (federal state), the Federal Constitutional Court and the

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<sup>234</sup> Cliquennois (2018) 1-3, 6.

<sup>235</sup> *ibid.*

<sup>236</sup> *ibid* 3-4, 6-8.

<sup>237</sup> *ibid* 4-6, 8, 10. See also Tapio Lappi-Seppala and Lauri Koskeniemi, 'National and Regional Instruments in Securing the Rule of Law and Human Rights in the Nordic Prisons' (2018) 70 *Crime Law and Social Change* 135.

<sup>238</sup> See Bentham (1791); Foucault (1995) 200-2004.

<sup>239</sup> Cliquennois and Snacken (2018) 10-12.

<sup>240</sup> Frieder Dünkel and Christine Morgenstern, 'The Monitoring of Prisons in German Law and Practice' (2018) 70 *Crime Law and Social Change* 93. Dünkel is a criminologist; Morgenstern is a specialist in criminal law.

<sup>241</sup> *ibid* 93, 98-99, 102-103, 109.

ECtHR.<sup>242</sup> They argue that the fact that every exercise of carceral power became reviewable – even prison staff failing to knock at a cell door – has tempered its arbitrary exercise, with the enforceability of the few judgments that have succeeded having a powerful, direct impact on prisons, especially since 2006.<sup>243</sup>

Yet if we cross back to the UK, Padfield's 2018 assessment is sobering.<sup>244</sup> She found the British Parliament to be passive, with the courts reluctant to intervene in how prisons exercise their discretion and ambivalent concerning European norms – Brexit having underscored these trends.<sup>245</sup> She felt that this could leave the UK without enforceable standards while prison conditions worsen.<sup>246</sup> Despite it being 'easy to assert' the efficacy of civil prison oversight, she accepted that the dearth of empirical research means there is still no evidence that it 'actually drives up standards'.<sup>247</sup>

A picture emerges through these works in which hard versions of civil prison oversight serve a facilitating role in a complex, densely networked European prison regulation landscape. Over time, this has established a robust 'framework for humane imprisonment' in the EU – if not in the UK.

#### *Proponents search for evidence*

Even some prominent 'norm entrepreneurs' have participated in this gradual shift away from rhetoric towards empiricism. In 2009, eminent civil prison oversight authority Nigel Rodley stated that inspection had always been 'remedial' – not 'prophylactic', with the word 'preventive' a euphemism used to entice torturing jurisdictions into giving inspectors access.<sup>248</sup>

The Association for the Prevention of Torture (APT) made its first empirical foray after a major donor inquired as to how the APT measured the efficacy of monitoring.<sup>249</sup> It funded a comparative study by Carver and Handley, published in 2016, that sought to correlate 66 anti-torture measures in 16 countries worldwide with torture incidence rates across 1985 to 2014.<sup>250</sup> A 'monitoring' cluster of

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<sup>242</sup> The German Federal Republic is made up of 16 *Länder*.

<sup>243</sup> Dünkel and Morgenstern (2018) 94-98, 100.

<sup>244</sup> Padfield (2018). Padfield considered the IMBs, the NPM led by HMIP, the relevant ombudsman, various NGOs, the courts and Coroners Courts.

<sup>245</sup> *ibid* 70-72.

<sup>246</sup> *ibid* 58, 64.

<sup>247</sup> Padfield (2018) 74-75.

<sup>248</sup> Nigel S Rodley, 'Reflections on Working for the Prevention of Torture' (2009) 6(1) *Essex Human Rights Review* 15, 20-21. Rodley was the author of the authoritative text on international law norms applying to prisoners: Nigel S Rodley NS and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd, Oxford University Press 2009). He served in legal roles for Amnesty International from 1973 to 1990; as UN Special Rapporteur on Torture from 1993 to 2001; and as a UN Human Rights Committee member from 2001 to 2016.

<sup>249</sup> Founded by Gautier in 1977.

<sup>250</sup> Richard Carver and Lisa Handley, 'Does Torture Prevention Work?' Report of Exploratory Phase - Research Project Commissioned by the Association for the Prevention of Torture' (Association for the Prevention of Torture, 2014); Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press 2016).

measures assessed the work of monitoring bodies<sup>251</sup> and the authors used qualitative methods to build a quantitative index for measuring torture incidence.<sup>252</sup> There was a moderate negative correlation between the presence of hard civil prison oversight practice – involving trained overseers, frequent scheduled and unscheduled visits, little or no prison interference and published reports – and the incidence of torture.<sup>253</sup> There was no correlation with the presence of soft versions.<sup>254</sup>

The authors commented that while civil prison oversight is ‘one of the easiest and politically cost-free ways of complying with external pressure’ concerning prison abuses, monitoring bodies ‘can be set up to fail by being starved of funds, deprived of expertise and blocked from effective access.’<sup>255</sup> They also found that recently founded monitoring mechanisms had been ‘less ... conscientious’ than early versions like HMIP.<sup>256</sup>

Hardwick, who led HMIP from 2010 to 2016, attempted an empirical study with Murray in 2019.<sup>257</sup> The authors intended to demonstrate a fundamental tenet of civil prison oversight practice. This tenet, that greater visit frequency and regularity produces greater preventive impact, was previously regarded as ‘self-evident’.<sup>258</sup> They analysed European NPM annual reports and surveyed 32 of the 38 European NPMs, with 18 responses concerning visits to 167 prisons.<sup>259</sup> The study failed to elucidate whether or how ‘prevention’ works in practice due to the lack of consistency in how NPMs defined

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<sup>251</sup> Carver and Handley (2016) 8-12, 58-61. The 16 jurisdictions were Türkiye, Argentina, Norway, the UK, Chile, Ethiopia, Georgia, Hungary, Kyrgyzstan, India, Indonesia, Israel, Peru, the Philippines, South Africa and Tunisia. The authors constructed eight independent variables in the form of indices evaluating the law and practice found in each jurisdiction relating to each of the four clusters of preventive measures.

<sup>252</sup> *ibid* 61-69. The authors grouped the 66 measures into four clusters of preventive mechanisms: those related to detention; prosecution; monitoring; and complaints. They constructed eight independent variables in the form of indices evaluating the law (four indices) and practice (four indices) found in each jurisdiction relating to each of the four clusters of preventive measures, then conducted bivariate correlations of these eight indices with CHATS.

<sup>253</sup> *ibid* 130-131.

<sup>254</sup> Importantly, no international monitoring body had the ‘sustained preventive character that is claimed for monitoring mechanisms’. The CHATS correlation for international monitoring visits was -.466,  $p < .01$ . For domestic monitoring visits the value was -.457 ( $p < .01$ ). The study found that the best predictor of the incidence of torture was proper detention practice, while monitoring practice came in third of four indices that assessed different aspects of prison operations and governance. Note that this work’s relevance to this study is limited to its examination of a single, narrow question – whether the presence of monitoring mechanisms was correlated with a reduction in the incidence of torture.

<sup>255</sup> Carvey and Handley (2016) 131-132.

<sup>256</sup> *ibid* 86-90, 97, 129-136.

<sup>257</sup> Nick Hardwick and Rachel Murray, ‘Regularity of OPCAT visits by NPMs in Europe’ (2019) 25(1) *Australian Journal of Human Rights* 66. Both Hardwick and Murray have expertise in international human rights law.

<sup>258</sup> *ibid* 2.

<sup>259</sup> *ibid* 3.

and reported oversight visit ‘regularity’ and ‘impact’. It could not draw any conclusion about either concept, let alone show any correlation or causal link between them.<sup>260</sup>

Overall, we can see that some influential ‘norm entrepreneurs’ are aware of the data deficit concerning the efficacy of civil prison oversight and have tried to fill the gap,<sup>261</sup> with limited success.

### *Sobering insights*

In Europe, we have seen the moderation of claims of a heroic role for civil prison oversight in preventing abuses and promoting reform. Empirical evidence remains thin, but it seems that even hard versions of the mechanism may play only a peripheral role, which depends on the presence of a sophisticated network of civil, political and judicial bodies working in concert. At the same time, evaluations of soft versions of civil prison oversight have been largely negative since – for over a century. Critiques have suggested a range of causes, often citing overseers’ lack of expertise and vulnerability to capture by staff. Nonetheless, soft oversight bodies like the IMB and *Anstaltsbeiräte* advisory board have been widely copied - possibly for reasons other than their efficacy.

Some English language studies are now contributing empirical evidence concerning the nature and impact of civil prison oversight. However, this literature remains largely compartmentalised by disciplinary and geopolitical boundaries. Northern European legal reasoning still dominates, despite relevant literature in fields including public administration, social psychology and regulation and global governance. This lack of evidence and interdisciplinary may partly explain why Asian jurisdictions generally remain unconvinced about the merits of adopting the mechanism.<sup>262</sup>

These are uncomfortable insights, given the sincerity and scale of the global investment in civil prison oversight in recent decades by public interest groups, scholars, policymakers, prisons administrations and international treaty bodies – as well as civil oversight practitioners themselves. This investment has clearly been driven by the earnest desire to regulate the risks faced by people who are held in the closed prison environment. Yet it has been made in the absence of a rigorous evidence base on the nature and impact of this regulatory mechanism in its various forms. This study on the soft form of the mechanism aims to contribute to building that evidence base.

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<sup>260</sup> *ibid* 5-20. Some aspects of the Hardwick and Murray study design and methodology are concerning. The first is the assumption that establishing a correlation between visit ‘regularity’ and ‘impact’ could prove a causal link between these two phenomena. The second is the study’s use of civil oversight personnel as its sole data source. This cohort has far less knowledge of what happens inside prisons than staff and prisoners.

<sup>261</sup> Sunstein (1996) 909.

<sup>262</sup> See Richard Harding and Neil Morgan, ‘OPCAT in the Asia-Pacific and Australasia’ (2010) 6(2) *Essex Human Rights Review* 99 as to the ‘slow progress’ of OPCAT in this region.

## 1.4 Thesis Outline

We have seen in this first chapter that our view of whether and how civil prison oversight regulates prisons is obscured. A slim but persistent literature has expressed disquiet concerning its efficacy, but only a few studies have been comparative, empirical or both. It has been even more rare to seek evidence from the cohort whose conduct is actually being regulated: prison staff. No study has developed or validated a comprehensive empirical methodology for deconstructing a civil oversight system and evaluating its nature and impact given the prerequisites for viable persuasive regulation.

Chapter 2 shifts the discussion to regulatory theory. It opens by explaining the place of soft civil prison oversight within ‘regulatory state’ governance and among the persuasive regulatory mechanisms at the base of the regulatory enforcement pyramid.<sup>263</sup> Secondly, it explores the three theoretical models that the study uses to evaluate the nature and impact of soft civil prison oversight mechanisms in Japan and the ACT: the theories of relational distance; regulatory intermediaries; and social alignments and motivational postures.

Chapters 3 through 5 begin to answer the first research question, which interrogates the nature of civil prison oversight in Japan and the ACT. Chapters 3 and 4 explain the nature of Japan’s mechanism on paper and at launch. Chapter 3 explores the post-war development of Japan’s prisons. This information is essential for understanding why Japan introduced its unusual civil prison oversight and the lived experience of the people who populate Japan’s prison system – which is reported in detail across three later chapters. Chapter 3 begins with Japanese prisons’ transition from 1960s lawlessness to 1970s orderliness, then turns to three prison reform bills that were stymied in the 1980s and 1990s as Japan entered a demoralising recession, followed by a disastrous experiment with ‘get tough on crime’ policies.

Chapter 4 explores how the Nagoya Prison Scandal of 2002-2003 triggered long-delayed reforms. It outlines the rigid, minimalistic shape of the Penal Institution Visiting Committees introduced as part of those reforms and the early years of this soft civil prison oversight mechanism.

Chapter 5 outlines the nature of the ACT mechanism on paper and at launch. This chapter begins by introducing the ACT’s historical trajectory towards self-government and faith in human rights. It then turns to how the ACT vision for its first prison as an exemplar of human rights compliance led to a flexible, expansive Official Visitor model and how this design settled into practice.

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<sup>263</sup> Ayres and Braithwaite (1992).

Chapter 6 is the first of five data-related chapters. It opens by introducing the motivations and philosophy behind the project. The chapter then discusses the study's choice of comparators and mixed methods research design, which draws on over 2700 'voices from inside', including staff, overseers and prisoners. It concludes by acknowledging the study's limitations.

Chapters 7 through 10 complete the study's response to the research questions by reporting the empirical findings on the nature and impact of civil prison oversight in Japan and the ACT – and evaluating them in light of the theory introduced in Chapter 2. Chapter 7 addresses the study's empirical findings concerning the nature of Japan's soft civil prison oversight mechanism in prisons. It begins by examining the characteristics of Japan's overseer workforce and their workflows. It then evaluates the three participant cohorts' views on overseers' merits as personnel, presence in prisons and performance.

Chapters 8 and 9 address the study's empirical findings concerning the impact of Japan's soft civil prison oversight system. Chapter 8 reports the study's findings on the mechanism's benefits, whether for prisons, staff or prisoners, as seen by each participant cohort. It then introduces an analysis performed to ascertain whether there was any correlation between increases in oversight activities and perceptions of benefits. Chapter 9 reports on the mechanism's unintended consequences in Japan, as reported by each participant cohort. These fall into two categories: staff and overseer workloads; and psychological consequences for all three cohorts.

Chapter 10 reports on the study's findings concerning both research questions in the ACT by evaluating the nature and impact of soft civil oversight in the ACT prison. This chapter mirrors the analysis of Japan's mechanism in Chapters 7 through 9. It highlights the surface-level divergence between these two 'Most Different' oversight systems, while identifying an underlying convergence in participants' views on these mechanisms' nature and impact.

Finally, Chapter 11 synthesises the study's findings and explores the study's theoretical and practical implications. It suggests refinements for both regulatory intermediaries theory and the theory of social alignments and recommends regulatory strategies for jurisdictions considering introducing persuasive regulatory mechanisms in prisons. It pauses to reflect on recent prison reforms in Japan and the ACT, before addressing the study's significance and the extent to which its limitations affect its findings. It concludes with suggestions for further research.

## Chapter 2 Regulating Prisons through Civil Oversight: Lessons from Regulatory Theory

We have seen in Chapter 1 that much of the literature on civil prison oversight has emphasised the need to enforce international human rights standards in prisons. This study wholeheartedly supports that goal. However, we have also seen a slim but persistent literature questioning whether civil oversight is an effective tool for achieving this regulatory aim. Accordingly, this study focuses directly on two aspects of this question. The first is what shape does soft civil prison oversight take inside prisons – its nature? The second is what are its effects – its impact? Using the framework of regulatory theory helps in approaching these two aspects with rigour. As civil oversight is a regulatory mechanism and both aspects concern its regulatory efficacy, it is regulatory theory that offers the evaluative tools we need to elucidate them.

This chapter introduces the regulatory theory that informs the study in two sections. The first explains the origins of regulatory mechanisms like civil oversight as part of the ‘regulatory state’ mode of governance and explores whether the ‘regulatory state’ can effectively regulate itself in this way. The second section examines what regulatory theory tells us about how to design regulatory tools to optimise compliance, especially through persuasive mechanisms like soft civil oversight.

### 2.1 Civil Prison Oversight as ‘Regulatory State’ Governance

This project follows the path of a popular European regulatory idea – civil oversight – into prisons in two jurisdictions in the Asia-Pacific region. The focus here is on government attempts to regulate – in this case, attempts to regulate itself.

The last three decades have seen dramatic growth in global understanding of regulation, which is delivered in three recognised modes: the ‘welfare state’, ‘regulatory state’ and ‘post-regulatory state’ modes.<sup>1</sup> This study introduces all three but focuses on the regulatory state mode. In this mode, the state is central to regulatory decision making and ‘steers’ policy but is no longer able to meet the growing societal demands for delivery of regulatory services, or ‘rowing’, so delivery of regulation is outsourced, often to private actors.<sup>2</sup>

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<sup>1</sup> David Levi-Faur, ‘The Odyssey of the Regulatory State: From A “Thin” Monomorphic Concept to A “Thick” and Polymorphic Concept’ (2013) 35(1-2) *Law & Policy* 29.

<sup>2</sup> David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Addison-Wesley 1992) 25. See also John Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *British Journal of Criminology* 222, 223.



Civil prison oversight is one example of regulatory state governance. As we have seen in Chapter 1, it is a European-origin mechanism seen as essential for states to achieve the social regulation of prisons.<sup>3</sup> The state ‘steers’ by deciding what genre of prison oversight mechanism to use – whether soft or hard – and which design. However, it is civilian actors who actually deliver oversight in prisons, providing the regulatory ‘rowing’.

Most of what we know about how the regulatory state operates comes from studies of Western jurisdictions. Less is known about whether Western regulatory models ‘translate’ to Japan.<sup>4</sup> One of this study’s contributions is to the existing discussion on regulatory state governance, by providing the first empirical inquiry into this European-origin regulatory mechanism in the Japanese criminal justice context. It reveals a distinctive type of regulatory state governance, where the Japanese state not only ‘steers’ but also exercises pervasive, granular control over how private actors ‘row’ when tasked with helping the state to deliver regulation.

### **2.1.1 What roles can the state play in regulation?**

Commentators agree that the state’s role in regulation is in flux, although views differ as to the nature of this change. As Levi-Faur noted in 2013, it has been common to regard the three types of state involvement – the welfare state, the regulatory state and the post-regulatory state modes – as an evolutionary progression.<sup>5</sup>

There is a consensus that the ‘welfare state’,<sup>6</sup> a configuration that implies direct state involvement in regulation, excluding other actors, experienced a heyday in the decades immediately after World War II. In this mode, the state is central to regulation and primarily concerned with redistributive interventions to maximise citizen welfare through fiscal transfers. The state is willing, capable and provides regulation directly. In simple terms, this regulatory mode includes both formulating policies, or ‘steering’ – and delivering services, or ‘rowing’. For example, if the state wishes to regulate public

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<sup>3</sup> ‘Social regulation’ means regulation to achieve social, as opposed to economic objectives: Susan E Dudley and Jerry Brito, *Regulation: A Primer* (2nd edn, George Mason University and George Washington University 2021) 8. In the context of prisons, social regulation concerns often focus on human rights protections.

<sup>4</sup> See however Masahiro Mogaki, *Understanding Governance in Contemporary Japan: Transformation and the Regulatory State* (Manchester University Press 2019). See also Andrew Walter, ‘From Developmental to Regulatory State? Japan’s New Financial Regulatory System’ (2006) 19(4) *The Pacific Review* 405; cf Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925-1975* (Stanford University Press 1992).

<sup>5</sup> Levi-Faur (2013).

<sup>6</sup> Levi-Faur (2013); Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1.

health, it builds and operates public hospitals. Sometimes called the ‘positive’<sup>7</sup> or ‘developmental’<sup>8</sup> state, this regulatory mode implies ‘command and control’ style regulation.<sup>9</sup>

The second mode of regulation, where the state becomes the regulatory state is distinctly different. Majone’s pivotal work in the 1990s drew attention to the emergence of this mode amid the rise of transnational regulatory regimes, notably the expansion of the European Community in the lead up to the 1993 founding of the European Union (EU).<sup>10</sup> While it may have emerged in US as early as the 1930s, this thesis focuses on the European iteration of this governance mode as the appropriate context when discussing a European-origin regulatory mechanism.<sup>11</sup>

In the regulatory state mode, the state is still central to the regulatory endeavour and ‘steers’ policy.<sup>12</sup> However, it is no longer able to do all the required ‘rowing’ – that is, delivering regulatory services – on its own.<sup>13</sup> Beck shows that a key driver for the ballooning demand for regulatory services is our heightened sensitivity to a far wider range of risks than before, namely the ‘hazards and insecurities’ of modernity.<sup>14</sup> Citizens now ask for more than basic public hospitals – they want a range of cutting-edge, specialist hospitals and the state cannot build and operate them all.<sup>15</sup> What is more, citizens’ concerns have expanded, now extending to man-made threats to our shared survival, like climate change and abstract threats to our shared values, like human rights abuses in prisons.<sup>16</sup>

The state copes with these multiplying demands by rationalising its role, which in practical terms means outsourcing production and service delivery to third parties – for example, by privatising state institutions like the postal service. At the same time, the state creates bodies that monitor these third parties’ performance<sup>17</sup> and sometimes further processes to supervise these monitoring bodies.<sup>18</sup> This is a switch from doing *government* to doing *governance*<sup>19</sup> – regulating others to whom

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<sup>7</sup> Giandomenico Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17(3) *West European Politics* 77; Giandomenico Majone, ‘From the Positive to the Regulatory State’ (1997) 11(1) *Journal of Public Policy* 139.

<sup>8</sup> Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925-1975* (Stanford University Press 1982)

<sup>9</sup> Black (2002); Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2<sup>nd</sup> edn, Oxford University Press 2012) 106-111.

<sup>10</sup> Majone (1994); Majone (1997).

<sup>11</sup> See generally Colin Scott, ‘The Regulatory State and Beyond’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017).

<sup>12</sup> Levi-Faur (2013).

<sup>13</sup> *ibid.*

<sup>14</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage Publications 1992) 21; Ulrich Beck, ‘Living in the World Risk Society’ (2006) 35(3) *Economy and Society* 329; David Bayley and Cliff Shearing, ‘The Future of Policing’ (1996) 30(3) *Law and Society Review* 585.

<sup>15</sup> Scott (2017) 269.

<sup>16</sup> Beck (1992) Ch 1.

<sup>17</sup> Scott (2017) 266.

<sup>18</sup> Michael Power, *The Audit Explosion* (Demos 1994).

<sup>19</sup> Levi-Faur (2013) 36; See also Peter Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995b) 8(4) *Governance* 527.

governments delegate work. As the advent of transnational regulatory regimes has also relieved states of some functions, the overall effect has been to diminish the direct control of the state.<sup>20</sup>

Yet as Moran observes, the regulatory state approach has also delivered ‘huge new areas of intervention and institution building’ into the state’s remit.<sup>21</sup> This expanded authority incorporates ‘surveillance’ mechanisms – a bevy of new oversight, assessment, inspection, audit, evaluation and monitoring bodies. Day and Klein heralded this development as the ‘age of inspection’ in 1990,<sup>22</sup> while Power called it ‘the audit explosion’ in 1994.<sup>23</sup>

This study demonstrates in Chapters 4 and 7 through 9 that the Japanese state takes a distinctive approach to regulatory state governance in the criminal justice domain. Rather than simply outsourcing the delivery of regulatory services and monitoring performance at arm’s length, the state remains involved on a granular level, ‘steering’ to the extent that discretions ordinarily granted to private actors tasked with ‘rowing’ are withheld. The private actors recruited to deliver regulatory services can be difficult to distinguish from state actors. This contrasts with the more traditional regulatory state governance model adopted in the ACT, discussed in Chapters 5 and 10, where the state grants the private actors ample discretion when asking them to deliver civil oversight and largely refrains from telling them how to exercise it.

The third mode of state involvement in regulation is the ‘post-regulatory state’<sup>24</sup> or ‘new regulatory state’.<sup>25</sup> Here the state is not central to the regulatory endeavour and may not participate at all. Instead, a plethora of hybrid, multidirectional mechanisms involving diverse actors ‘diffused throughout society’<sup>26</sup> achieve control in a ‘decentred’ fashion.<sup>27</sup> In this mode, for example, a private foundation sees public demands for innovative, specialist hospitals and steps in to recruit diverse actors to build and operate these facilities. These actors self-regulate or co-regulate, drawing on a

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<sup>20</sup> Baldwin and others (2012) 374-375.

<sup>21</sup> Michael Moran, ‘The Frank Stacey Memorial Lecture: From Command to Regulatory State?’ (2000) 15(4) *Public Policy and Administration* 1, 6.

<sup>22</sup> Patricia Day and Rudolph Klein, *Inspecting the inspectorates: Services for the Elderly* (Rowntree Memorial Trust 1990) 4. See also Patricia Day and Rudolph Klein, *Accountabilities: Five Public Services* (Routledge 1987).

<sup>23</sup> Power (1994). See also Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press 1999).

<sup>24</sup> Black (2002).

<sup>25</sup> John Braithwaite (2000).

<sup>26</sup> Black (2002) 2; Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar 2004).

<sup>27</sup> John Braithwaite (2000) 225.

‘wider range of norms, institutions and processes’,<sup>28</sup> while ‘the state, international society, business and NGOs’ all regulate ‘one another’.<sup>29</sup> In this mode, many sets of hands ‘steer’ and ‘row’.

Levi-Faur’s 2013 article mounts a compelling counterargument to the notion that these three types of governance occur in evolutionary succession; in fact, the three modes are cumulative. All can coexist in a single jurisdiction, so that state regulatory activity is ‘polymorphic’, with the mode tailored to suit each situation and task.<sup>30</sup> For our purposes, this means that while Japan and the ACT may use regulatory state governance when regulating prisons or even other aspects of criminal justice, this does not necessarily mean that they deliver all regulation in this mode.

### **2.1.2 How do ‘power of ideas’ and ‘institutional’ forces drive regulation?**

Among the various theoretical schools concerning how regulation takes shape, ‘network’ theories downplay the role of the state and highlight external factors. Two are of interest – ‘power of ideas’ theories and ‘institutions’ theories.<sup>31</sup> We will see in Chapters 4 and 5 that these network theory clusters provide useful lenses through which to understand the advent of civil oversight systems in Japanese and ACT prisons.

‘Power of ideas’ theories focus on the rise and fall of influential ideas. This school sees powerful ideas as recruiting and uniting diverse networks of public and private actors, who then drive regulatory change. An ideas-driven process like this requires broad participation in policy and implementation, by diverse actors who collaborate.<sup>32</sup> We saw in Chapter 1 that the powerful idea that civil prison oversight enforces prisoners’ human rights has driven the global diffusion of the mechanism. Chapter 5 will show that the ACT is a prime example of this phenomenon.

The ‘institutions’ cluster focuses on regulatory institutions, holding that ‘institutional structure and arrangements’ together with ‘social processes’ drive regulatory change.<sup>33</sup> This ‘institutions’ school is concerned with how to optimise regulatory design and how forces inside regulators and regulatees can defeat or support regulatory intent – both issues that are central to this study and explored further in Section 2.2.<sup>34</sup>

This literature on regulatory institution design aims to promote desirable outcomes and minimise risks. One risk is ‘capture’, which is often thought of as the risk that regulatees will inappropriately

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<sup>28</sup> Scott (2004) 146.

<sup>29</sup> John Braithwaite (2000) 233.

<sup>30</sup> David Levi-Faur, ‘The Welfare State: A Regulatory Perspective’ (2014) 92(3) *Public Administration* 599.

<sup>31</sup> See Baldwin, Cave and Lodge (2012) Table 4.3; cf Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials*, Cambridge University Press 2007) ch 2.

<sup>32</sup> Baldwin, Cave and Lodge (2012) 49-53.

<sup>33</sup> *ibid* 53.

<sup>34</sup> *ibid* 53-65.

dominate those sent to enforce regulation, but can involve any regulatory actor dominating any other.<sup>35</sup> A further risk is ‘ritualism’, where the regulator ‘shirks’ its mandate.<sup>36</sup> ‘Information asymmetry’ is one factor that increases these risks.<sup>37</sup> This refers to the difficulty external regulators face in knowing what is ‘really going on’ inside a regulatee institution. In Chapters 7 through 10, we will see this factor raised repeatedly by staff and prisoners in Japan and the ACT, who comment on overseers’ lack of understanding of the institutions they oversee. This study shows that this issue can be acute, particularly in soft civil oversight systems, where oversight personnel typically have no expertise or experience relating to prisons.

Regulatory institutions literature is also concerned with how regulators and regulatees can themselves stymie regulatory efforts.<sup>38</sup> For example, institutional layering theory explains how institutions initially resist regulatory change, then embrace only palatable aspects,<sup>39</sup> while perversity theory shows that regulation can backfire when it encounters internal institutional processes and norms.<sup>40</sup> A systems theory approach shows that attempts to regulate a siloed domain can fail because it is in Teubner’s terms ‘autopoietic’, meaning ‘self-referential’ or guided by its own rules, which makes it impervious to disruption by regulation.<sup>41</sup> We will see in Chapters 7 through 10 that both the Japanese and the ACT soft civil prison oversight systems demonstrate strong institutional resistance of this kind, as well as perverse outcomes.

However, a more optimistic view is that siloed domains may respond to ‘proceduralisation’, where regulation opens pluralistic pathways for democratic participation, deliberation, negotiation and building lateral ties.<sup>42</sup> Siloed domains might also welcome the chance to evolve autonomously, ‘steering’ themselves in the desired direction.<sup>43</sup> We saw in Chapter 1 that proceduralisation assumptions undergird the diffusion of civil prison oversight as a regulatory mechanism. In recent

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<sup>35</sup> Kenneth W Abbott, David Levi-Faur and Duncan Snidal (2017) ‘Theorising Regulatory Intermediaries: The RIT Model’ 670 *The Annals of the American Academy* 14, 28.

<sup>36</sup> Baldwin, Cave and Lodge (2012) 54.

<sup>37</sup> See Encyclopedia Britannica, ‘George A Akerlof – American economist’ (*Encyclopedia Britannica*, 2023) [www.britannica.com/biography/George-Akerlof#ref749262](https://www.britannica.com/biography/George-Akerlof#ref749262) accessed 2 April 2023. See also Mathew D McCubbins, Roger G Noll and Barry R Weingast, ‘Administrative Procedures as Instruments of Political Control’ (1987) 3(2) *Journal of Law, Economics and Organization* 247.

<sup>38</sup> Baldwin, Cave and Lodge (2012) 58. See also Peter Grabosky, ‘Counterproductive Regulation’ (1995a) 23(4) *International Journal of the Sociology of Law* 347.

<sup>39</sup> Baldwin, Cave and Lodge (2012) 59.

<sup>40</sup> Baldwin, Cave and Lodge (2012) 59-60, citing Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981).

<sup>41</sup> Baldwin, Cave and Lodge 61 n 78-79; Richard Nobles and David Schiff, *Observing Law through Systems Theory* (Hart 2013) 140-167. See generally Gunther Teubner, *Law as an Autopoietic System* (Blackwell Publishers 1993).

<sup>42</sup> Julia Black, ‘Proceduralising Regulation: Part I’ (2000) 20(4) *Oxford Journal of Legal Studies* 597; Julia Black, ‘Proceduralising Regulation: Part II’ (2001) 21(1) *Oxford Journal of Legal Studies* 331.

<sup>43</sup> Baldwin, Cave and Lodge (2012) 61-63.

decades, civil prison oversight has been promoted as if this desirable outcome were a foregone conclusion, rather than contingent.

### 2.1.3 Can civil oversight really regulate government services?

The prevailing belief is that monitoring of government activities should be at 'arm's length', carried out by regulators independent of government. This idea has ancient antecedents – the Imperial Chinese Censorate, a powerful independent oversight agency, monitored Chinese governance in one form or another for more than two thousand years.<sup>44</sup> Moreover, Chapters 4 and 5 show that both Japan and the ACT have embraced it. However, views on the need for monitors to be external have fluctuated. In the 18<sup>th</sup> and 19<sup>th</sup> centuries, public administration scholarship favoured close peer relationships between regulators and regulatees,<sup>45</sup> assuming that this would deliver effective, efficient public services.<sup>46</sup> The raft of British Inspectorates – including for prisons – established at that time dominated control arrangements for over a century.<sup>47</sup> Bureaucratic elites monitored each other in cooperative, consensual relationships, which Moran has called oligarchic 'club regulation'.<sup>48</sup>

#### *1970s to 1998: seminal works*

In the 1970s, two seminal works championed the idea that regulators should be strictly independent – both citing the risk of capture. Wilson and Rachal warned that, in general, public regulators' lack of independence from their target public bodies would make them weak and ineffective,<sup>49</sup> while Donald Black went further.<sup>50</sup> He demonstrated that the 'relational distance' between regulators and regulatees correlates with how strictly legal standards are enforced, as well as their formality and rigidity. While this means that *formal* government attempts to regulate itself will fail for lack of relational distance, Black accepted the possibility of *informal* advisory or 'conciliatory' enforcement using law in situations involving low relational distance.<sup>51</sup> These two key works emerged as public

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<sup>44</sup> See Richard L Walker, 'The Control System of the Chinese Government' (1947) 7(1) *Far Eastern Quarterly* 2 (1947); Christopher Hood, *The Art of the State: Culture, Rhetoric and Public Management* (Clarendon 1998) 53.

<sup>45</sup> Leonard J Hume, *Bentham and Bureaucracy* (Cambridge University Press 1981) 49-52.

<sup>46</sup> Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Clarendon Press 1996) 42-43.

<sup>47</sup> See generally Eric Stockdale, 'A Short History of Prison Inspection in England' (1983) 23(3) *British Journal of Criminology* 209.

<sup>48</sup> Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford University Press 2003) ch 3; Christopher Hood and others, *Regulation Inside Government: Waste-Watchers, Quality Police and Sleaze-Busters* (Oxford University Press 1999) 42.

<sup>49</sup> James Q Wilson and Patricia Rachal, 'Can the Government Regulate Itself?' (1977) 46(1) *The Public Interest* 3, 4-5.

<sup>50</sup> Donald Black, *The Behaviour of Law* (Academic Press 1976) 40-48.

<sup>51</sup> *ibid* 40-48. See also John Braithwaite and Peter Grabosky (1986) *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press 1986) 205-219.

deference to government waned and economic uncertainty grew.<sup>52</sup> There was a new scepticism as to whether government could properly regulate itself at all.

Despite this scepticism, government bodies that formally audited, inspected and evaluated government delivery of public services flourished in the 1980s. McCubbins and others evaluated three common regulatory designs.<sup>53</sup> Periodic 'police patrol' designs like civil prison oversight were found to be expensive and unreliable,<sup>54</sup> while 'fire alarm' designs that rely on virtuous external actors who raise the alarm – like citizens and the courts were found to be too contingent.<sup>55</sup> In contrast, 'deck stacking' designs, which are pre-emptive, emerged as effective.<sup>56</sup> In these designs, the regulatee agency is structured to maximise the likelihood that it will operate as the regulator prefers. The regulator uses administrative constraints to channel and limit regulatees' activities before problems emerge.<sup>57</sup>

Day and Klein investigated the wide variance in how five public services in the United Kingdom (UK) were kept accountable in 1987 and then in 1990 published an exploratory study of three agencies charged with overseeing aged care institutions.<sup>58</sup> While this study suggested legitimating attributes for oversight bodies, like transparency and independence, as well as evaluative criteria, like impact and resource usage, it concluded that the rapid, uncontrolled expansion of the monitoring sector was problematic and should itself be regulated.<sup>59</sup>

In 1998, Kelly and Rodden sounded another warning note, arguing that it may be unrealistic to give a single oversight body both a more empowered 'watchdog' role and a purely advisory 'guide dog' role, given the different processes and skills involved.<sup>60</sup> Overall, these disparate early efforts to understand the runaway growth in auditing, inspection and evaluative bodies express mounting unease while making tentative efforts to establish criteria for assessing their merit.

#### *1999-2004: developing a taxonomy, identifying risks*

Hood, Scott, James, Jones and Travers' 1999 empirical study took a sceptical stance, referring to these bodies as 'waste watchers, quality police and sleaze busters', which they saw as unfettered and

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<sup>52</sup> See generally Moran (2000).

<sup>53</sup> Mathew D McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms' (1984) 28(1) *American Journal of Political Science* 165; McCubbins, Noll and Weingast (1987).

<sup>54</sup> McCubbins, Noll and Weingast (1987) 249-250.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* 273-274.

<sup>57</sup> *ibid.*

<sup>58</sup> Day and Klein (1987); Day and Klein (1990).

<sup>59</sup> Day and Klein (1990).

<sup>60</sup> Siobhan Kelly and Corrinne Rodden, 'From Watchdog to Guide Dog? The Evolving Role of the Accounts Commission for Scotland' (1998) Glasgow Caledonian University Faculty of Business Working Paper Vol 10, 1.

uncoordinated.<sup>61</sup> This work progressed the field in three ways. Firstly, it provided a workable definition of regulation in government, as any checking system where one part of the bureaucracy is officially charged with overseeing the conduct of another part outside the same direct chain of command.<sup>62</sup> Secondly, it contributed a basic four-quadrant model of controls that were already known to increase the transparency and accountability of public service delivery.<sup>63</sup> Three quadrants are occupied by organisational design features that reduce the ability of staff to exercise unfettered power, while oversight using human agents occupies the fourth.<sup>64</sup>

This 1999 study's third contribution was to connect Donald Black's 'relational distance' theory to regulation inside government: the further overseers were relationally from a public service, the more formal the oversight.<sup>65</sup> We will see below that this principle is consistent with pyramidal enforcement theory: both models agree that high relational distance is a corollary of formal regulatory mechanisms, while low relational distance accompanies informal mechanisms.

In 2000, Power revisited his seminal works on the 'audit explosion',<sup>66</sup> arguing that demands for accountability had often led to more enthusiasm than forethought.<sup>67</sup> Specifically, Power noted monitoring processes were frequently 'understood uncritically' and 'rapidly disseminated' – without safeguards, and that the audit explosion was essentially an 'ideologically driven system for disciplining and controlling' others – 'not an instrument of genuine accountability'.<sup>68</sup> This was likely to lead to unintended consequences, as they often constituted wasteful, distracting pageantry designed to provide legitimating 'comfort and reassurance' for external stakeholders.<sup>69</sup> In Sieber's terms, these perverse outcomes map to functional disruption and placation effects.<sup>70</sup>

In 2002, Boyne, Day and Walker were the first to articulate a cost-benefit matrix for evaluating public service inspection, identifying five risks in the shape of 'resistance, ritual compliance, regulatory capture, performance ambiguity and information gaps', while positioning inspectors' expertise as a

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<sup>61</sup> Hood and others (1999) 4.

<sup>62</sup> *ibid* 9-11.

<sup>63</sup> *ibid* Figure 1.2.

<sup>64</sup> *ibid* 12-17. See also Martin Lodge and Christopher Hood, 'Regulation Inside Government: Retro-Theory Vindicated or Outdated?' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 8-9.

<sup>65</sup> Hood and others (1999) 60-67.

<sup>66</sup> Power (1994); (1999).

<sup>67</sup> Michael Power, 'The Audit Society: Second Thoughts' (2000) 4(1) *International Journal of Auditing* 111, 112, 118.

<sup>68</sup> Power (2000) 114.

<sup>69</sup> Power (2000) 115-116. See generally Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981).

<sup>70</sup> Sieber (1981) chs 3 and 9.



key 'mediating variable'.<sup>71</sup> Power followed this study in 2003 by proposing comparative evaluations of auditing practices using five legitimating attributes, measured in relative rather than absolute terms.<sup>72</sup> 'Good' audit systems would have: an 'evolutionary improvement' orientation; a mostly risk-based 'operating style' that favoured randomness but would also be able to investigate thoroughly; open, informative reporting; a degree of independence; and a 'rich' enforcement pyramid – a concept explained below.<sup>73</sup> He felt that audit systems could be deconstructed along three 'axes'. These were: the 'knowledge base' or 'dominant... discourses' that framed a problem and informed audit processes; the 'formal organisation' of the audit body, including its independence, discretion and role in standard setting; and 'operational dimensions' such as to whom the audit body reported and how often, as well as auditors' level of expertise.<sup>74</sup>

In 2004, the four-quadrant model of government controls developed by Hood and others<sup>75</sup> anchored a major comparative study of three government domains including prisons, in eight jurisdictions, including Japan, the UK, Germany and Australia.<sup>76</sup> This study found that complex, hybrid combinations of the four methods of regulating inside government worked best; oversight was particularly 'weak' unless used in combination with one or more other methods.<sup>77</sup>

This literature published between 1999 and 2004 represents a more pragmatic turn. These works sought to develop a taxonomy of regulatory mechanisms inside government, deconstruct their parts – whether sequenced tasks or constituent elements, understand how these parts interacted and then propose ways to evaluate their efficacy.

#### *2007 onwards: a change in tone*

From 2007 onwards, works proposing legitimating attributes for regulation inside government became more common.<sup>78</sup> However, sceptical works were also common. For example, Downe and Martin's 2007 empirical study of UK Audit Commission inspections highlighted a lack of evidence as

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<sup>71</sup> George Boyne, Patricia Day and Richard Walker, 'The Evaluation of Public Service Inspection: A Theoretical Framework' (2002) 39(7) *Urban Studies* 1197.

<sup>72</sup> Michael Power, 'Evaluating the Audit Explosion' (2003) 25 *Law and Policy* 185.

<sup>73</sup> *ibid* 195-199.

<sup>74</sup> *ibid* 192-195.

<sup>75</sup> See Hood and others (1999).

<sup>76</sup> Christopher Hood, 'Controlling Public Services and Government: Towards a Cross-National Perspective' in Christopher Hood and others (eds), *Controlling Modern Government: Variety, Commonality and Change* (Edward Elgar 2004) 3, 5-13.

<sup>77</sup> Christopher Hood, 'Conclusion: Making Sense of Controls over Government' in Christopher Hood and others, (eds), *Controlling Modern Government: Variety, Commonality and Change* (Edward Elgar 2004) 185, 195-196.

<sup>78</sup> See, for example, Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137; Baldwin, Cave and Lodge (2012) 26-39.

to benefits; substantial evidence as to costs and risks; and a persistent lack of coordination.<sup>79</sup> The authors confirmed Kelly and Rodden's earlier finding on the impracticality of assigning both policing and advisory functions to the same inspection personnel and found inspection to be driven largely by faith and unrealistic expectations, rather than evidence.<sup>80</sup>

In the same vein, Lodge and Hood's 2010 review of a decade of literature on regulation in government emphasised its 'inherent limits',<sup>81</sup> acknowledging lessons from non-English speaking jurisdictions over millennia and earlier literature on regulation of the private sector. For example, the authors observe that even the hybrid mechanisms combining methods from multiple quadrants that Hood and others recommended in 2004 may not succeed.<sup>82</sup> They give the example of the widely-used technique of inspecting prisons without notice, which combines 'contrived randomness' with 'oversight', noting that it leads to the unintended consequence of destroying 'openness and trust between regulator and regulatee',<sup>83</sup> which in Sieber's taxonomy fits within the provocation category of perverse results.<sup>84</sup>

In 2010, Martin's analysis showed that public service inspection systems that primarily generate data on compliance with external standards – for consumption by internal actors – are inherently a political exercise designed to deliver no more than 'public assurance'.<sup>85</sup> He argues that these 'public assurance' oversight models are excluded from the change processes that their advice is expected to trigger.<sup>86</sup> Further, even if public service inspection mechanisms claim to promote the public interest, such claims are largely rhetorical: 'direct public involvement in generating and consuming knowledge through inspection is limited and rare'.<sup>87</sup> He also raises the problem of unintended consequences, reasoning that even if the impact of public service inspection is hard to quantify, there is little doubt that it is distracting and onerous for officials.<sup>88</sup>

These works published from 2007 onwards offer a sobering 'reality check' on the growing use of civil oversight within government. All theorists regard civil oversight of government services as problematic. This underscores earlier critiques arguing that civil oversight is a weak regulatory

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<sup>79</sup> James Downe and Steve Martin, 'Regulation Inside Government: Processes and Impacts of Inspection of Local Public Services' (2007) 35(2) *Policy & Politics* 215.

<sup>80</sup> *ibid* Kelly and Rodden (1998). See also Steve Martin, 'Knowledge from Inspection: External Oversight and Information to Improve Performance' in Kieran Walshe, Gill Harvey and Pauline Jas (eds), *Connecting Knowledge and Performance in Public Services: From Knowing to Doing* (Cambridge University Press 2010) 22.

<sup>81</sup> Lodge and Hood (2010) 591.

<sup>82</sup> Hood and others (2004).

<sup>83</sup> Lodge and Hood (2010) 605-606.

<sup>84</sup> Sieber S, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981) ch 6.

<sup>85</sup> Martin (2010) 22-23, 28

<sup>86</sup> *ibid* 22-23.

<sup>87</sup> *ibid* 28.

<sup>88</sup> *ibid* 29.

mechanism at best, which is often adopted in a rush of enthusiasm rather than reliance on evidence and siloed from existing systems of administrative control – and comes with serious risks.

We will see in Chapters 7 through 10 that the ideas above are integral to the analysis that this study uses to answer the research questions. Some are explored further below, including relational distance, the role of public interest groups in oversight and regulatees' responses to regulation – whether cooperative or defiant.

## **2.2 Soft Civil Oversight as Persuasive Regulation**

We have seen above that civil oversight is a prime example of the regulatory state mode of governance and that regulatory network theories explain its widespread adoption in recent decades. However, we also saw that regulatory theorists have raised concerns since the 1980s about its ineffectiveness when deployed inside government and these concerns have intensified.

This section shifts our theoretical focus to civil oversight as a persuasive regulatory mechanism. We consider its place among possible regulatory interventions and what we already know empirically about how to optimise the design of such mechanisms to increase the likelihood of compliance.

### **2.2.1 Responsiveness, pyramids and intermediaries**

Ayres and Braithwaite's seminal work published in 1992 catapulted understanding of regulatory enforcement forward.<sup>89</sup> Their 'responsive regulation' theory proposes a pyramid of enforcement measures arranged in escalating levels of intrusiveness (as shown in Figure A below) and relational distance (as shown in Figure C below).<sup>90</sup> Measures using education and persuasion populate the base, while measures involving coercion occupy the peak.<sup>91</sup> It makes sense for governments to start with the simple, economical persuasive measures as a rule, keeping increasingly intrusive responses in reserve for where cooperation is poor – and being open to de-escalation if cooperation improves.<sup>92</sup> Persuasive measures are efficient; they encourage regulatees to either self-regulate or co-regulate by cooperating closely with the regulator to achieve regulatory goals.<sup>93</sup> Crucially, a persuasive measures are only meaningful if the regulator can always 'credibly asser[t] a willingness to regulate more intrusively' by responding to defiance by escalating interventions to higher levels.<sup>94</sup>

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<sup>89</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992).

<sup>90</sup> *ibid* 35-41.

<sup>91</sup> *ibid*.

<sup>92</sup> *ibid*, ch 2.

<sup>93</sup> *ibid* 25, 102.

<sup>94</sup> *ibid* 4-5.

Ayres and Braithwaite argue that capture can be prevented by including representatives of public interest groups in regulatory interactions, on the basis that they will ensure that regulators maintain their integrity and do their duty.<sup>95</sup> They posit that this strategy will be effective when regulatory mechanisms are designed to involve public interest groups ‘as well as regulators in a tripartite culture of regulatory reasonableness’.<sup>96</sup> However, they use game theory to predict the risk of regulatory dysfunction due to public interest group representatives who are not ‘rational’ but ‘zealous’ contributors.<sup>97</sup> They even contemplate that overly zealous, antagonistic individuals might self-select into public interest group representative roles, as for some public interest group members, ‘sustaining the identity of a knight on a white charger may be quite important’, as this disruptive, adversarial identity can attract influence and resources for the public interest group.<sup>98</sup> The authors argue that this risk can be mitigated and reasonableness achieved by training those asked to deliver regulation – including the public interest group representatives – in regulatory ethics,<sup>99</sup> while also neutralising the threat of zealotry by empowering the public interest group representatives and enhancing their access to information.<sup>100</sup>

The overall gist of pyramidal enforcement strategies is to allow the state to achieve better compliance with more public interest objectives at lower cost, reserving the ‘big gun’ of escalation, including intrusive, legally-enforced sanctions, for cases of intractable defiance.<sup>101</sup> In 1991, John O Haley observed that Japan governance makes extraordinarily heavy use of informal, persuasive regulatory mechanisms and not just for the sake of cost efficiency.<sup>102</sup> Haley reasoned that informal persuasive measures allow elite Japanese bureaucrats to adjust rules, norms and compliance standards as they see fit, using sublegal levers.<sup>103</sup>

We will see an example of escalation in regulatory enforcement in the ACT in Chapter 11. John Braithwaite added a further ‘pyramid of supports’ in 2011, which contains incentives and rewards for regulatee compliance at each level, and is shown beside the regulatory enforcement pyramid in Figure A.<sup>104</sup>

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<sup>95</sup> *ibid* 56-60, 70-71.

<sup>96</sup> *ibid* 70.

<sup>97</sup> *ibid* 70-71, 74-78.

<sup>98</sup> *ibid* 75.

<sup>99</sup> *ibid* 68, 70.

<sup>100</sup> *ibid* 76-78.

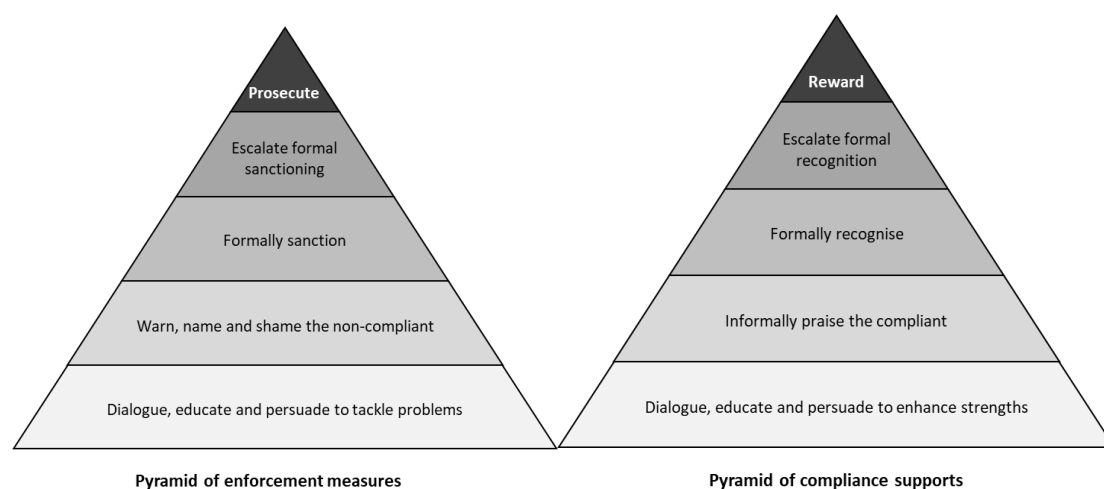
<sup>101</sup> *ibid* 19.

<sup>102</sup> *Authority Without Power: Law and the Japanese Paradox*, Oxford University Press.

<sup>103</sup> *ibid*.

<sup>104</sup> John Braithwaite, ‘The Essence of Responsive Regulation’ (2011) 44 *University of British Columbia Law Review* 475, 480-482. See also Mary Ivec and others, ‘Applications of Responsive Regulatory Theory in Australia and Overseas: Update’ (2015) Australian National University Regulatory Institutions Network Occasional Paper

**Figure A** Regulatory enforcement and compliance supports pyramids<sup>105</sup>



Responsive regulation has attracted critiques, two of which are relevant to this study.<sup>106</sup> The first is that escalation and de-escalation can be impractical for a range of reasons.<sup>107</sup> The second concerns attempts to prevent capture by including public interest group representatives among regulatory personnel. Hood and Lodge suggest that this is fraught with the risk that it will ‘entrench’ rather than alleviate adversarial public interest group attitudes and fail to overcome bureaucratic resistance.<sup>108</sup> Baldwin, Cave and Lodge add that that the regulatory interaction may not be ‘constructively underpinned by trust and cooperation’ and that ‘gridlock may result’.<sup>109</sup> We will see these risks realised to varying degrees in both Japan and the ACT.

Elaborations of the regulatory pyramid theory have emphasised that the original pyramid model, includes just two actors – the state as regulator and the private sector as regulatee – and a single dimension – in which the state escalates or de-escalates its intervention in response to the level of cooperation achieved.<sup>110</sup> Some elaborations accommodate additional actors in networked relationships, so can be thought of as recognising complexity, while others distinguish between situations requiring regulation, so can be seen as enabling differentiation.

23 [https://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/Occasional%2520Paper%252023\\_Ivec\\_Braithwaite\\_0.pdf](https://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/Occasional%2520Paper%252023_Ivec_Braithwaite_0.pdf) accessed 2 April 2023.

<sup>105</sup> Adapted from Braithwaite (2011) Figure 1.

<sup>106</sup> See generally Peter Mascini, ‘Why Was the Enforcement Pyramid so Influential? And What Price Was Paid?’ (2013) 7 *Regulation & Governance* 48, 48; Christine Parker, ‘Twenty Years of Responsive Regulation: An Appreciation and Appraisal’ (2013) 7 *Regulation & Governance* 2, 2; Ian Ayres, ‘Responsive Regulation: A Co-Author’s Appreciation’ (2013) 7 *Regulation & Governance* 145; John Braithwaite, ‘Relational Republican Regulation’ (2013) 7 *Regulation & Governance* 124.

<sup>107</sup> Baldwin, Cave and Lodge (2012) 259-264.

<sup>108</sup> Lodge and Hood (2010) 603-604.

<sup>109</sup> Baldwin, Cave and Lodge (2012) 265.

<sup>110</sup> cf Colin Scott, ‘The Regulatory State and Beyond’ in Peter Drahos (eds), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 266.

### *Complexity elaborations: 'smart' regulation and regulatory intermediaries*

The first genre of elaborations recognises complex regulatory networks. These complexity elaborations explore how a single regulatory initiative can involve multiple actors who wield – or assist with – a range of distinct regulatory measures. Works by Gunningham and others on 'smart' regulation<sup>111</sup> or 'regulatory pluralism'<sup>112</sup> are useful examples that emphasise the regulatory utility of incorporating other measures and actors. 'Smart' regulation expands the pyramid into an 'inclusive' three-dimensional shape, accommodating a regulatory 'mix' of public regulators, private self-regulatory bodies and third-party 'surrogate' regulators.<sup>113</sup> These surrogate regulators might include commercial actors, such as financial services providers who insure regulatees in a given industry, or non-commercial actors, such as supranational bodies that set standards in a regulated sector, or both.<sup>114</sup> 'Smart' regulation envisions that, where practicable and compatible, multiple actors will regulate in concert, imposing complementary, escalating measures, whether simultaneously or in sequence.<sup>115</sup> We will see in Chapters 5 and 11 that the ACT had some aspects of 'smart' regulation in place from the launch of its soft civil oversight system and later augmented these arrangements when the need became clear.

Abbott, Levi-Faur and Snidal's contribution in 2017 is a further complexity elaboration.<sup>116</sup> This work recognises the role of the 'diverse intermediaries' who assist with regulatory interactions, defined as 'any actor that acts directly or indirectly in conjunction with a regulator to affect the behaviour of a target'.<sup>117</sup> Literally any kind of actor can serve as an intermediary in the regulator-regulatee relationship; they can be 'public or private, domestic or international' and can play either formal or informal roles.<sup>118</sup> They are commonly deployed to provide ongoing technical and operational expertise, as well as to establish trust through their apparent independence and legitimacy – even serving as co-regulators.<sup>119</sup> Importantly, regulatory intermediaries may have their own agendas, which can either amplify a regulatory initiative, or derail it. This can happen if an intermediary is captured by external interests, or if there is more than one intermediary and they conflict or

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<sup>111</sup> Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press 1998).

<sup>112</sup> Neil Gunningham and Cameron Holley, 'Next-Generation Environmental Regulation: Law, Regulation, and Governance' (2016) 12 *Annual Review of Law and Social Science* 273.

<sup>113</sup> Neil Gunningham and Duncan Sinclair, 'Designing Smart Regulation' in Bridget Hutter (eds), *A Reader in Environmental Law* (Oxford University Press 1999) 9.

<sup>114</sup> *ibid.*

<sup>115</sup> Gunningham and Grabosky (1998) See also Peter Grabosky, 'Beyond *Responsive Regulation*: The Expanding Role of Non-State Actors in the Regulatory Process' (2013) 7 *Regulation & Governance* 114.

<sup>116</sup> Abbott, Levi-Faur and Snidal (2017).

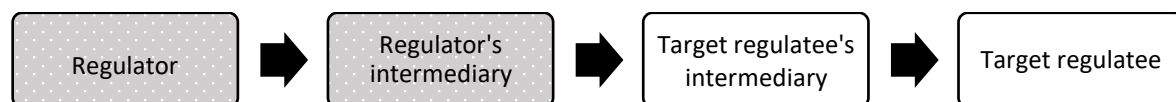
<sup>117</sup> *ibid* 15.

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid* 19-21, 22-24.

compete.<sup>120</sup> Figure B shows a pattern that emerged in both Japan and the ACT, where civil prison oversight involves multiple intermediaries: overseers, who act for the regulatory authority; and designated corrections officers, who act for the prison. This pattern is explored further in Chapters 4, 5, 7 and 10.

**Figure B** [Regulator→ Intermediary→ Target] model: Dual intermediary variation



*Differentiation elaborations: 'really responsive' and 'risk-based' regulation*

The second kind of elaborations of responsive regulatory theory highlights the need for careful differentiation between situations requiring regulation. 'Really responsive'<sup>121</sup> and 'risk-based' regulation theories<sup>122</sup> are two key contributions.

'Really responsive' regulation, developed by Baldwin and Black, emphasises that regulation must be highly differentiated for each regulatory challenge, while maintaining internal coherence and consistency, which necessitates 'sensitivity' to six matters.<sup>123</sup> These are the regulatees' 'compliance response' and 'attitudinal settings'; the 'institutional environments' around the regulator and regulatee; whether regulatory mechanisms deployed together are compatible; how the regulatory regime performs over time; and any changes 'in regulatory priorities, challenges and objectives'.<sup>124</sup> These matters are to be considered at each of Sparrow's five stages of enforcement.<sup>125</sup> These are: when regulators detect a problem; design mechanisms for responding; then enforce, evaluate and modify them.<sup>126</sup>

Baldwin and Black admit the intricacy of this systematised approach, as imposing 'severe informational, analytical and resource demands', especially in 'regulatory spaces'<sup>127</sup> that are 'decentred', meaning that there is no hegemonic regulator.<sup>128</sup> However, they also point out that

<sup>120</sup> *ibid.* pp 19-20, 28-31.

<sup>121</sup> See Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59.

<sup>122</sup> See Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law and Policy* 181.

<sup>123</sup> Baldwin and Black, 61-62.

<sup>124</sup> *ibid* 69-76.

<sup>125</sup> *ibid* 76. See also Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (Brookings Institution Press 2000) ch 10.

<sup>126</sup> Baldwin and Black (2008) 78-79.

<sup>127</sup> See generally Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press 1989).

<sup>128</sup> *ibid* 93.

‘really responsive’ regulatory mechanisms will contain an inbuilt mechanism for continuous updating and improvement.<sup>129</sup> We will see in Chapters 4, 5, 7, 10 and 11 that Japan’s soft civil prison oversight system has sidestepped all six of these matters requiring regulatory ‘sensitivity’, while the ACT version has given attention to the final three.

Risk-based regulation, developed by Baldwin and Black,<sup>130</sup> accommodates the reality that many regulators triage what to control, and how, using risk analysis.<sup>131</sup> This strategy emerged in the Hampton Report 2005 in the UK as a way to rationalise overlapping regulatory activity.<sup>132</sup> ‘Risk-based regulation’ complements ‘responsive’ or ‘really responsive’ regulation, facilitating responsiveness by narrowing the question of how to concentrate resources – on which activity, or on what actors.<sup>133</sup> It considers matters including the likelihood that an individual regulatee, or class of regulatee, will fail to cooperate and the degree to which this would frustrate the regulator’s mission. This might lead, for example, to replacing wastefully indiscriminate inspections with targeted inspections of high-risk regulatees.<sup>134</sup> However, risk-based regulation is research and resource-intensive; it involves the costly pursuit of a recalcitrant few while tolerating widespread non-compliance by low-risk regulatees.<sup>135</sup> The ‘neatness’ and comfort of the risk assessment formula may mean regulators miss higher-order aims.<sup>136</sup>

We will see in Chapters 4 and 7 that the design of Japan’s soft civil oversight system does not differentiate between lower and higher risk penal institutions. Chapter 5 and 10 show that in the ACT, most aspects of how to differentiate oversight activities between the wide range of security levels and prisoner classifications present in the prison is left to the overseers’ discretion. The only systemic differentiation is by prisoners’ Indigenous status.

### **2.2.2 Relational distance for persuasive measures**

While Sieber’s taxonomy of ways that social regulation can backfire is sobering,<sup>137</sup> van der Heijden’s recent systematic review shows that we also ‘know a lot about how to make responsive regulation

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<sup>129</sup> *ibid* 75.

<sup>130</sup> Black and Baldwin (2010).

<sup>131</sup> Julia Black, ‘The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom’ [2005] *Autumn Public Law* 512.

<sup>132</sup> Philip Hampton, *Reducing Administrative Burdens* (HM Treasury 2005); Black and Baldwin (2010) 184-185.

<sup>133</sup> Hampton (2005) 4, 27. See also John Braithwaite, ‘Meta Risk Management and Responsive Regulation for Tax System Integrity (2003) 25(1) *Law and Policy* 1; Florentin Blanc, *From Chasing Violations to Managing Risks: Origins, Challenges and Evolutions* (Edward Elgar 2018).

<sup>134</sup> Baldwin, Cave and Lodge (2012) 281-283.

<sup>135</sup> *ibid* 283-285.

<sup>136</sup> Black and Baldwin (2010) 204. See also Baldwin, Cave and Lodge (2012) 288-291.

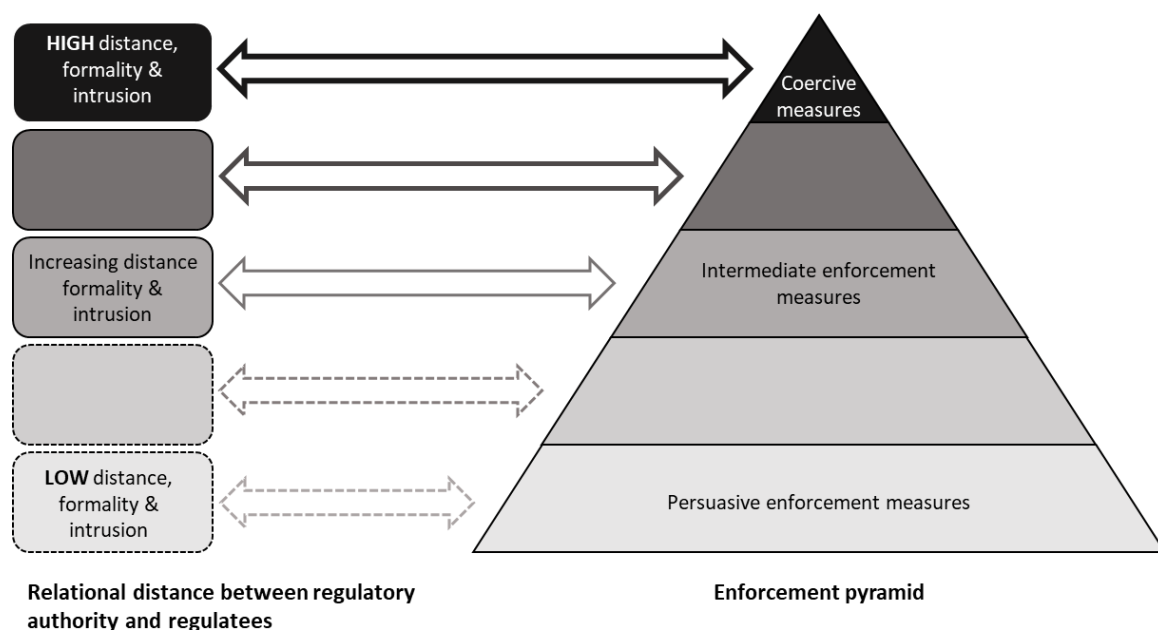
<sup>137</sup> Sieber (1981).



work well'.<sup>138</sup> In other words, the global uptake of pyramidal enforcement has been rapid, diverse and well-scrutinised, producing thorough empirical studies that have generated practical aids that allow regulators to optimise regulatory designs. One such aid has been in our understanding of the optimal relational distance between regulators and regulatees. As noted above, the view in decades past was that any closeness between regulator and regulatee compromised regulatory integrity.<sup>139</sup> However, pyramidal regulatory theory has since built on Donald Black's scholarship, which revealed that the optimal relational distance varies depending on the level of regulatory intrusiveness.<sup>140</sup>

As Figure C below shows, we now know that it is the infrequently used coercive measures at the apex of Ayres and Braithwaite's regulatory enforcement pyramid that require a distant, adversarial relationship. Persuasion through the dialogic measures at the broad base of the pyramid – which produces the bulk of regulatory compliance<sup>141</sup> – demands the opposite, a close working relationship that builds trust and elicits cooperation.

**Figure C** Relationship between enforcement mechanism choice and relational distance



<sup>138</sup> Jeroen van der Heijden 'Responsive Regulation in Practice: A Review of the International Academic Literature' (2020) Victoria University of Wellington Government Regulatory Practice Initiative State of the Art in Regulatory Governance Research Paper, June [www.wgtn.ac.nz/\\_data/assets/pdf\\_file/0005/1873103/2020-State-of-the-Art-in-Regulatory-Governance-06-Responsive-regulation-in-practice.pdf](http://www.wgtn.ac.nz/_data/assets/pdf_file/0005/1873103/2020-State-of-the-Art-in-Regulatory-Governance-06-Responsive-regulation-in-practice.pdf) accessed 2 April 2023.

<sup>139</sup> Wilson and Rachal (1977). See also George J Stigler, 'The Theory of Economic Regulation' (1971) 2(1) *Bell Journal of Economics and Management Science* 3.

<sup>140</sup> Donald Black (1976) 40-48.

<sup>141</sup> See for example, Joseph V Rees, *Hostages of Each Other: The Transformation of Nuclear Safety since Three Mile Island* (University of Chicago Press 1994)

Julia Black confirms this principle in her discussion of proceduralisation. She notes that regulators who wish to encourage proceduralisation, particularly in autopoietic (self-referential) domains, must become 'social gardeners' rather than 'social engineers', abandoning top-down methodologies for 'heterarchical' interactions that facilitate persuasion.<sup>142</sup> Persuaded regulatees then either self-regulate or co-regulate – which means engaging with the state and other stakeholders to achieve regulatory aims. Ayres and Braithwaite give the example of a retail industry association, consumers and a trade practices regulator collaborating to reform supermarket checkout processes.<sup>143</sup>

Etienne's work on relational signals between regulators and regulatees is helpful here. He suggests that regulators' and regulatees' perceptions of their relationships with each other should guide regulators' choices. He identifies five different types of regulatory relationships – those based on 'self-interest', 'legality', 'authority', 'judgment' and 'solidarity', arguing that behaviours that strengthen some relationships, will weaken others.<sup>144</sup> For example, a social event between regulators and regulatees can seem sinister, suggesting capture, if the optimal relational distance is high and the relationship adversarial. However, it can be an encouraging sign if the optimal distance is low, and the relationship relies on dialogue.<sup>145</sup>

Etienne's 'judgment' category is particularly relevant for this study on civil oversight of prisons. In regulatory interactions that fall into this category, regulators and regulatees see their relationship as governed by judgments concerning standards of 'morality or science', in which 'consideration of truth or right dominate'. He cautions that regulatees in a 'judgment' relationship can resent monitoring, as it signals that regulators are unsure of regulatees' 'competence or morality'.<sup>146</sup>

Innes, Davies and McDermont's empirical work sheds more light on how 'soft and interactive' regulatory processes work best.<sup>147</sup> Their findings highlight the value of 'regulation by co-production', which achieves 'influence and persuasion' through patient, ongoing co-regulatory interactions between regulators, regulatees and third-party beneficiaries.<sup>148</sup> These interactions start well before a regulatory mechanism is designed. Regulatees and beneficiaries join in from the outset; they are invited to 'co-define' the problem then 'co-design' and 'co-deliver' solutions.<sup>149</sup> This approach acknowledges that regulatees and other stakeholders are custodians of knowledge that regulators

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<sup>142</sup> Black (2001) 57-58, 57.

<sup>143</sup> Ayres and Braithwaite (1992) 102.

<sup>144</sup> Julien Etienne, 'Ambiguity and Relational Signals in Regulator - Regulatee Relationships' (2013) 7 *Regulation & Governance* 30, 36-41.

<sup>145</sup> *ibid* 31, 34.

<sup>146</sup> *ibid* 39-40.

<sup>147</sup> Martin Innes, Bethan Davies and Morag McDermont, 'How Co-Production Regulates' (2019) 28(3) *Social and Legal Studies* 370.

<sup>148</sup> *ibid* 372, 382.

<sup>149</sup> *ibid* 377.

need to regulate well.<sup>150</sup> It also predicts that the shape of a co-produced regulatory measure may differ from what regulators envisage, as input from regulatees and stakeholders who are directly affected by the problem will ‘regulate’ the regulators’ expectations.<sup>151</sup>

### 2.2.3 Social alignments and motivational postures

We have seen an emerging understanding that the optimal relational distance between regulator and regulatee varies in accordance with the hardness or softness of a regulatory measure – and even according to how the two sides perceive their relationship. However, we also need to grasp the psychological processes that lead regulatees towards cooperation or defiance.

Empirical social psychology makes two further contributions here, both developed by Valerie Braithwaite in empirical research spanning decades. These contributions take the position that ‘responsive regulation... calls on regulators to scrutinise their own practice ‘through a social lens’;<sup>152</sup> to ‘engage’ with social ‘forces’ and ‘work collaboratively’ with regulatees ‘to build a base of voluntary compliance’.<sup>153</sup>

Valerie Braithwaite’s work establishes that to succeed, regulatory behaviour and soft regulatory designs must be appealing, not ‘dominating’;<sup>154</sup> they must ‘strengthen’ the existing ‘natural systems of social regulation’ in the regulated domain.<sup>155</sup> In this, she echoes Foucault, who argued that government’s role was to complement the existing fabric of society,<sup>156</sup> a principle that Burchell describes as ‘governing in accordance with the grain of things.’<sup>157</sup>

Her empirical research has identified the elements of regulatory designs, particularly those at the broad base of the pyramid, that promote compliance, which she sees as a ‘process’ rather than as an ‘outcome’.<sup>158</sup> For Valerie Braithwaite, ‘compliance as process’ is a ‘relational concept’ which ‘bridges the world of the regulated and the world of the regulator.’<sup>159</sup> For regulatees, it includes ‘understanding of what an authority wants us to do, the purpose behind the regulation, whether or

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<sup>150</sup> *ibid* 371.

<sup>151</sup> *ibid* 378.

<sup>152</sup> Valerie Braithwaite ‘Closing the Gap between Regulation and the Community’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 26.

<sup>153</sup> Valerie Braithwaite, Kristina Murphy and Monika Reinhart ‘Taxation Threat, Motivational Postures, and Responsive Regulation’ (2007) 29(1) *Law and Policy* 137, 152.

<sup>154</sup> Valerie Braithwaite (2017) 25.

<sup>155</sup> *ibid* 26.

<sup>156</sup> Michel Foucault, ‘Governmentality’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester-Wheatsheaf 1991).

<sup>157</sup> Graham Burchell, ‘Peculiar Interests: Civil Society and Governing ‘The System of Natural Liberty’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester-Wheatsheaf 1991) 119, 127. See also Ayres and Braithwaite (1992) 4-5.

<sup>158</sup> Valerie Braithwaite (2017) 28.

<sup>159</sup> *ibid*.

not we agree with it, how we evaluate implementation of the regulations and what our attitudes and behavioural intentions are with regard to the regulatory request and the authority.<sup>160</sup>

Importantly, her 'compliance as process' model acknowledges that regulation is not born into a vacuum. Each regulatee community has existing 'values, norms, beliefs and processes', as well as alternative sources of advice.<sup>161</sup> This means regulators must be aware of these competing forces. For regulators, 'compliance as process' asks not only 'what effort has a regulatory authority made to elicit compliance', but also 'what have alternative authorities been doing: contesting the actions of the ... regulator or endorsing them?'.<sup>162</sup>

### *Social alignments*

Valerie Braithwaite's Wheel of Social Alignments figure seen below in Figure D, integrates all these elements.<sup>163</sup> The 'outer band' labelled 'Design of System and its Administration' represents the regulatory mechanism on paper and in action – including policy, law and practice.<sup>164</sup> The 'middle band' shown divided into three segments is a contested space, where regulatees decide whether to comply with or defy the mechanism. These three segments represent the factors mentioned above that are most likely to affect compliance decisions – whether the mechanism: (1) offers benefits from regulatees' perspective; (2) safeguards procedural justice, again from regulatees' perspective; and (3) imbues regulatees with a sense of moral duty.<sup>165</sup> The 'inner core' labeled 'the other' represents existing influences on regulatees. These existing influences emanate from regulatees' existing interests, which include the interests of all the groups with which they are affiliated.<sup>166</sup>

The wheel depicts a balanced, viable persuasive regulatory system, where neither the regulatory mechanism nor the prior influences over regulatees dominate. All the parts 'work harmoniously together';<sup>167</sup> regulatees are likely to cooperate and the wheel can roll onward. However, if the regulator dominates, intrudes and coerces, the 'outer band' will be oversized, dwarfing the other elements and distorting the wheel. Where the other influences on regulatees dominate, and defy regulatory influence, the 'inner core' will be oversized, also leading to dysfunction.<sup>168</sup>

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<sup>160</sup> *ibid* 28-29.

<sup>161</sup> *ibid* 29.

<sup>162</sup> *ibid*.

<sup>163</sup> *ibid* 31.

<sup>164</sup> *ibid*.

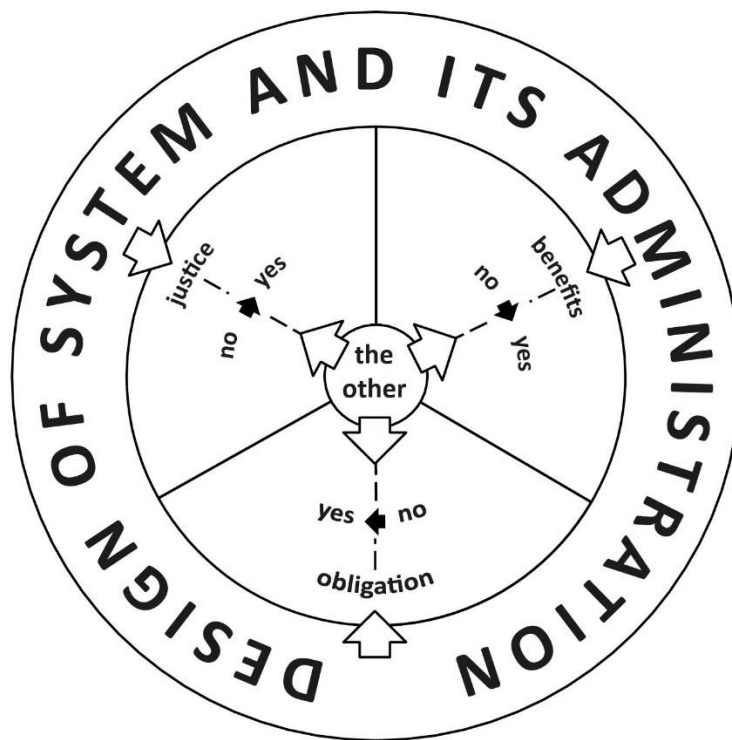
<sup>165</sup> *ibid* 32

<sup>166</sup> *ibid*.

<sup>167</sup> *ibid*.

<sup>168</sup> *ibid*.

**Figure D** Wheel of Social Alignments<sup>169</sup>



The three factors that have the greatest effect on compliance all relate to a regulatory mechanism's value proposition for regulatees. Firstly, regulatees decide their response depending on perceived benefits – whether career, communal or for the various interest groups with which they identify.<sup>170</sup> Examples might include regulatory mechanism designs that offer workplace recognition and rewards or arrange positive media coverage of the regulatees' profession when regulatees comply.

Secondly, regulatees feel less threatened if they see the regulatory authority as legitimate and the mechanism as procedurally just, transparent, and respectful.<sup>171</sup> Examples include regulators who have credentials that regulatees' esteem, which align well with regulatees' own 'values, norms, beliefs and processes'.<sup>172</sup> Regulators with these attributes might, for example, engage regulatees in respectful dialogue early in the problem definition and policy formation stage. They might also take care to ensure that regulatees will have accessible ways to challenge regulatory decisions that affect them once a mechanism is operational. Thirdly, regulatees develop a sense of moral obligation when

<sup>169</sup> *ibid* 31.

<sup>170</sup> *ibid* 32. See also Valerie Braithwaite and Michael Wenzel, 'Integrating Explanations of Tax Evasion and Avoidance', in Alan Lewis (ed.), *Cambridge Handbook of Psychology and Economic Behaviour* (Cambridge University Press 2008).

<sup>171</sup> Braithwaite, Murphy and Reinhart (2007) 142. See also Valerie Braithwaite, 'The Hope Process and Social Inclusion' (2004) 592 *The Annals of the American Academy of Political and Social Science* 128, 134, 148.

<sup>172</sup> Valerie Braithwaite (2017) 29.

they feel that complying is the ‘right thing to do’ – that the regulators’ aims are inherently worthy.<sup>173</sup> Regulators can engender this response by connecting their agenda to larger goals or values that regulatees share.

The Wheel of Social Alignments model makes it possible to break down a persuasive regulatory mechanism into its elements, identifying both merits and friction points in terms of potential regulatory outcomes. Importantly, it locates regulatees’ lived experience of civil prison oversight at the centre of the debate on regulatory efficacy. Applying that insight to this study, we can see that civil prison oversight can only succeed if it persuades prison staff – not the public, not overseers themselves and not prisoners. The Wheel is one lens that we will use in Chapters 4, 5 and 7 through 10 to evaluate the elements of the Japanese and ACT civil prison oversight designs and assess whether each is likely to win staff cooperation.

### *Motivational postures*

The second important contribution of social psychology is Valerie Braithwaite’s heuristic for evaluating regulatees’ responses to regulatory measures, comprised of five ‘motivational postures.’<sup>174</sup> She describes them as ‘... composites of attitudes, beliefs, interests and preferences’ that indicate ‘the social distance individuals wish to place between themselves and ... authority.’<sup>175</sup> These postures ‘signal openly to the authority and ... others’ how regulatees ‘feel about the regulatory system’, if they ‘believe it is worthwhile ... feel comfortable with’ it and are willing ‘to do what [it] wants.’<sup>176</sup> Two postures signal willingness to comply: ‘commitment’, which demonstrates ‘belief in the authority, its goals and purpose’; and ‘capitulation’, which signals the conclusion that ‘acquiescing’ will ‘bring the least trouble’.<sup>177</sup> A further posture, ‘resistance’ sees the authority as valid, but expresses constructive defiance. Regulatees adopting this posture disagree with how an authority regulates.<sup>178</sup> Finally, two postures signal defiance: ‘disengagement’, which ‘severs the

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<sup>173</sup> *ibid* 32.

<sup>174</sup> See for example Valerie Braithwaite and others, ‘Regulatory Styles, Motivational Postures and Nursing Home Compliance’ (1994) 16 *Law and Policy* 363; Valerie Braithwaite, ‘Games of Engagement: Postures within the Regulatory Community’ (1995) 17 *Law and Policy* 225; Valerie Braithwaite ‘Tensions between the Citizen Taxpaying Role and Compliance Practices’ (2001) Australian National University Centre for Tax System Integrity Working Paper 13, [https://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/CTSI-WorkingPaper13-full\\_0.pdf](https://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/CTSI-WorkingPaper13-full_0.pdf) accessed 2 April 2023; Valerie Braithwaite and Mary Ivec, ‘Policing Child Protection: Motivational Posture of Contesting Third Parties’ (2022) 17 *Asian Journal of Criminology* 425.

<sup>175</sup> Valerie Braithwaite (2004) 137.

<sup>176</sup> *ibid*.

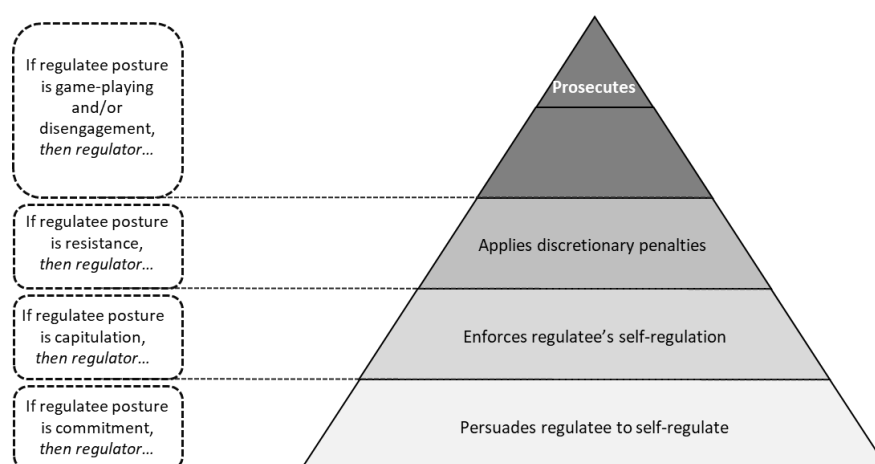
<sup>177</sup> Valerie Braithwaite, ‘Defiance and Motivational Postures’, in David Weisburd and Gerben Bruinsma (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer Science & Business Media 2014) 915.

<sup>178</sup> *ibid*.

relationship with authority', treating it as 'irrelevant'; and 'game-playing', which 'challenges authority by circumventing rules and laws' while feigning compliance.<sup>179</sup>

Motivational postures answer a question prompted by the enforcement pyramid's layered design, which is when – on what behavioural signal from regulatees – a regulator should escalate or de-escalate their enforcement strategy. As we see in Figure E, postures help determine intrusiveness. The more compliant the posture, the less intrusive the required enforcement. Responsive regulation responds to motivational postures; they are the criteria for escalation or de-escalation.

**Figure E** Relationship between motivational postures and choice of regulatory mechanism



The motivational postures heuristic offers this study a useful lens for interpreting corrections officers' responses to civil prison oversight in the data collected in Japan and the ACT. It provides a framework through which to understand officers' lived experience of the compliance process, including how they perceive each regulatory mechanism and what this tells us about the factors that may have contributed to the regulatory outcome in each jurisdiction.

## 2.3 Conclusion

The theoretical lenses introduced in this chapter are deployed throughout the thesis, beginning with the three background chapters. In Chapter 3, the study evaluates the internal and external oversight arrangements for Japanese prisons prior to the introduction of civil prison oversight – using the theories of relational distance, pyramidal enforcement and compliance supports, 'smart' networked regulatory arrangements and Hood's four-quadrant model for controlling government services.

<sup>179</sup> *ibid.*

Chapters 4 and 5 offer preliminary insights into the first research question concerning the nature of civil prison oversight in Japan and the ACT, by examining each mechanism on paper. These chapters rely on network theories of regulation to assess how each mechanism emerged and took shape, then use regulatory intermediaries theory to understand the roles of the overseers and prison-side actors in each system. They also rely on the concepts of ‘rowing’ and ‘steering’ in regulatory state governance theory to better understand the differences between the two designs. These two background chapters also marshal theories related to the regulatory enforcement pyramid: ‘really responsive’ and ‘risk-based’ regulation; relational distance; and the Wheel of Social Alignments. ‘Smart’ regulation is also helpful, although only in the case of the ACT system.

Chapter 7 and the first part of Chapter 10 complete the study’s answer to the first research question, which concerns the nature of civil prison oversight in Japan and the ACT, by examining how participants viewed each mechanism in practice in prisons. The main aim of these parts of the thesis is to begin a granular examination of the data using the theories of social alignments and motivational postures. Specifically, these parts hone in on the foundational question in the Wheel of Social Alignments model: whether the regulatee staff in Japan and the ACT accept the regulatory intermediary overseers’ credentials – and what this suggests regarding their cooperation. Relational distance theory is again useful here in terms of understanding how staff view the overseers in each jurisdiction.

Chapters 8, 9 and the second part of Chapter 10 complete the study’s answer to the second research question, which concerns the impact of civil prison oversight in Japan and the ACT, again by drawing on the lived experience of participants. These parts of the thesis examine the benefits and unintended consequences of civil oversight using three further elements of the Wheel of Social Alignments as a lens. These elements are whether staff feel that oversight offers benefits and is both procedurally fair and morally worthy. These parts also rely on motivational postures theory to understand whether staff are willing to cooperate with civil prison oversight in each jurisdiction – and why.

Finally, the second part of Chapter 11 revisits several of the theories in this chapter in light of the study’s findings. It explores the implications of the study for regulatory state theory as applied to Japanese governance; whether and how ‘zealous’ public interest groups can participate as regulator-side intermediaries in pyramidal regulatory enforcement; and how the Wheel of Social Alignments model might be advanced and enhanced.



### Chapter 3 Japan's Prisons after World War II: Mounting Pressures

In Chapter 1, we saw that in recent decades civil oversight has been elevated to the status of an ideal regulatory mechanism for the risk-laden prison environment. This might lead to an assumption that its adoption in Japan was straightforward, yet this is far from reality. Certainly, early 20<sup>th</sup> century reformers conceived Japan's prison system in response to two pressing needs: to demonstrate mastery of Western penal science; and to secure recognition from the international community.<sup>1</sup> As we will see below, similar drivers for reform emerged again after World War II. However, we will also see that a third factor in the shape of an entrenched political deadlock precluded substantive prison reform in Japan across the entire latter half of the 20<sup>th</sup> century.

These three factors, combined with historical Japanese mores concerning crime and punishment, embedded and preserved a distinctive, if anachronistic, corrections culture. This chapter sheds light on this deeply ingrained correctional ethos, which determined Japan's highly particularistic regulatory choices concerning civil prison oversight and goes a long way towards explaining the perceptions of Japanese staff, overseers and prisoners reported in Chapters 7 through 9. In other words, this chapter elucidates the 'values, norms, belief and processes' with which Japanese prisons and prison staff remain closely aligned, and which will help us understand the nature and impact of Japan's civil prison oversight mechanism.

This chapter traces the trajectory of Japan's prison system across the 50-year political deadlock that precluded prison reform. It firstly argues that prisons served crucial domestic and external goals during the first four postwar decades. Well-managed prisons demonstrated the 'welfare state' governance we encountered in Chapter 2, which encouraged trust in Japan's newly democratic government. Prisons helped deliver an inspiring, even miraculous transition to low crime, high conviction rates, low recidivism and enviable public safety. Secondly, this chapter shows how Japan's prisons became a vital source of external soft power and prestige, just as they had at the beginning of the 20<sup>th</sup> century.<sup>2</sup> For the second time, Japan's exemplary postwar achievements in carceral safety and order validated its participation in the international order.

Yet these achievements dimmed as Japan peaked economically. In the 1990s, rising crime rates, 'get tough on crime' policies and a profound loss of faith in criminal justice institutions led to intolerable stress on prisons. This went largely unobserved inside Japan, even though human rights concerns

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<sup>1</sup> Daniel Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005) chs 5-7, 194. See also John L Gillin, 'Japan's Prison System' (1928) 7(2) *Social Forces* 117 and Richard H Mitchell, *Janus-Faced Justice: Political Criminals in Imperial Japan* (University of Hawaii 1992).

<sup>2</sup> Late in the Meiji era (1868-1912).

about Japan's frugal, harshly disciplinarian, prison conditions were gaining traction internationally. These forces created the conditions in which the Nagoya Prison Scandal erupted in 2002-2003, precipitating the adoption of civil oversight as part of broader reforms. We will turn to those developments in Chapter 4.

### 3.1 Japan's Postwar Prisons: Prowess and Paralysis

Japan's Prison Act 1908 had been innovative by early 20th century standards, incorporating the best in penological science.<sup>3</sup> By mid-century, however, Japan had used forced prison labour for wartime production and prisons had seen political detention, torture, malnutrition and unsanitary conditions.<sup>4</sup> The immediate postwar years saw the announcement of a new policy that prisons were to respect prisoners' rights and moderation of some particularly draconian prison rules, followed by the adoption of selected contemporary correctional norms over the next decade.<sup>5</sup> These included scientific classification and diagnostic guidelines, quasi-volunteer rather than state appointed chaplains, separate facilities for prisoners with mental illness and charitable visitors.<sup>6</sup>

However, Japan was in a fierce struggle for control of its prisons at this time, amidst overcrowding caused by the sharp spike in reported crimes that followed Japan's wartime defeat and the Allied Occupation purges of those suspected of war crimes, ultranationalism and communism.<sup>7</sup> The year-end prisoner population exploded from around 42,250 in 1945 to over 95,250 in 1950.<sup>8</sup> While the mass escapes of the early postwar years were gradually brought under control,<sup>9</sup> frequent prisoner-

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<sup>3</sup> *Kangoku hō* (Prison Act) 1908. See Gillin (1928); Tokyo Asahi Shinbun, 'Nihon demo shūnin no tomo: akarui Kosuge keimusho ni kigekiō no kantan' (A Friend to Prisoners even in Japan: The King of Comedy Admires the Pleasant Kosuge Prison) (Tokyo, 20 May 1932); Akira Masaki, *Reminiscences of a Japanese Penologist* (Japan Correctional Association, 1964); Günther Kaiser, *Prison Systems & Correctional Laws: Europe, The United States and Japan: A Comparative Analysis* (Sharon Byrd tr, Transnational Publishers 1984) 137; Kazuyoshi Shigematsu, *Zukan Nihon no kangokushi* (A History of Japanese Prisons) (Yuzankaku 1985); Mitchell (1992); Botsman (2005) Ch 6.

<sup>4</sup> Minoru Shikita and Shinichi Tsuchiya, *Crime and Criminal Policy in Japan from 1926 to 1988: Analysis and Evaluation of the Showa Era* (Japan Criminal Policy Society 1990); 174-175, 179; Mitchell (1992) 90-96; Adam Lyons, 'From Marxism to Religion: Thought Crimes and Forced Conversions in Imperial Japan' (2019) 46(2) *Japanese Journal of Religious Studies* 193.

<sup>5</sup> Shikita and Tsuchiya (1990) 175-182. See also Adam Lyons, *Karma and Punishment: Prison Chaplaincy in Japan* (Harvard University Asia Centre 2021) ch 5.

<sup>6</sup> *ibid.*

<sup>7</sup> Shikita and Tsuchiya (1990) 43-44; Ryoichi Sasakawa, *Sugamo Diary* (Ken Hijino tr, Hurst 2010); Chalmers Johnson, *Conspiracy at Matsukawa* (University of California 1972).

<sup>8</sup> Including unsentenced prisoners: Masaharu Ozawa, *Gyōkei no kindai: keiji shisetsu to jukeisha shogū no hensen* (The Modernisation of Penal Administration: Penal Institutions and the Treatment of Prisoners in Transition) (Nihon Hyōronsha 2014) 123-128, 127. See Figure F. See also Shikita and Tsuchiya (1990) 184-185.

<sup>9</sup> Ozawa (2014) 173-176.

on-prisoner violence, deaths in custody, riots and attacks on staff continued into the first half of the 1950s.<sup>10</sup>

The Ministry of Justice (MoJ) Correction Bureau's priority was regaining control through intensive management. The number of prison staff more than doubled to over 17,000 between 1945 and 1950.<sup>11</sup> The period to 1960 saw the imposition of disciplinary measures climb steeply,<sup>12</sup> even as the prison population plummeted.<sup>13</sup> In particular, the use of solitary confinement for up to two months in submissive postures, prohibitions on exercise and denial of reading and writing privileges grew exponentially.<sup>14</sup> The use of chains was abolished in 1966, but straightjackets, gags, rope restraints, and a leather-belt-with-handcuffs device were all still available to prison personnel.<sup>15</sup> Prisons were also introducing prisoner classification methods that made it possible to start dispersing and weakening *yakuza* gang structures in prison at this time.<sup>16</sup>

### 3.1.1 Prolonged prosperity, order and prestige

By the early 1960s, escapes and violent attacks on staff and between prisoners had dropped to a fraction of their postwar peaks.<sup>17</sup> This had allowed prisons to return to their pre-war self-sufficiency, with 98% of running costs met by prison factory income – and would shortly see them enter surplus.<sup>18</sup>

At the same time, Japanese society was rapidly transitioning from post-conflict chaos to safety and prosperity, in a development story unparalleled in the 20<sup>th</sup> century. Real gross domestic product (GDP) grew by an annual average of 9.6% to 1973<sup>19</sup> and then remained strong to 1991.<sup>20</sup>

Japan's criminal justice system continued its record of exceptional success and stability for over four decades. Crime rates for major offences dropped or were flat from around 1955.<sup>21</sup> The homicide

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<sup>10</sup> Masaki Kubota and others, *Keimusho no tabū* (Prison Taboo) (Takarajimasha 2013) 215-217; Shikita and Tsuchiya (1990) 175-176. See generally Toshio Sakamoto, *Moto keimukan ga kataru keimusho* (Prisons: A Former Corrections Officer's Account) (San'ichi Shobō 1997) Part II.

<sup>11</sup> Ozawa (2014) 77.

<sup>12</sup> Ozawa (2014) 345.

<sup>13</sup> See Figure F.

<sup>14</sup> Ozawa (2014) 344-346.

<sup>15</sup> Ozawa (2014) 101.

<sup>16</sup> See generally Shikita and Tsuchiya (1990) 81-87, 179-180.

<sup>17</sup> CrimeInfo, 'Keiji shisetsu ni okeru jiko hassei jōkyō' (Security Incidents in Penal Institutions) (*CrimeInfo*, nd) [www.crimeinfo.jp/data/toukei/accident/](http://www.crimeinfo.jp/data/toukei/accident/) accessed 2 April 2023.

<sup>18</sup> Ministry of Justice (MoJ), *Showa 42-nen hanzai hakusho* (1967 White Paper on Crime) <https://hakusyo1.moj.go.jp/jp/8/nfm/mokuji.html> accessed 2 April 2023, Table II-43.

<sup>19</sup> Yutaka Kōsai and Andrew Goble, 'The Postwar Japanese Economy 1945-1973' in Peter Duus (ed), *The Cambridge History of Japan* (Vol 6, Cambridge University Press 1989).

<sup>20</sup> See The World Bank, 'GDP Growth (Annual %) – Japan' (*The World Bank*, 2023) <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2021&locations=JP&start=1973&view=chart> accessed 2 April 2023.

<sup>21</sup> Shikita and Tsuchiya (1990) 74

rate, which is seen as the best figure for international comparison,<sup>22</sup> slowly declined to just 1.3 per 100,000 of population in 1987.<sup>23</sup> While there was some variation, this was trivial when viewed against the steep rises in the United Kingdom, Germany, France and the United States; in relative terms, the overall Japanese crime rate remained almost flat.<sup>24</sup>

Police clearance rates remained at around 60% through to the late 1980s,<sup>25</sup> far above those of other industrialised countries, although data collection differences explain some of this disparity.<sup>26</sup> The average overall conviction rate rose above 99.5% in 1956, where it has stayed.<sup>27</sup> These figures should, however, be understood in light of an ultra-conservative charging policy and criminal procedure that favours conviction once charges are laid.<sup>28</sup> As we see below in Figure F, the incarceration rate fell overall for 43 years from a 1949 high of 118 per 100,000 of population to a 1992 low of 36.<sup>29</sup> For comparison, the 1995 rate for South Korea stood at 135, while France reported 89, Australia 97 and England and Wales 100 – and the German rate was 79 in 1996.<sup>30</sup>

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<sup>22</sup> Definitions of homicide do not vary, and it is relatively difficult to conceal; cf Joseph Hincks, 'Do Stressed-Out Japanese Really Stage Elaborate Disappearances? On the Trail of the *Jōhatsu* or Evaporated People' *Time* (Los Angeles, 2 May 2017) <https://time.com/4646293/japan-missing-people-johatsu-evaporated/> accessed 2 April 2023; Bruce Wallace, 'Japan's Police See No Evil' *Los Angeles Times* (Los Angeles, 9 November 2007). [www.latimes.com/archives/la-xpm-2007-nov-09-fg-autopsy9-story.html](http://www.latimes.com/archives/la-xpm-2007-nov-09-fg-autopsy9-story.html) accessed 2 April 2023.

<sup>23</sup> Shikita and Tsuchiya (1990) 74-75; David T Johnson, 'The Homicide Drop in Postwar Japan' (2008b) 12(1) *Homicide Studies* 146.

<sup>24</sup> Shikita and Tsuchiya (1990) 74-78. See also Satyanshu K Mukherjee, 'What is So Good About the Low Crime Rate in Japan?' (1994) 37 *The Australian Rationalist* 7, 11.

<sup>25</sup> MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) <https://hakusyo1.moj.go.jp/jp/69/nfm/mokuji.html> accessed 2 April 2023, Graph 1-1-1-1; Shikita and Tsuchiya (1990) 349.

<sup>26</sup> In Japan, police record a crime as solved or 'cleared' (*kenkyo*) after a file on a suspect is sent to the prosecutor's office for a decision on charging. No arrest or charge is required. See Setsuo Miyazawa, *Policing in Japan: A Study on Making Crime* (Frank G Bennett tr, with John O Haley, State University of New York Press 1992) chs 13-15; Chris Aldous and Frank Leishman 'Worlds Apart? Policing in Japan and Britain' (2001) 44(1) *Criminal Justice Matters* 20; AJ Finch, 'The Japanese Police's Claim to Efficiency: A Critical View' (1999) 33(2) *Modern Asian Studies* 483; David T Johnson, 'Nihon ni okeru shihō seido kaikaku: keisatsu no shozai to sono jūyōsei' (Justice System Reform in Japan: Where Are the Police and Why It Matters) (2004) 76(2) *Hōritsu Jihō* 8.

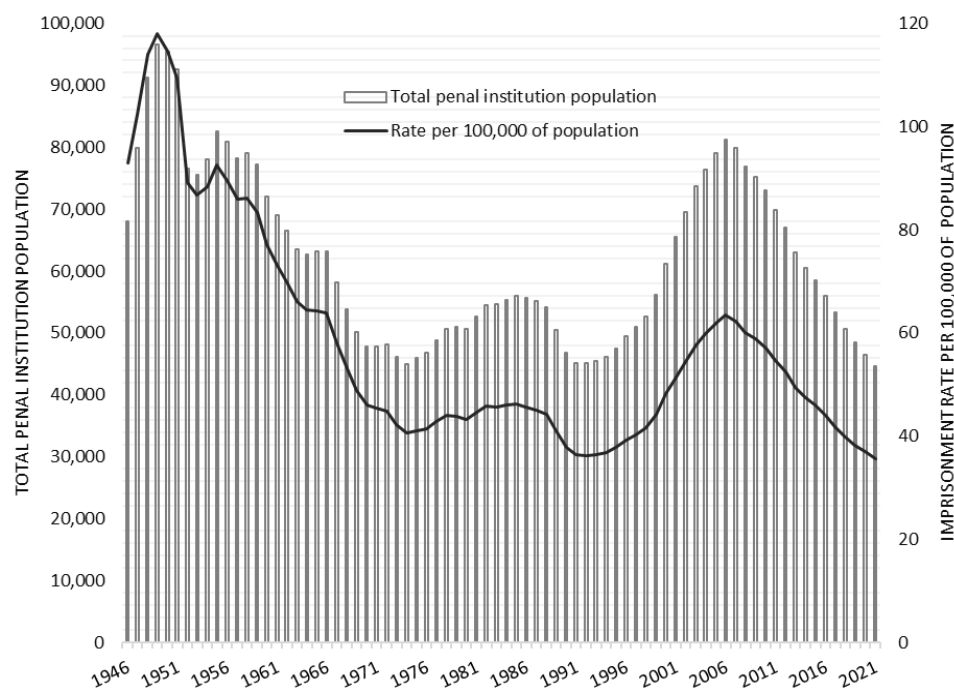
<sup>27</sup> Shikita and Tsuchiya (1990) 148; MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Excel 2-3-2-1.

<sup>28</sup> David T Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press 2002); Bruce E Aronson and David T Johnson, 'Comparative Reflections on the Carlos Ghosn Case and Japanese Criminal Justice' (2020) 18(24) 2 *The Asia-Pacific Journal: Japan Focus* 1.

<sup>29</sup> MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-1. Figures include unsentenced prisoners.

<sup>30</sup> World Prison Brief, 'Data' (*World Prison Brief*, nd) [www.prisonstudies.org/world-prison-brief-data](http://www.prisonstudies.org/world-prison-brief-data) accessed 2 April 2023.

**Figure F** Japan: penal institution population and incarceration rate 1946-2021<sup>31</sup>



Recidivism rates also fell overall for decades, with the two-year rate of 41% in 1950 dropping to 36% by 1973<sup>32</sup> and then, after a minor rebound, reaching 31.7% in 1990.<sup>33</sup>

Internationally, a small industry in analysing Japanese criminal justice in English emerged, driven by Western fascination with Japanese successes.<sup>34</sup> What distinguished Japan, in Mukherjee's view, was not only the extraordinary organisation and dedication poured into both social policy and criminal policy, but that the two were continuously coordinated to produce desired outcomes and embraced by a receptive, cooperative public.<sup>35</sup> In regulatory terms, this was the happy union of 'welfare state'

<sup>31</sup> MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-1.

<sup>32</sup> MoJ, *Showa 54-nen hanzai hakusho* (1979 White Paper on Crime)

<https://hakyuso1.moj.go.jp/jp/20/nfm/mokuji.html> accessed 2 April 2023, Table I-77. See also Shikita and Tsuchiya (1990) 216-217. Recidivism refers to the proportion of prisoners released in a given year who re-enter prison within a certain number of years.

<sup>33</sup> MoJ, *Heisei 8-nen hanzai hakusho* (1996 White Paper on Crime)

<https://hakyuso1.moj.go.jp/jp/37/nfm/mokuji.html> accessed 2 April 2023, Table II-17.

<sup>34</sup> Even focusing on single-author monographs alone, see for example William Clifford, *Crime Control in Japan* (Lexington Books 1976); David H Bayley, *Forces of Order: Police Behaviour in Japan and the United States* (University of California Press 1978); Walter L. Ames, *Police and Community in Japan* (University of California Press 1981); A Didrick Castberg, *Japanese Criminal Justice* (Praeger Publishers 1990); Won-Kyu Park, *Trends in Crime Rates in Postwar Japan: A Structural Perspective* (Florida State University 1992, Shinzansha 2006); Tetsuya Fujimoto, *Crime Problems in Japan* (Chuo University Press 1994); Elmer H Johnson, *Managing Convicted Offenders in an Orderly Society* (Southern Illinois University Press 1996); Dag Leonardsen, *Japan as a Low-Crime Nation* (Palgrave Macmillan 2004). See also Yoshio Sugimoto, *An Introduction to Japanese Society* (4th edn, Cambridge University Press 2014) 19.

<sup>35</sup> Mukherjee (1994).

regulatory actors: a legislature determined to steer, an executive with expert steering skills and a populace willing to be steered.<sup>36</sup>

This synopsis of Japan's achievements is important for understanding the content and tenor of Japan's postwar *Hanzai hakusho* (White Papers on Crime) published annually since 1960,<sup>37</sup> which tend to problematise small changes in crime frequencies. This focus on minor numerical fluctuations rather than Japan's low and largely static crime rates arguably sustains Japan's formidable criminal justice apparatus. While the *White Papers on Crime* do also report on Japan's extraordinary prowess relative to other industrialised democracies, this analysis is less prominent<sup>38</sup> and some scholars have questioned the reliability of Ministry of Justice statistics.<sup>39</sup>

#### *Japan emerges in international criminal justice regulation*

Japan had deployed its criminal justice prowess in diplomatic contexts even before the Allied Occupation ended.<sup>40</sup> Its contributions in this domain were surefooted, even if 1950s Western perceptions were generally still of a primitive society that the West 'should educate'.<sup>41</sup> Japan was among the 39 countries that made written responses to a 1951 draft of the Standard Minimum Rules for the Treatment of Prisoners 1955 (SMR).<sup>42</sup> By 1954, an Asia region seminar in Rangoon had passed a unanimous resolution to establish an Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) in Tokyo, hosted by the Japanese government.<sup>43</sup> Japan was one of just three Asian nations that were invited to the First United Nations Congress on Crime and the Treatment of Offenders in 1955 and participated in the unanimous 85-nation vote to adopt the SMR.<sup>44</sup> Japan sent a delegation of six led by a senior prosecutor, with other members drawn from the

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<sup>36</sup> Carol Lawson and Simon Thornley, 'Translation: "Perceptions of the Current State of the Japanese Legal System": Interview with Koji Sato, Chairman of Japan's Judicial Reform Council' (2002) 4(1) *Australian Journal of Asian Law* 76, 77.

<sup>37</sup> Full versions are available in Japanese for 1960-2021; abridged versions in English for 2000 onwards.

<sup>38</sup> See for example MoJ, *Heisei 19-nen hanzai hakusho* (2007 White Paper on Crime)

[https://hakusyo1.moj.go.jp/jp/54/nfm/mokuji.html#1\\_4](https://hakusyo1.moj.go.jp/jp/54/nfm/mokuji.html#1_4) accessed 2 April 2023, Chapter 4 Section 1.

<sup>39</sup> See for example AJ Finch, 'Criminal Statistics in Japan: The "White Paper on Crime, Hanzai Hakusho" and "Hanzai Tōkeisho"' (2000) 3(2) *Social Science Japan Journal* 237; Mai Sato, 'From Measuring Support for the Death Penalty to Justifying its Retention: Japanese Public Opinion Surveys on Crime and Punishment 1956-2014' in Jianhong Liu and Setsuo Miyazawa (eds), *Crime and Justice in Contemporary Japan* (Springer International Publishing 2018).

<sup>40</sup> 1946-1952.

<sup>41</sup> Sugimoto (2014) 17.

<sup>42</sup> First UN Congress on the Prevention of Crime and Treatment of Offenders 'Standard Minimum Rules for the Treatment of Prisoners: Observations and Proposals of the Secretariat' (1955) UN Doc A/CONF.6/C.1/L.1, 4.

<sup>43</sup> Now Yangon. United Nations and Japan, Agreement (with Annex) for the Establishment of the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (signed 15 March 1961) 5706 UNTS 199, Preamble.

<sup>44</sup> Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the

police, the Correction Bureau, the University of Tokyo, the Diet and Japan's Delegation to International Organisations in Geneva.<sup>45</sup> The serving head of Japan's Correction Bureau made two written submissions.<sup>46</sup> The other Asian invitees, China and Cambodia, sent just three and two delegates respectively and made no written submissions.<sup>47</sup>

Accepted into the United Nations in 1956, Japan began to make consistent practical and financial contributions in accordance with the postwar approach to external relations known as the Yoshida Doctrine. This unobtrusive reliability leveraged the nation's niche areas of expertise and growing economic heft to regain trust and reinforce its rebirth as a peace-loving global citizen.<sup>48</sup>

Japan's involvement in the adoption of the SMR meant that it participated in developing the first international standards for civil prison oversight, signalling in-principle agreement with the need for regular external prison inspection. The 1955 text specified the use of formally appointed inspectors who were 'qualified and experienced', with whom prisoners could speak privately, at short notice, to make 'requests or complaints'.<sup>49</sup> The aims of inspection were stated as ensuring compliance with local laws and fulfilling the objectives of the prisons service through prompt responses to requests and complaints that were not 'evidently frivolous or groundless'.<sup>50</sup> While the SMR are non-binding, materials distributed to participants noted that they were 'not meant to be purely optional, but ... in the nature of a pledge' by prisons administrations.<sup>51</sup>

Japanese prisoners acquired the right to sue public officials during the Occupation years and 1954 saw the first suits finalised.<sup>52</sup> The Correction Bureau did not make any immediate efforts to bring Japanese prisons into line with the SMR.<sup>53</sup> By 1957, prominent criminal law scholar Shigemitsu Dandō

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Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (SMR).

<sup>45</sup> First UN Congress on the Prevention of Crime and the Treatment of Offenders, 'List of Participants' (19 August 1955) UN Doc A/CONF.6/INF.3, 13.

<sup>46</sup> First UN Congress on the Prevention of Crime and the Treatment of Offenders, 'Open Institutions: Open Institutions in Japan - Bunsaku Nakao' (9 January 1955) UN Doc A/CONF.6/C.2/L.14; First UN Congress on the Prevention of Crime and the Treatment of Offenders, 'Personnel: Selection and Training of Correctional Service Personnel in Japan - Bunsaku Nakao' (28 January 1955) UN Doc A/CONF.6/C.1/L.13.

<sup>47</sup> First UN Congress on the Prevention of Crime and the Treatment of Offenders, 'List of Participants', 3-4.

<sup>48</sup> See generally Nobumasa Akiyama, 'Japan's Failed Bid for a Permanent Seat on the UN Security Council' in Yoichi Funabashi and Barak Kushner (eds), *Examining Japan's Lost Decades* (Routledge 2015) 276-277.

<sup>49</sup> SMR (1955) 36(2), 36(4) and 55.

<sup>50</sup> *ibid.*

<sup>51</sup> First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Information for Participants' (11 July 1955) UN Doc A/CONF.6/INF.2, 2.

<sup>52</sup> Article 17 of the 1946 Constitution of Japan states: 'Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official'. See also *Gyōsei jiken soshō tokurei hō* (Administrative Case Litigation Act) 1949; Ozawa (2014) 115-120.

<sup>53</sup> Correctional Administration Reform Council (CARC), *Gyōkei kaikaku shingikai teigen: kokumin ni rikai sare, sasaeraru keimusho e* (Correctional Administrative Reform Council Proposal: Towards Prisons that will be

had called for independent civil oversight to protect human rights in criminal justice settings, citing the high risk of human rights abuses where officials have unfettered discretion.<sup>54</sup> However, despite important interventions by Dandō,<sup>55</sup> prison reform was not a priority. In 1963, Abe expressed both concern and confidence, warning against fixating on ‘apparent efficiency’ in running prisons and emphasising that rehabilitation and reducing recidivism were paramount, while calling for a correctional system that was ‘less authoritarian’ and staffed by skilled ‘caseworkers’.<sup>56</sup> However, he also felt that Japan’s correctional system had ‘already reached the level of Western systems’.<sup>57</sup>

Prisoners and their attorneys did not share Abe’s confidence. By the 1960s, the numbers of complaints, suits and letters to the Minister of Justice were rising,<sup>58</sup> and in 1964 a young attorney, Kōichi Kikuta began a lifetime of advocating for reform.<sup>59</sup> Partial successes in some prisoner lawsuits led to modest concessions in the form of 1966 amendments to the Prison Act Enforcement Rules,<sup>60</sup> The changes included shortening the maximum period of disciplinary solitary confinement to six months and allowing prisoners to read newspapers, as well as to speak to each other for short periods during the working day.<sup>61</sup>

In 1970, some 75 lawsuits were heard, three times as many as a decade before.<sup>62</sup> In the same year, Correction Bureau official Yanagimoto stated that prisoners often filed them ‘just to kill time’ or ‘threaten[ed] to sue when ‘bargaining for personal favours’.<sup>63</sup> He argued, however, that the fact that

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Understood and Supported by the People) (Correctional Administration Reform Council, 22 December 2003) 4-5.

<sup>54</sup> Shigemitsu Dandō, *Keihō kōyō sōron* (Penal Code: Compendium of General Principles) (expanded 1<sup>st</sup> ed, Sōbunsha 1957) 441-442. Dandō (1913-2012), a University of Tokyo professor, had drafted Japan’s new 1948 *Code of Criminal Procedure* during the Occupation. He later served as a Supreme Court justice and advisor to Crown Prince Akihito. His Catholic faith influenced his compassionate approach to criminal justice. See generally ‘Shikei haishiron’ no Dandō Shigemitsu shi ga shikyo – moto Saikōsai hanji (Shigemitsu Dandō, author of ‘Toward the Abolition of the Death Penalty’ dies – former Supreme Court judge) *Nihon Keizai Shinbun* (Tokyo, 25 June 20120) [www.nikkei.com/article/DGXNASDG25028\\_V20C12A6000000/](http://www.nikkei.com/article/DGXNASDG25028_V20C12A6000000/) accessed 2 April 2023.

<sup>55</sup> Dandō (1957) 442-551.

<sup>56</sup> Haruo Abe, ‘The Accused and Society: Therapeutic and Preventive Aspects of Criminal Justice in Japan’ in Arthur Taylor von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press 1963) 351-353.

<sup>57</sup> *ibid* 356-358.

<sup>58</sup> Ozawa (2014) 115-120, 116: 21 suits were decided in 1960.

<sup>59</sup> Kōichi Kikuta (1934- ) is an Emeritus Professor of Meiji University who has acted for prisoners in many lawsuits and founded the Centre for Prisoners Rights in 1995. He was a member of the 2003 Correctional Administration Reform Council, and currently serves as chair of a non-profit organisation, *Zenkoku hanzai hikō kyōgikai* (National Council on Crime and Delinquency in Japan). He is the author of a large number of scholarly publications on criminal justice and prisoners’ human rights.

<sup>60</sup> Correctional Administration Reform Council (CARC) Proposal (2003) 5.

<sup>61</sup> Lawson (2015) 136; Shikita and Tsuchiya (1990) 178.

<sup>62</sup> Ozawa (2014) 115-120, 116.

<sup>63</sup> Masaharu Yanagimoto, ‘Some Features of the Japanese Prison System’ (1970) 10 *British Journal of Criminology* 209, 214-215.



‘any official decision affecting the lives of prisoners’ could now be ‘the target of a malicious prisoner competent enough to bring a suit’ was keeping prisons accountable.<sup>64</sup>

*‘Miracle’ at home cements soft power abroad*

When the UNAFEI facility outside Fuchu Prison in western Tokyo opened in 1961 and began to train criminal justice officials from the global South in Japanese criminal justice knowhow,<sup>65</sup> Japanese crime rates had been on an overall downward trajectory for over a decade<sup>66</sup> and Japan had become an exemplar of stable, democratic development in Asia.<sup>67</sup> This has been a reliable means of generating goodwill and soft power, particularly regionally.<sup>68</sup>

Private contributions to enhancing the benefits of Japan’s criminal justice exceptionalism also deserve mention. An NGO formed in 1982 to support the work of UNAFEI, the Asia Crime Prevention Foundation (ACPF), which is led by retired business and bureaucratic elites, has brought private sector financial clout to bear in significantly expanding, extending and enriching UNAFEI’s activities and impact abroad.<sup>69</sup> Recognised in 1991 by the United Nations Economic and Social Council (ECOSOC), this NGO is a strong co-regulatory force in bureaucratic efforts to capitalise on Japanese success in criminal justice regulation.<sup>70</sup>

Japan’s role as host of the Fourth United Nations Congress on the Prevention of Crime and Treatment of Offenders in Kyoto in 1970, the first held outside Europe, rewarded these exceptional gains in safety and order.<sup>71</sup> The Report of the Preparatory Regional Meeting of Experts in Social Defence 1969, which emerged from a meeting held in Bangkok, repeatedly highlighted Japan’s achievements.<sup>72</sup> Yanagimoto even wrote with pride of Japan’s ‘scientific’ and ‘humanitarian’ prisons in an article published in English ahead of the event.<sup>73</sup> He noted that their ‘physical surroundings and

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<sup>64</sup> *ibid.*

<sup>65</sup> Now located further west in Akishima City.

<sup>66</sup> Leonardsen (2004) 38-39.

<sup>67</sup> Sugimoto (2014) 19.

<sup>68</sup> Zen Tokoi, ‘Asian Development Through Crime Prevention - Roles and Activities of UNAFEI’ (1974) 2 *Journal of Criminal Justice* 147; Tatsuya Sakuma, ‘Criminal Justice Capacity Building Efforts by UNAFEI’ (2012) 19(3) *Journal of Financial Crime* 274.

<sup>69</sup> Asia Crime Prevention Foundation, ‘What is the ACPF’ (*Asia Crime Prevention Foundation* nd) [www.acpf.org/english/about#history](http://www.acpf.org/english/about#history) accessed 2 April 2023.

<sup>70</sup> Masaharu Hino ‘30-shūnen o mukaete’ (On the Occasion of ACPF’s 30<sup>th</sup> Anniversary) *Asia Crime Prevention Foundation News* No. 52 (Tokyo, June 2012) [www.acpf.org/wp-content/uploads/2018/01/acpf52.pdf](http://www.acpf.org/wp-content/uploads/2018/01/acpf52.pdf) accessed 2 April 2023.

<sup>71</sup> The first three Congresses were in was in Geneva, London and Stockholm: United Nations Office on Drugs and Crime, ‘Previous Congresses’ (*United Nations Office on Drugs and Crime* 2023) [www.unodc.org/congress/en/previous-congresses.html](http://www.unodc.org/congress/en/previous-congresses.html) accessed 2 April 2023.

<sup>72</sup> UNGA, ‘Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report of the Preparatory Regional Meeting of Experts in Social Defence - Asian Region’ (6 January 1970) UN Doc A/CONF.43/RM.2. See, for example, at 11-12.

<sup>73</sup> Yanagimoto (1970) 210.

custodial devices' were 'not as repressive' as in prisons in the United States,<sup>74</sup> but that prisoners lived appropriately 'stern and lonely' lives, regulated by 'forced labour'.<sup>75</sup>

Implementing the SMR was a key theme of the Congress and many countries, including Japan,<sup>76</sup> noted difficulties. Sei'ichiro Ono, a former prosecutor and University of Tokyo professor,<sup>77</sup> took the opportunity presented by the opening lecture to stress Japan's intention to review the Prison Act 1908 to cope with the 'profound impact' of modernisation and cater for vulnerable offenders, citing Japan's inability, for example, to offer onsite medical care and an hour's exercise each day.<sup>78</sup>

Meanwhile the Secretariat noted that indefinite sentences and head shaving could be seen as 'cruel', 'inhuman' and 'degrading' and that Japan was considering prohibiting the use of reducing prisoners' rations as a punishment,<sup>79</sup> then still common in Japanese prisons.<sup>80</sup> There was a consensus that changing global values, the development of human rights norms and advances in penology meant that the SMR already implied higher standards of treatment than originally anticipated.<sup>81</sup>

### 3.1.2 Advent of 'controlled corrections'

Organized crime was in its heyday in Japan from the 1960s through to the 1980s, with *yakuza* gang members occupying 17% of the prison population by 1970.<sup>82</sup> 'Tell all' accounts, like those by retired corrections officer Toshio Sakamoto, describe dysfunctional prisons in western Japan, with corrupt staff conspiring with *yakuza* power brokers to avoid scrutiny by keeping escapes, fires and suicides low.<sup>83</sup> Success in some prisoner lawsuits and the minor liberalisation of the Prison Act Enforcement Rules in 1966 meant prisoners became more aware of the SMR, leading to worsening unrest<sup>84</sup> just as

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<sup>74</sup> Yanagimoto (1970) 213.

<sup>75</sup> Yanagimoto (1970) 215.

<sup>76</sup> UNGA, 'Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report of the Preparatory Regional Meeting of Experts in Social Defence - Asian Region' (6 January 1970) 22.

<sup>77</sup> Sei'ichiro Ono (1891-1986) had served as attorney representing Japanese naval personnel in the Tokyo War Crimes Tribunal and later led the drafting of the 1974 revisions to the Penal Code. Iwate Prefecture, 'Ono Sei'ichiro' (*Glossary of Iwate's Cultural Information*, 2004) [www.bunka.pref.iwate.jp/en/archive/person14](http://www.bunka.pref.iwate.jp/en/archive/person14) accessed 2 April 2023.

<sup>78</sup> UNGA, 'Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report of the Preparatory Regional Meeting of Experts in Social Defence - Asian Region' (6 January 1970) 22.

<sup>79</sup> Fourth UN Congress on the Prevention of Crime and the Treatment of Offenders, 'The Standard Minimum Rules for the Treatment of Prisoners in Light of Recent Developments in the Correctional Field: Working Paper Prepared by the Secretariat' (1970) UN Doc A/CONF.43/3, 27.

<sup>80</sup> Ozawa (2014) 145.

<sup>81</sup> Fourth UN Congress on the Prevention of Crime and the Treatment of Offenders, 'The Standard Minimum Rules for the Treatment of Prisoners in Light of Recent Developments in the Correctional Field: Working Paper Prepared by the Secretariat' (1970) UN Doc A/CONF.43/3, 24-30.

<sup>82</sup> Yanagimoto (1970) 215.

<sup>83</sup> Sakamoto, 1997: 109-118. Sakamoto became a third-generation corrections officer at age 19 in 1967. On retiring, he joined Center for Prisoners Rights, a public interest group (NGO) and published a series of frank memoirs.

<sup>84</sup> See Kubota and others (2013) 212-230, 217.

Japan was also experiencing political violence in the lead up to the Red Army terror attacks in the early 1970s.<sup>85</sup> All parts of the criminal justice system tightened measures against deviance, while major newspapers cooperated with the crackdown by censoring articles that reported security incidents or advocated for reform.<sup>86</sup> However, national labour law reforms cut officers' weekly working hours while staffing was not increased, which made maintaining control more difficult.<sup>87</sup>

'Ben' Oda, a talented and charismatic corrections officer, had previously brought the *yakuza* at Kōchi Prison in western Japan under control using a system of intensive micromanagement that he called 'controlled corrections' (*kanri gyōkei*).<sup>88</sup> In 1973, he set about introducing the same draconian methods at the massive, unruly Ōsaka Prison, persuading his colleagues to encase prisoners in a myriad of rigid, militaristic rules governing every aspect of their lives, telling prisoners they had a better chance of parole if they complied.<sup>89</sup> Controlled corrections involves the strict preventive regulation of every aspect of a prisoner's autonomy: their property; bodily movements and posture, including while sleeping; gaze; attire; meals; and speech and toileting, which are both prohibited for much of the working day. Managing the minutiae of daily life at this extraordinary level of granularity controls every exercise of a prisoner's will, even on the most trivial of matters, such as the precise placement of a toothbrush, several steps before a disruptive choice becomes an option. Prisons installed CCTV systems and made military-style marching and chanting mandatory for all prisoner movements within the prison.<sup>90</sup>

Hundreds of new restrictions reduced prisoners to silent automatons as staff imposed swift punishment for even trivial infractions.<sup>91</sup> Ōsaka Prison achieved exemplary safety and orderliness within a few months.<sup>92</sup> Yet this intrusive suppression of volition evoked the authoritarian discipline, silence and surveillance of the Pennsylvania and Auburn prison systems of the 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>93</sup> The most common punishments were solitary confinement in a submissive posture for

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<sup>85</sup> Sakamoto (1997) 149-150.

<sup>86</sup> *ibid.* From a 51-hour working week to 48.

<sup>87</sup> *ibid.*

<sup>88</sup> Also known as *manuaru gyōkei* (corrections by the book).

<sup>89</sup> Sakamoto, 1997: 149-150.

<sup>90</sup> See further Tetchō Tsuboyama, *Keimusho no karakuri* (How Prison Works) (Saizusha 2009); Kazuichi Hanawa, *Keimusho no naka* (Doing Time) (Seirinkōgeisha 2000); Kazuichi Hanawa, *Doing Time* (Shizuka Shimomiya and Elizabeth Tieran tr, Fanfare / Ponent Mon 2000); *Keimusho no naka* (Doing Time) (Yōichi Sai dir, Big World Eisei Gekijō 2002) 146 mins; *Le Japon: A Double Tour (Japan from Inside)* (Arts & Facts Productions 2000) 61 minutes [www.youtube.com/watch?v=BJp9nKaO7c4](http://www.youtube.com/watch?v=BJp9nKaO7c4) accessed 2 April 2023.

<sup>91</sup> Sakamoto (1997) 149-150; Human Rights Watch Asia, *Prison Conditions in Japan* (Human Rights Watch Asia 1995) [www.hrw.org/sites/default/files/reports/JAPAN953.PDF](http://www.hrw.org/sites/default/files/reports/JAPAN953.PDF) accessed 2 April 2023.

<sup>92</sup> Sakamoto, 1997: 157-160; 2002: 119-126.

<sup>93</sup> See generally David J Rothman, 'Perfecting the Prison: United States 1789-1865' in Norval Morris and David J Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1995).

30 days – which remained indefinitely renewable despite the 1966 reforms – and denial of reading and writing privileges. In 1975, each of these punishments were imposed over 24,000 times on a national prisoner population of roughly 46,000.<sup>94</sup> Security incidents fell and stayed low; escapes fell permanently to single digits in 1978.<sup>95</sup>

Mass retirements of experienced Japanese staff in the early 1980s led to the national rollout of ‘controlled corrections’, producing immediate results.<sup>96</sup> It was now possible to have a single inexperienced custodial officer safely in charge of a large number of prisoners, reducing personnel costs and stress while improving factory productivity.<sup>97</sup> However, the informal paternal mentoring that staff had provided for prisoners now shifted to a more impersonal, utilitarian relationship.<sup>98</sup> The decline in one-on-one communication worsened with the further shortening of the working week in the late 1980s, from 48 to 40 hours – without adding personnel.<sup>99</sup> In other words, Japanese prisons achieved order by imposing a Japanese version of what Robert Johnson has called ‘human warehousing’ in the US context.<sup>100</sup>

Sociolegal scholar Takao Tanase has made a general claim that imposing Western notions of law and justice hollows out and depersonalises the human relationships at the centre of Japanese society.<sup>101</sup> Yet what we observe in Japanese prisons is depersonalisation through domestic regulatory reforms that broke with contemporary Western penological science. While external observers may perceive Japanese criminal justice as uniformly focused on reintegrative, even restorative practice,<sup>102</sup> Japanese prisons pursued regressive institutional security, order and cost efficiency measures above all else across the latter part of 20<sup>th</sup> century, even as Western prisons grappled with implementing the lessons of the Attica and Bathurst Gaol riots.<sup>103</sup> Still, as incarceration rates rose and prison safety

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<sup>94</sup> Ozawa (2014) 345.

<sup>95</sup> Ozawa (2014) 174.

<sup>96</sup> Sakamoto 1997: 156-158.

<sup>97</sup> Satoshi Tomiyama mentions a ratio of at least 50 prisoners to a single officer: Lawson (2020a) 139

<sup>98</sup> Sakamoto (1997) 159.

<sup>99</sup> *ibid* 159.

<sup>100</sup> Robert Johnson, *Hard Time: Understanding and Reforming the Prison* (3rd edn, Wadsworth Group 2002) 7-8.

<sup>101</sup> Takao Tanase, *Community and the Law: A Critical Reassessment of American Liberalism and Japanese Modernity* (Edward Elgar 2010).

<sup>102</sup> John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989)

<sup>103</sup> The Attica Prison riot took place in New York State in September 1971. See generally New York State Special Commission on Attica, *Attica: The Official Report of the New York State Special Commission on Attica – Investigation by a Special Governor’s Committee into the Causes and Handling of New York State’s Violent Prison Disorder* (Bantam Books 1972). The Bathurst Gaol Riot occurred in New South Wales in February 1974. See generally John HF Nagle, *Report of the Royal Commission into NSW Prisons* (NSW Government Printer 1982).

deteriorated in Western industrialised nations, fascinated external observers continued to pen admiring ‘learn from Japan’ accounts of this high level of control.<sup>104</sup>

### 3.2 Increasing Pressure: The Troubled 1990s

Decades passed without substantive reform. However, as Japan increasingly engaged with international human rights instruments in the final decades of the 20th century, prisons came under increasing under scrutiny and its keen desire for international approval made it vulnerable to critique. However, reform proved remarkably difficult, even when the economic malaise of the 1990s led to intolerable pressure on prisons.

#### 3.2.1 Stymied reforms and human rights norms

As human rights consciousness spread globally, the central dilemma in Japanese prison governance became how to balance international human rights obligations with institutional security. A Preparatory Commission for Revision of the Prison Act 1908 was established in 1976, which made recommendations in late 1980.<sup>105</sup> While they did not include a civil oversight body, they did suggest establishing an external *keiji shisetsu unei kyōgikai* (Penal Institution Administration Advisory Council) for each prison, including staff from relevant agencies, public and private organisations and persons with knowledge and experience of prisoner treatment whose opinions the warden could choose to consider.<sup>106</sup> Japan ratified the International Convention on Civil and Political Rights 1966 (ICCPR) in 1979,<sup>107</sup> and the Ministry took its first two reform bill packages forward in 1980 and 1987 respectively, although neither contained the advisory board proposal. Both attracted National Police Agency support but failed due to vigorous, well-organised opposition by the Japan Federation of Bar

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<sup>104</sup> Sugimoto (2014) 19. See, for example, Webb, 1984 ‘What We Can Learn from Japanese Prisons’; [www.jameswebb.com/articles/economic-fairness-social-justice/what-we-can-learn-from-japanese-prisons](http://www.jameswebb.com/articles/economic-fairness-social-justice/what-we-can-learn-from-japanese-prisons) accessed 2 April 2023. Elmer Johnson (1996); Elmer H Johnson, *Criminalization and Prisoners in Japan: Six Contrary Cohorts* (Southern Illinois University Press 1997).

<sup>105</sup> CARC Proposal (2003) 5.

<sup>106</sup> MoJ Correction Bureau, *Gyōkei kaikaku kaigi dai-2 bunkakai dai-2-kai kaigi giji gaiyō: besshi 2 – Jōhō no kōkai to gyōkei shisetsu o kanshi suru tame no i'inkai ni tsuite* (Outline Attachment 2: 2<sup>nd</sup> Meeting of CARC Subcommittee 2: Concerning Freedom of Information and Monitoring Committees for Penal Facilities) (22 September 2003) [www.moj.go.jp/content/000002262.pdf](http://www.moj.go.jp/content/000002262.pdf) accessed 2 April 2023, 6.

<sup>107</sup> UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; See generally Yūji Iwasawa, *International Law, Human Rights and Japanese Law* (Clarendon Press Oxford 1998).

Associations (JFBA)<sup>108</sup> and other human rights groups, who felt that the bills failed to satisfy international human rights law norms protecting detainees.<sup>109</sup>

The obstacle was that the bills reaffirmed Japan's controversial *daiyō kangoku* (substitute prison) system. When the Prison Act 1908 was passed, Japan's new prisons were still under construction, so art 1(3) permitted police to hold suspects in local police cells – as substitutes for prisons.<sup>110</sup> However, this police cell detention strongly favoured Japan's confession-focussed police and prosecutors.<sup>111</sup> Even now, police may hold suspects for up to 23 days on each charge<sup>112</sup> and interrogations are conducted in the absence of an attorney, for long hours daily and are not recorded as a rule.<sup>113</sup> In the 20<sup>th</sup> century, the arresting officer could also be the custodial officer;<sup>114</sup> and there was scant access to legal advice or prospect of bail.<sup>115</sup> Accordingly, even when the Correction Bureau established regional Detention Houses, police still preferred to hold suspects in local police cells. In 1971, police conveyed just 18.48% of arrestees directly to Detention Houses and this figure subsequently declined.<sup>116</sup>

Carver and Handley's 30-year review of measures to prevent torture in detention notes that abuses are most likely to occur in the period immediately following arrest.<sup>117</sup> Frequent reports of forced confessions in Japan's 'substitute prisons' led to constant domestic and international censure, including by the United Nations Human Rights Committee as Japan began submitting its Periodic

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<sup>108</sup> Toshiki Odanaka, 'The Prison Institution Bill and the Detention Institution Bill: Basic Perspectives in Evaluating Both Bills - With Special Concern for the Substitute Prison Problem' (1990) 23 *Law in Japan* 72; Sawanobori (2005) 143; Sylvia Croydon, *The Politics of Police Detention in Japan: Consensus of Convenience* (Oxford University Press 2016a).

<sup>109</sup> Iwasawa (1998) 260-270; cf Croydon (2016a) 83 who argues that National Police Agency dissent was the cause of the deadlock.

<sup>110</sup> *Kangoku hō* (Prison Act) 1908 art 1(3).

<sup>111</sup> Futaba Igarashi, 'Forced to Confess' in Gavan McCormack and Yoshio Sugimoto (eds), *Democracy in Contemporary Japan* (Gavan McCormack tr, ME Sharpe 1986); Toyoji Saitō, 'Substitute Prison: A Hotbed of False Criminal Charges in Japan' (1991) 18(3) *Northern Kentucky Law Review* 399.

<sup>112</sup> Under *Keiji soshō hō* (Code of Criminal Procedure) 1948 arts 203, 205 and 208.

<sup>113</sup> David T Johnson, 'You Don't Need a Weather Man to Know which Way the Wind Blows: Lessons from the United States and South Korea for Recording Interrogations in Japan' (2008c) 25 *Ritsumeikan Law Review* 141; Dimitri Vanoverbeke, 'The Right to an Attorney in Interrogations in Japan: Is the Ghosn Extradition Case a Turning Point?' in Shin Matsukawa, Anne Weyembergh and Irene Wieczorek (eds), *Europe and Japan Cooperation in the Fight Against Cross-Border Crime* (Routledge 2022).

<sup>114</sup> Saitō (1991). The Penal Detention Act 2005 art 16(3) now prohibits this practice.

<sup>115</sup> Elmer Johnson (1996) 222-224; Iwasawa (1998) 281-287; Daniel H Foote, "'Benevolent Paternalism' Revisited' (2021) 1(5) *USALI East-West Studies* 1.

<sup>116</sup> Reaching just 1.73% of suspects who bypassed police cell detention by 2004: MoJ, *Dai 1-kai miketsu kōkinsha no shōgū to ni kansuru yūshikisha kaigi – haifu shiryō 6: ryūchi higisha no kōchisho e no ryūchi wariiai no sui'i* (First Meeting of the Expert Committee on the Treatment of Unsented Detainees: Materials 6: Trends in Share of Suspects Transferred to Detention Houses) (6 December 2005) [www.moj.go.jp/KYOUSEI/SYOGU/shiryo01-01.pdf](http://www.moj.go.jp/KYOUSEI/SYOGU/shiryo01-01.pdf) accessed 2 April 2023.

<sup>117</sup> Carver and Handley (2016) 29.

Reports under the ICCPR.<sup>118</sup> Even the Tokyo High Court had made critical comments on human rights compliance in police detention by 1991.<sup>119</sup>

In 1989, the MoJ lamented the lack of progress, arguing that reform was essential to keep up with social change and advances in criminology.<sup>120</sup> In 1990, yet another industrialised peer in the West reached its reform turning point after substandard conditions triggered the Strangeways Prison riot in Manchester, England.<sup>121</sup> However, ‘controlled corrections’, which enhanced Japan’s traditional *mikkō shugi* (policy of maintaining secrecy) regarding prisons, restricted information flows to both prisoners and staff,<sup>122</sup> precluded any such unrest in Japan.

#### *Public interest group civil oversight proposals*

In 1991, as the MoJ prepared to submit its prison reform proposal to the Diet yet again, the *Keiji Rippō Kenkyūkai* (Society for Prison Reform) made the first of three proposals for new prisons legislation, which included a civil oversight mechanism based on European models, then a JFBA proposal incorporating civil oversight followed in 1992.<sup>123</sup> Japan had declared its intention of seeking a permanent seat on the United Nations Security Council in early 1992 and by 1993 was making external statements consistent with the ‘universalist’ rather than ‘Asian values’ position on human rights.<sup>124</sup> What is more, the conservative Liberal Democratic Party (LDP), which had been in power since 1955, briefly lost majority government at this time.<sup>125</sup> However, these shifts did not translate into domestic willingness to introduce civil oversight or make other concessions. The third reform bill contained a single provision that would have obliged wardens to consider opinions that would

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<sup>118</sup> See, for example, UN Human Rights Committee ‘International Covenant on Civil and Political Rights - Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee - Japan’ (5 November 1993) UN Doc CCPR/C/79/Add.28; See generally Croydon (2016a) ch 2.

<sup>119</sup> Iwasawa (1998) 270, citing a decision of the Tokyo High Court given on 23 April 1991.

<sup>120</sup> MoJ, *Heisei gan’nen hanzai hakusho* (1989 White Paper on Crime) <https://hakusyo1.moj.go.jp/jp/30/nfm/mokuji.html#219> accessed 2 April 2023, Section 4-5-5; Shikita and Tsuchiya (1990) 352.

<sup>121</sup> Prison Reform Trust, *A Summary of the Main Findings and Recommendations of the Inquiry into Prison Disturbances* (Prison Reform Trust 1991).

<sup>122</sup> Sakamoto (1997) 160; Lawson (2015) 139.

<sup>123</sup> Keiji Rippō Kenkyūkai (ed), *Nyūmon Kangoku Kaikaku* (Introduction to Prison Reform) (Nihon Hyōronsha 1996) 136, 207; Shin’ichi Ishizuka, ‘Keiji shisetsunai shōgū no shiminteki kontorōru’ (Community Control of how Prisoners are Treated in Prison) in Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standards and Citizen Participation) (Nihon Hyōronsha 2003) 76, 79, 236, 335. The further proposals from this group followed in 1996 and 2003; Japan Federation of Bar Associations (JFBA), *Kaisetsu: Nichibenren keiji shōgū hōan - shisetsu kanri hō kara ningenteki shōgū hō e* (Commentary: Bill on Penal Treatment - From a Facility Management Act to a Humane Treatment Act) (JFBA 1994) 175; Aya Kuwayama ‘Exploring the Possibility of Designating a National Preventative Mechanism in Japan’ (2010) 6 *Essex Human Rights Review* 125, 130-131.

<sup>124</sup> Ian Neary, *Human Rights in Japan, South Korea and Taiwan* (Taylor and Francis Group 2002) 50.

<sup>125</sup> See generally Michio Umeda, ‘The Liberal Democratic Party: Its Adaptability and Predominance in Japanese Politics for 60 Years’ (2019) 4(1) *Asian Journal of Comparative Politics* 8.



contribute to the ‘appropriate administration’ of the penal institution from ‘staff of relevant public agencies, public organisations and private organisations’ and ‘those with relevant knowledge and experience’.<sup>126</sup> However this too failed in 1993 and the *Hanzai hakusho* (White Paper on Crime) again recorded the MoJ’s frustration.<sup>127</sup>

Meanwhile, Japanese NGOs had realised the credibility and impact available to them through making their own submissions to the United Nations Human Rights Committee ahead of Japan’s Periodic Reports under the ICCPR.<sup>128</sup> Among the public interest groups involved was the Center for Prisoners Rights, formed in 1995 under the leadership of Kōichi Kikuta.<sup>129</sup> The efforts of the JFBA and Japanese NGOs piqued the interest of international rights groups, such as Human Rights Watch, which issued a 131-page report on detention in Japan in the same year, roundly condemning existing practices and the failed reform bills.<sup>130</sup>

Trust in government declined after botched rescue efforts following the Great Hanshin Earthquake, also in 1995, while the rapid development of the Internet reduced ‘information asymmetry’ between elites and ordinary citizens.<sup>131</sup> Soon, two groundbreaking pieces of legislation reflected this shift: the *Tokuteki hieri katsudō sokushin hō* (Act on Promotion of Specified Non-Profit Activities; NPO Act) 1998 which made it easier for concerned citizens to organise in support of a cause;<sup>132</sup> and the *Gyōsei kikan no hoyūsuru jōhō no kōkai ni kansuru hōritsu* (Act on Access to Information held by Administrative Organs; Information Disclosure Act) 1999, which lowered barriers to public

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<sup>126</sup> MoJ Correction Bureau, (22 September 2003) 6. This proposal was eventually enacted as Penal Detention Act 2005 art 6, which is not related to civil prison oversight.

<sup>127</sup> *Heisei 5-nen hanzai hakusho* (1993 White Paper on Crime)

<https://hakusyo1.moj.go.jp/jp/34/nfm/mokuji.html> accessed 2 April 2023, Section 2-3-1-1.

<sup>128</sup> Iwasawa (1998) 9-11; Neary (2002) 51-52.

<sup>129</sup> See, for example, Centre for Prisoners Rights, *Human Rights Situation in Japanese Prisons: Alternate Report submitted to Human Rights Council* (September 1998) [https://prisonersrights.org/cpr-cms/wp-content/uploads/2021/07/1998SepfourthICCPR\\_English.pdf](https://prisonersrights.org/cpr-cms/wp-content/uploads/2021/07/1998SepfourthICCPR_English.pdf) accessed 2 April 2023.

<sup>130</sup> Human Rights Watch (1995) viii-xx.

<sup>131</sup> See generally Jeff Kingston, *Japan’s Quiet Transformation: Social Change and Civil Society in the Twenty-First Century* (RoutledgeCurzon 2004) chs 1, 10. See also Encyclopedia Britannica, ‘George A Akerlof – American economist’ (*Encyclopedia Britannica*, 2023) [www.britannica.com/biography/George-Akerlof#ref749262](https://www.britannica.com/biography/George-Akerlof#ref749262) accessed 2 April 2023.

<sup>132</sup> *Tokuteki hieri katsudō sokushin hō* (Act on Promotion of Specified Non-Profit Activities; NPO Act) 1999 [www.japaneselawtranslation.go.jp/en/laws/view/3028](https://www.japaneselawtranslation.go.jp/en/laws/view/3028) accessed 2 April 2023; Robert Pekkanen, ‘Japan’s New Politics: The Case of the NPO Law’ (2000) 26(1) *The Journal of Japanese Studies* 111; Kingston (2004) ch 2.



accountability.<sup>133</sup> By the end of the 1990s, a range of commentators had published critiques of Japan's sclerotic carceral practices, in both Japanese and English.<sup>134</sup>

### *Human rights scepticism*

While enforcing human rights was becoming popular and important for Japan's international profile, this did not immediately translate to action. Rather, the Japanese government invested an increasing amount of energy in deflecting challenges on prison conditions in lengthy submissions to the UN Human Rights Committee in its third and fourth periodic reports under the ICCPR,<sup>135</sup> even as it prepared to accede to the Convention against Torture or Other Cruel Inhuman or Degrading Treatment or Punishment 1984 (CAT) in 1999.<sup>136</sup>

Two phenomena assist in explaining the imperviousness of Japanese prisons to change. The first is an enduring scepticism regarding whether European-origin human rights norms bind states, meaning a preference for seeing these rights as primarily relevant to horizontal interactions between private individuals. Suami's 2014 articulation of this Japanese perspective argues that the state, which is in a vertical relationship with those it governs, should not be subject to interference from below in the name of human rights, although citizens might legitimately take on a hortatory

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<sup>133</sup> *Gyōsei kikan no hoyūsuru jōhō no kōkai ni kansuru hōritsu* (Act on Access to Information held by Administrative Organs; Information Disclosure Act) 1998 [www.japaneselawtranslation.go.jp/en/laws/view/3765](http://www.japaneselawtranslation.go.jp/en/laws/view/3765) accessed 2 April 2023. Kingston (2004) ch 3. Katsuya Uga, 'Development of the Concepts of Transparency and Accountability in Japanese Administrative Law' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007); Tom Ginsburg, 'The Politics of Transparency in Japanese Administrative Law' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007).

<sup>134</sup> See for example Ralph Blumenthal, 'On a Mission to Turn Spotlight on His Jailers; He Claims Japan Mistreats Its Inmates' *The New York Times* (New York, 1 June 1994) [www.nytimes.com/1994/06/10/nyregion/mission-turn-spotlight-his-jailers-he-claims-japan-mistreats-its-inmates.html](http://www.nytimes.com/1994/06/10/nyregion/mission-turn-spotlight-his-jailers-he-claims-japan-mistreats-its-inmates.html) accessed 2 April 2023; Frank Gibney and Hiroko Tashiro, 'Hard Time: Trapped in Japan's Harsh Prisons, Inmates are Seeking Justice. Lots of Luck' (1996) 44 *Time South Pacific* 36; Sheryl Wudunn, 'Prisons in Japan are Safe but Harsh' (*The New York Times*, 8 July 1996) [www.nytimes.com/1996/07/08/world/prisons-in-japan-are-safe-but-harsh.html](http://www.nytimes.com/1996/07/08/world/prisons-in-japan-are-safe-but-harsh.html) accessed 2 April 2023; Amnesty International, *Japan: Ill-Treatment of Foreigners in Detention* (1997) Index No. ASA 22/009/1997, 10 November [www.amnesty.org/es/documents/asa22/009/1997/en/](http://www.amnesty.org/es/documents/asa22/009/1997/en/) accessed 2 April 2023; Amnesty International, *Japan: Prisoners Face Cruel and Humiliating Punishment* (1998) Index No. ASA 22/008/1998, 10 June [www.amnesty.org/en/documents/asa22/008/1998/en/](http://www.amnesty.org/en/documents/asa22/008/1998/en/) accessed 2 April 2023; Amnesty International, *Japan: Abusive Punishments in Japanese Prisons* (Amnesty International 1998); Vivien Stern, *A Sin Against the Future: Imprisonment in the World* (Northeastern University Press 1998) 95-101; Kiyoshi Yamashita, 'Human Rights of Prisoners in Japan' (1999) 29 *Victoria University of Wellington Law Review* 75; James Welsh, 'Japan: Prisoners Wait for Rights' (1993) 353 *The Lancet* 922; Hanawa (2000a); Hanawa (2000b); *Le Japon: A Double Tour* (Japan from Inside) 2000.

<sup>135</sup> Government of Japan, 'International Covenant on Civil and Political Rights – Third Periodic Report' (16 December 1991) UN Doc CCPR/C/70/Add.1; Government of Japan, 'International Covenant on Civil and Political Rights - Fourth Periodic Report' (16 June 1997) UN Doc CCPR/C/115/Add.3; Neary (2002) 51-52.

<sup>136</sup> UNGA, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT). Japan acceded to CAT on 29 June 1999.

role.<sup>137</sup> Public acquiescence to this position supported the status quo. In 1996, Elmer Johnson wrote 'Correctional issues do not arouse sufficient nationwide concern to produce major interest-group lobbying'.<sup>138</sup> For a century, the position of prisons in the collective Japanese imagination was as a properly harsh, repressive and secretive place where the state sequestered and punished wrongdoers.<sup>139</sup> Permitting prisoners to develop a sense of entitlement to burden the state with self-regarding demands was anathema in light of Japanese correctional goals, which are for the incarcerated to adopt a posture of humility and remorse.<sup>140</sup>

The second is external. Human rights have grown in number over time,<sup>141</sup> even as Western prison systems have increasingly embraced the idea that prisoners should enjoy many of the same human rights as members of the community.<sup>142</sup> This is in addition to the far more limited set of human rights considered to properly apply to prisoners in Japan.<sup>143</sup> Yet the prison systems that had embraced this expansive approach to prisoners human rights and introduced civil oversight mechanisms, had nonetheless continued to experience high numbers of security incidents: escapes, riots, assaults, suicides, deaths in custody and corruption scandals.<sup>144</sup> What is more, they continued to suffer from chronic underlying dysfunction – including idleness and overcrowding – that Japan had either never tolerated or had resolved without relying on human rights discourse.<sup>145</sup> In Japan, these realities seriously diminished the credibility of the trend towards establishing multiple layers of civil prison oversight already seen in the UK<sup>146</sup> and Europe,<sup>147</sup> as well

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<sup>137</sup> Takao Suami, 'Rule of Law and Human Rights in the Context of the EU-Japan Relationship: Are Both the EU and Japan Really Sharing the Same Values?' in Dimitri Vanoverbeke and others (eds), *The Changing Role of Law in Japan* (Edward Elgar Publishing 2014).

<sup>138</sup> Elmer Johnson (1996) 83.

<sup>139</sup> Lawson (2015).

<sup>140</sup> Lyons (2021).

<sup>141</sup> See generally Alison Brysk and Michael Stohl (eds.), *Expanding Human Rights: 21<sup>st</sup> Century Norms and Governance* (Edward Elgar 2017).

<sup>142</sup> See generally Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011); Sonja Snacken, 'Human Dignity and Prisoners' Rights in Europe' (2021) 50 *Crime and Justice: A Review of Research* 301.

<sup>143</sup> Yūichi Kaido, 'Japan' in Dirk van Zyl Smit and Frieder Dünkel (eds), *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* (2<sup>nd</sup> edn, Kluwer Law International 2001)

<sup>144</sup> See, for, example His Majesty's Prison & Probation Service, *Safety in Custody Statistics – England and Wales: Deaths in Prison Custody to December 2021, Assaults and Self-Harm to September 2021* (3 March 2023) [www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-september-2021/safety-in-custody-statistics-england-and-wales-deaths-in-prison-custody-to-december-2021-assaults-and-self-harm-to-september-2021](https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-september-2021/safety-in-custody-statistics-england-and-wales-deaths-in-prison-custody-to-december-2021-assaults-and-self-harm-to-september-2021) accessed 2 April 2023.

<sup>145</sup> As the reports of CPT visits to EU member states have made clear since 1990. See generally Council of Europe, 'European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – CPT Visits' (Council of Europe, 2023) [www.coe.int/en/web/cpt/visits](https://www.coe.int/en/web/cpt/visits) accessed 2 April 2023.

<sup>146</sup> Padfield (2018).

<sup>147</sup> Gaëtan Cliquennois and Sonja Snacken, 'European and United Nations Monitoring of Penal and Prison Policies as a Source of an Inverted Panopticon?' (2018) 70 *Crime Law and Social Change* 1.

as the pending establishment of a similar body with global reach.<sup>148</sup> There was little appeal for Japan in a Western, human rights-based, regulatory model that had not produced a level of order and safety equivalent to that achieved in Japanese prisons.

As the turn of the millennium approached, the stakes were high for the Japanese criminal justice system. Having risen to a leadership position in Asia by the early 1990s,<sup>149</sup> Japan was continuing to build its reputation as a reliable provider of overseas development assistance by disseminating Japanese criminal justice knowhow to the developing world through UNAFEI.<sup>150</sup> It had also begun technical legal assistance projects involving civil law in South East and Central Asia.<sup>151</sup> The 2001 *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21<sup>st</sup> Century* affirmed Japan's vision of continuing to contribute to the international community by sharing its legal and regulatory prowess.<sup>152</sup>

Japan's credibility as a foreign aid donor rested on its reputation for having navigated the dilemmas of modernity so successfully that it had avoided the social problems dogging Western donor states. The exemplary safety and order of its prisons had long supported the narrative that Japanese governance is exceptional. Although the antiquated Prison Act 1908 was causing increasing friction with human rights proponents at home and abroad,<sup>153</sup> it was not yet a serious impediment to Japan's external affairs.

However, Japan's international standing in these domains was increasingly at risk for another reason. This was a rapid increase in the prison population due to flows of vulnerable people newly criminalised through increasingly punitive policing, prosecutorial and sentencing practices.<sup>154</sup>

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<sup>148</sup> UNGA, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT) was adopted by the UNGA in December 2002 and established the Subcommittee on Prevention of Torture (SPT).

<sup>149</sup> David Arase, 'Japanese Policy Toward Democracy and Human Rights in Asia' (1993) 33(10) *Asian Survey* 935; Neary (2002) 66.

<sup>150</sup> See UNAFEI, 'Participants by Country' (UNAFEI nd) [www.unafei.or.jp/english/country/index.html](http://www.unafei.or.jp/english/country/index.html) accessed 2 April 2023.

<sup>151</sup> Yoshiharu Matsuura, 'Toward a New Generation of Comparative Law: A Framework for Bilateral Cooperation in Law & Development Projects in Asia' (2005) 23(2) *Wisconsin International Law Journal* 233; Veronica L Taylor, 'Japan's Legal Technical Assistance: A Different Modernization Narrative?' in David K Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Routledge 2012); Teilee Kuong, 'Legal Assistance in the Japanese ODA: The Spark of a New Era' (2018) 5 *Asian Journal of Law and Society* 271.

<sup>152</sup> Justice System Reform Council, *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21<sup>st</sup> Century* (12 June 2001) [https://japan.kantei.go.jp/policy/sihou/singikai/990612\\_e.html](https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html) accessed 2 April 2023, ch II pt 3(3).

<sup>153</sup> Koya Matsuo, 'The Development of Criminal Law in Japan since 1961' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007) 329.

<sup>154</sup> Kōichi Hamai and Tom Ellis, 'Japanese Criminal Justice: Was Reintegrative Shaming a Chimera?' (2008a) 10(1) *Punishment & Society* 25, 34; Carol Lawson, 'Subverting the Prison: The Incarceration of Stigmatised

### 3.2.2 Punitivism, overcrowding and internal controls

As the Japanese economy and social cohesion faltered in the early 1990s, the country's postwar criminological success also faltered.<sup>155</sup> The demographic crisis that had been building quietly since the 1970s came into sharp focus after the total fertility rate dropped permanently below what had been a shockingly anomalous historical low.<sup>156</sup> Growth in GDP fell to a post war low of 1% across 1992-1999,<sup>157</sup> as the economy rapidly transitioned from 'hyper-success' to 'hyper-failure'.<sup>158</sup> The rise in inequality due to economic malaise and technological change<sup>159</sup> led to seismic shifts. With four decades of prosperity and egalitarianism under threat, voters temporarily rejected the longstanding Liberal Democratic Party hegemony.<sup>160</sup> By 1995, failure to prevent the *Aum Shinrikyō* religious cult Tokyo sarin gas attacks just weeks after the Great Hanshin earthquake further reduced trust in government.<sup>161</sup>

There was a pervasive sense of disorder and decline, which led to less deferential public discourse that extended to revisionism and blame mongering.<sup>162</sup> There was dismay as police clearance rates declined to 66.4% in 2001, down by 20 percentage points against the previous decade.<sup>163</sup> As the recession became entrenched, dismay turned to alarm and citizens were more likely to report even trivial crimes to police.<sup>164</sup> Recidivism rates, which had fallen by around 10 percentage points across

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Older Japanese (2021) 17 *International Journal of Law in Context* 336. See also Mikio Kawai, *Anzen shinwa no hōkai no paradokkusu: chian no hōshakaigaku* (The Paradox of the Collapse of the Societal Safety Myth: A Sociolegal Study of Order) (Iwanami Shoten 2004); David T Johnson *Crime and Punishment in Contemporary Japan* (2007a) 36(1) *Crime and Justice* 371; David T Johnson, 'Japanese Punishment in Comparative Perspective' (2008a) 33 *Japanese Journal of Sociological Criminology* 46, 47-51; See generally Stanley Cohen, *Visions of Social Control* (Polity Press 1985); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009).

<sup>155</sup> Andrew Gordon 'Making Sense of the Lost Decades: Workplaces and Schools, Men and Women, Young and Old, Rich and Poor' in Yoichi Funabashi and Barak Kushner (eds), *Examining Japan's Lost Decades* (Routledge 2015)

<sup>156</sup> 1966 had seen a sharp drop in births due to being an ominous year in the Chinese Zodiac. See Atsushi Seike, 'Japan's Race Against the Ageing Clock' (*East Asia Forum*, 3 May 2015) [www.eastasiaforum.org/2015/05/03/japans-race-against-the-ageing-clock/](http://www.eastasiaforum.org/2015/05/03/japans-race-against-the-ageing-clock/) accessed 2 April 2023, 2, 9.

<sup>157</sup> Richard Katz, *Japan, the System That Soured: The Rise and Fall of the Japanese Economic Miracle* (Sharpe 1998) 3.

<sup>158</sup> Steven K Vogel, *Japan Remodeled: How Government and Industry are Reforming Japanese Capitalism* (Cornell University Press 2006) 23.

<sup>159</sup> Sugimoto (2014) 10-13, ch 2; Gordon (2015) 94-96.

<sup>160</sup> Kingston (2004) 21-22; Jeff Kingston, *Contemporary Japan: History, Politics and Social Change since the 1980s* (2<sup>nd</sup> edn, Wiley-Blackwell 2013) ch 2.

<sup>161</sup> Kingston (2013) 28-31.

<sup>162</sup> Sugimoto (2014) 20.

<sup>163</sup> MoJ, 2004 *White Paper on Crime* <https://hakusyo1.moj.go.jp/en/50/nfm/mokuji.html> accessed 2 April 2023, Figure 1-1-1.4.

<sup>164</sup> Kōichi Hamai and Tom Ellis, 'Genbatsuka: Growing Penal Populism and the Changing Role of Public Prosecutors in Japan' (2008b) 33 *Japanese Journal of Sociological Criminology* 67.

the 1980s, began to climb again from 1989.<sup>165</sup> By 1995, half the 1980s gains had been lost, with the two-year recidivism rate returning to 35.2% and the five-year rate to 49.1%.<sup>166</sup>

In separate works, Hamai, Miyazawa, Kawai and Johnson have all argued that both the drop in police ability to solve crime and the crime spike itself were due to increases in reporting and recording of lesser crimes, creating an artificial bubble in crime statistics and swamping the police's investigative capacity to produce a largely rhetorical 'collapse' in law and order.<sup>167</sup> Certainly the 2000 *International Crime Victims Survey* shows Japan's victimisation rate for violent crimes remained far lower than all other participating jurisdictions.<sup>168</sup>

However, public perceptions of the integrity and effectiveness of the criminal justice system suffered.<sup>169</sup> A series of gruesome and depraved murders began in 1997 with the 14-year-old Kobe child serial killer case and public shock rapidly developed into a pervasive sense of insecurity.<sup>170</sup> The media fixated on one sensational case after another, portraying monstrous criminality as an alarming new norm.<sup>171</sup> The idea that Japan's famed law and order was experiencing catastrophic decline became Japan's 'new orthodoxy', giving rise to a prolonged Cohenesque 'moral panic' in the criminal

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<sup>165</sup> The two-year rate fell from 40.1% in 1980 to 31.4% in 1989: MoJ Correction Bureau, *Showa 63-nen kyōsei tōkei nempō* (1988 Annual Corrections Statistics) 156; MoJ Correction Bureau, *Heisei 7-nen kyōsei tōkei nempō* (1995 Annual Corrections Statistics) 164.

<sup>166</sup> MoJ Correction Bureau, *Heisei 13-nen kyōsei tōkei nempō* (2001 Annual Corrections Statistics) 234.

<sup>167</sup> Kawai (2004); Kōichi Hamai, 'Nihon no chian akka shinwa wa ika ni tsukurareta ka: chian akka no jittai to haikei yōin - moraru panikku o koete (To what Extent was the Collapse of Japan's Societal Safety Myth Manufactured? Interrogating Whether the Collapse was Real and What Factors Contributed – Beyond Moral Panic) (2004) 29 *Japanese Journal of Sociological Criminology* 10; Kōichi Hamai and Kazuya Serizawa, *Hanzai fuan shakai* (The Crime-Anxious Society) (Kōbunsha 2006); Kōichi Hamai and Tom Ellis, 'Crime and Criminal Justice in Modern Japan: From Re-Integrative Shaming to Popular Punitivism' (2006) 34 *International Journal of the Sociology of Law* 157; David T Johnson (2007a); David T Johnson 'Criminal Justice in Japan' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007b); David T Johnson (2008a); Hamai and Ellis (2008a); Hamai and Ellis (2008b); Setsuo Miyazawa, 'The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy' (2008a) 10(1) *Punishment & Society* 47; Setsuo Miyazawa, 'Will Penal Populism in Japan Decline? A Discussion' (2008b) 33 *Japanese Journal of Sociological Criminology* 122; Kōichi Hamai and Tom Ellis, 'Crime and Punishment in Japan' in Wesley G. Jennings, George E. Higgins & Mildred M. Maldonado-Molina (eds), *The Encyclopedia of Crime and Punishment* (Wiley-Blackwell 2015) 1-2. cf Masahide Maeda, *Nihon no chian wa saisei dekiru ka* (Can Japan Restore its Societal Safety?) (Chikuma Shinsho 2003); Dag Leonardsen, *Crime in Japan: Paradise Lost?* (Palgrave Macmillan 2010) 91-105.

<sup>168</sup> John van Kesteren, Pat Mayhew and Paul Nieuwbeerta, 'Criminal Victimization in Seventeen Industrialized Countries: Key findings from the 2000 International Crime Victims Survey' (The Hague 2001); 'Hanzai higai chōsa (Crime Victimization Survey) ga sokutei suru hanzai: jikken chōsa o mochi'ita hanzai higai chōsa no datōsei – shinraisei ni tsuite no kōsatsu' (Crime Measured by Crime Victimization Surveys: Considering the Validity and Reliability of Empirical Crime Victimization Surveys (2007) 32 *Japanese Journal of Sociological Criminology* 8; Hamai and Ellis (2008b).

<sup>169</sup> Rin Ushiyama, 'Latency through Uncertainty: The 1994 Matsumoto Sarin Incident as a Delayed Cultural Trauma' (2019) 32 *International Journal of Politics Culture and Society* 21.

<sup>170</sup> Kazuya Serizawa, *Hora- hausu shakai* (House of Horror Society) (Kōdansha 2006); Miyazawa (2008a) Table 1. See also Mark Fenwick, 'Japan: From Child Protection to Penal Populism' in John Muncie and Barry Goldson (eds), *Comparative Youth Justice* (SAGE Publications 2006)

<sup>171</sup> David T Johnson (2007a); Hamai and Ellis (2008a).

justice domain.<sup>172</sup> The 1990s ended with devastating stories of police inaction in the face of victims' desperate pleas for help in the lead up to two separate murders.<sup>173</sup>

This new climate of insecurity saw new actors advocating for change and challenging the bureaucratic monopoly on criminal justice.<sup>174</sup> Among them were victims of heinous crimes, some of whom emerged as highly articulate 'norm entrepreneurs'.<sup>175</sup> The media, sympathetic lawyers and the National Police Agency amplified their voices. In Japan, this movement began as a retributive initiative, without a contemporaneous movement to enhance therapeutic justice and offender rehabilitation.<sup>176</sup> In response, politicians who were newly sensitised to the mood in their electorates sought to prioritize 'tough on crime' measures in an effort to enforce retribution and enhance deterrence.<sup>177</sup>

What Japanese criminal justice scholars describe as a *genbatsuka* (get tough on crime) era began as administrative changes, with official actors adopting more zealous policing and sentencing practices.<sup>178</sup> Meanwhile, the supremacy of prosecutors in Japan's criminal justice system made changes in the exercise of prosecutorial discretion a key aspect of these changes. Prosecutors now suspended fewer prosecutions, laid charges of a more serious nature and sought heavier penalties, gaining professional power and prestige in the process.<sup>179</sup> A slew of legislative measures augmented this prosecutorial zeal, beginning in 2000.<sup>180</sup> Johnson points out that many of these amendments had been proposed in previous decades, but were defeated.<sup>181</sup> As the 'tough on crime' law reform

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<sup>172</sup> Cohen (1972) 4 defined a 'moral panic' as:

A condition, episode, person or group of persons [that] emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other rightthinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.

See also Kiyoshi Murata and Yōko Orito (2010) 'Japanese Risk Society: Trying to Create Complete Security and Safety Using Information and Communication Technology' (2010) 40(2) *Association for Computing Machinery (ACM SIGCAS Computers and Society)* 38; Hamai (2004).

<sup>173</sup> The 1999 Okegawa stalker case and the 2000 Tochigi lynching case. See Hamai and Ellis (2006) 162.

<sup>174</sup> David T Johnson (2007a) 400; Mark Fenwick, "'Penal Populism' and Penological Change in Contemporary Japan' (2013) 17(2) *Theoretical Criminology* 215.

<sup>175</sup> Cass R Sunstein, 'Social Norms and Social Roles' (1996) 96(4) *Columbia Law Review* 903, 909. Sunstein's term describes people who strive to change social norms.

<sup>176</sup> See generally Shigenori Matsui, *Justice for the Accused or Justice for Victims: The Protection of Victims' Rights in Japan* (2011) 13(1) *Asia-Pacific Law and Policy Journal* 54; Erik Herber, 'Victim Participation in Japan: When Therapeutic Jurisprudence Meets Prosecutor Justice' (2016) 3(1) *Asian Journal of Law and Society* 135.

<sup>177</sup> Miyazawa (2008b) 132; Miyazawa (2008a); Hamai and Ellis (2008a) 32-33.

<sup>178</sup> Hamai and Ellis (2006) 162-167; Miyazawa (2008b) 128.

<sup>179</sup> David T Johnson (2008a).

<sup>180</sup> David T Johnson (2007a) 384-395; Miyazawa (2008a) Table 1.

<sup>181</sup> David T Johnson (2007a) 385.

agenda took hold, every corner of the criminal justice system experienced review, with tolerance reduced and controls tightened, often repeatedly.<sup>182</sup>

### *Silent surge in prison population*

The informal hardening of discretion in policing, charging, sentencing and parole decisions gradually sent prisoners pouring into prison, leading to stress, overcrowding, and understaffing. The prisoner population crept upwards from a 1992 low of 45,082, when prisons were at 70.7% of capacity, then rose steadily from 1995, reaching 65,508 prisoners by end 2001, then 101.2% of capacity.<sup>183</sup> Even expert commentators seemed initially unaware, with Hamai writing in 1999 that the prison population had been 'stable for 30 years' and that prisons had 'the confidence of both the public and... inmates'.<sup>184</sup> Yet by 2000, prisons were managing over 35% more prisoners than a decade before and the steady inflow became a torrent.<sup>185</sup> Crisis became inevitable.

As overcrowding disrupted the orderliness prized by Japanese corrections managers, prisons that had been accustomed to imposing the intrusive supervision mandated by 'controlled corrections' on a manageable population with limited resources reeled. While an average overcrowding level just over 100% may seem modest,<sup>186</sup> Japanese prisoners had meagre personal space in the first place. Single cells, with living space ranging from 6 m<sup>2</sup> to 7.5 m<sup>2</sup> were often holding two prisoners, while group cells designed for six were holding eight prisoners, each with just 2.5 m<sup>2</sup> of living space.<sup>187</sup> The need for 'reserve capacity' means that prisons are 'full' before reaching maximum capacity.<sup>188</sup>

Reform was more pressing than ever, but the punitive mood meant that there was no prospect of legislative success. In early 1999, a worried Correction Bureau formed a new internal Study Group on

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<sup>182</sup> David T Johnson (2007a) 384-395; Miyazawa (2008a) Table 1.

<sup>183</sup> MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-1; MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-2; Figure F.

<sup>184</sup> Kōichi Hamai, 'Prison Population in Japan Stable for 30 Years' in Michael Tonry (ed), *Penal Reform in Overcrowded Times* (Oxford University Press 2001) 189. See also André Kuhn, 'Incarceration Rates Across the World' in Michael Tonry (ed), *Penal Reform in Overcrowded Times* (Oxford University Press 2001) 211.

<sup>185</sup> MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-1; David T Johnson (2007b) 383; David T Johnson (2008a) 46, 47-51, Figure F.

<sup>186</sup> Overcrowding peaked at 106.5% at end 2002: MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-2; the prison population peaked at 81,255 at end 2006: MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-1; Figure F.

<sup>187</sup> CARC, *Dai-1 bunkakai dai-5-kai kaigi: gijiroku* (Subcommittee 1 Meeting 5: Minutes) (30 October 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_bunka01\\_gijiroku05.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_bunka01_gijiroku05.html) accessed 2 April 2023, Advisor Satoshi Tomiyama; cf European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) 'Living Space Per Prisoner in Prison Establishments: CPT Standards' (15 December 2015) CPT/Inf(2015) 44 <https://rm.coe.int/16806cc449> accessed 2 April 2023. See also MoJ, *2004 White Paper on Crime* Section 5-3-1.

<sup>188</sup> The amount of spare capacity required varies, reaching 20% in the case of medical prisons: MoJ, *2004 White Paper on Crime* Section 5-3-1.



Correctional Treatment and tasked it with finding ways to modernise informally through subordinate legislation and administrative guidance.<sup>189</sup>

As overcrowding rose, so did the use of disciplinary measures. While prisons administered punishments – overwhelmingly through the imposition of 30 days of solitary confinement in submissive postures – to 55% of the prison population in 2000, this figure was 71% five years later.<sup>190</sup> The small proportion of prisoners completing vocational training courses dropped after 2000 despite the spiking prisoner population,<sup>191</sup> while prisoner complaints, lawsuits, suicides and violence rose sharply.<sup>192</sup>

There were also qualitative and demographic changes in the prison population. Vulnerable, high needs individuals increasingly flowed into the prison system, which lacked the resources and expertise required to handle them. These included non-Japanese prisoners, the intellectually disabled, the mentally ill and older offenders – and the share of prisoners with a *yakuza* background rose from 1998.<sup>193</sup> While an aging trend from the 1970s meant that 17.5% of male admissions were already aged 50 or older in 1991, by 2001 this had risen to 28.2%,<sup>194</sup> and deaths in these older prisoners rose from 1995 and spiked from 2002.<sup>195</sup> Medical care was highly problematic, with prison doctors understaffed, overworked and providing substandard care with limited facilities.<sup>196</sup>

While sentencing reforms covered in Chapter 11 that will in effect abolish *chōeki* (imprisonment with work) will take effect in 2025, at present almost all prisoners still labour full time in prison factories.

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<sup>189</sup> Kyōsei shogū ni kansuru kenkyūkai; Mikio Kawai refers to his role on this body as an external legal expert in his upbeat scholarly account of his service on the Yokohama Prison Penal Institution Visiting Committee across 2007-2009: Mikio Kawai, 'Keiji shisetsu shisatsu i'in seido to shimin no shihō sankā' (The Penal Institution Visitor System and Civil Participation in the Justice System) in Yoshitaka Wada and others (eds), *Hō no kansatsu: hō to shakai no hihanteki saikōchiku ni mukete* (Monitoring Law: Towards a Critical Re-Shaping of Law and Society) (Hōritsu Bunkasha 2014).

<sup>190</sup> Ozawa (2014) 345 typically with denial of reading and writing privileges. See also Kenichi Nakane "'Prison Libraries' in Japan: the Current Situation of Access to Books and Reading in Correctional Institutions' (2011) 59(3) *Library Trends* 446.

<sup>191</sup> MoJ, 2004 *White Paper on Crime* Table 5-3-3-7. See also Jurg Gerber, Susan L Weeks and Furjen Denq, 'Tea Ceremony and Tatami Mat Making: Gender Differences in Access to Educational Programs in Japanese Prisons' (1994) 74(4) *The Prison Journal* 462.

<sup>192</sup> Isamu Sakai, *Tōkei de miru heisei nenkan no kyōsei* (Heisei Era Corrections in Statistics) (Shadan Hōjin Kyōsei Kyōkai 2012) 189-90.

<sup>193</sup> Hamai and Ellis (2008a) 36-37; Yokoyama (2018) 18 n 15; David T Johnson (2007b) 359-361; Sakai (2012) 99-102.

<sup>194</sup> MoJ, *Heisei 5-nen hanzai hakusho* (1993 White Paper on Crime) Table 2-3-2-3; MoJ, 2002 *White Paper on Crime* <https://hakusyo1.moj.go.jp/en/47/nfm/mokuji.html#133> accessed 2 April 2023, Table II-25; Lawson (2021). Old age is regarded as commencing up to 15 years earlier in incarcerated populations due to chronic poor health: UNODC *Handbook on Prisoners with Special Needs* (United Nations 2009) [www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Prisoners\\_with\\_Special\\_Needs.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf) accessed 2 April 2023, 123. See generally Lawson (2021).

<sup>195</sup> Hamai and Ellis (2008a) 40.

<sup>196</sup> CARC Proposal (2003) 35-43; JFBA (2005) 12-15; Kenichi Nakane, 'Kyōsei iryō no genjō to kadai' (Corrections Medical Care: Current State and Issues) (2007) *National Diet Library Refarensu* 5, 95.



This is a legacy from the Prison Act 1908 era when factory work and correctional treatment were synonymous; factory work dominates weekday life, with brief breaks on some days for exercise or hygiene purposes.<sup>197</sup> In the 1990s, the prison service was still isolated from other agencies and had little contact with outside expertise, so while some prisons began rehabilitative programs for offenders with a history of drug or alcohol abuse, *yakuza* gang involvement or traffic offences, these were designed and largely delivered by existing staff, who lacked relevant expertise or experience.<sup>198</sup> Evidence-based programs played no role in Japanese prisons until the turn of the millennium.<sup>199</sup>

Despite the labour intensive nature of ‘controlled corrections’, the recession made staffing increases difficult; between 1998 and 2003 the ratio of prisoners per corrections officer rose from 3.0 to 4.3, more than double the ratios seen in Germany, France and the UK,<sup>200</sup> while national labour reforms further reduced weekly working hours to 44, then 40 hours.<sup>201</sup> Staff were increasingly unable to take leave,<sup>202</sup> but also unable to take industrial action, as *Kokka kōmuin hō* (National Public Service Act) 1947 art 108-2(5) prohibits them from unionising.<sup>203</sup> At least one officer was recognised as a casualty of *karoshi* (death by overwork) by 1995,<sup>204</sup> while by 2003 overwork was so ubiquitous and excessive that prisons were ‘at risk of collapse’.<sup>205</sup>

Japan’s growing prison population was by no means unique: the South Korean incarceration rate rose from 124 in 1990 to a peak of 136 in 2000, while Singapore saw rates rise from 179 to 352 over the same decade and Australia saw a rise from 84 to 114.<sup>206</sup> However, Japan’s experiment with ‘lock ‘em

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<sup>197</sup> See generally Setsuo Miyazawa, ‘The Private Sector and Law Enforcement in Japan’ in William T Gormley (ed), *Privatisation and its Alternatives* (University of Wisconsin Press 1991); David Allen, ‘Ex-Marine Decries Nature of Japan Prison Work’ (*Stars and Stripes*, 18 July 2004) [www.stripes.com/news/ex-marine-decries-nature-of-japan-prison-work-1.21905](http://www.stripes.com/news/ex-marine-decries-nature-of-japan-prison-work-1.21905) accessed 2 April 2023.

<sup>198</sup> MoJ, *2004 White Paper on Crime*, Section 5-3-2-4, Table 5-3-2-42, Table 5-3-3-6. See generally senior corrections officer Genshi Shibata’s 27 October 2003 submission to CARC: MoJ Correction Bureau, *Gyōkei kaikaku kaigi dai-3 bunkakai dai-5-kai kaigi: besshi 6* (Materials 6: Corrections Administration Reform Council Subcommittee 3 Meeting 5) (27 October 2003) [www.moj.go.jp/content/000002298.pdf](http://www.moj.go.jp/content/000002298.pdf) accessed 2 April 2023.

<sup>199</sup> Carol Lawson, ‘Japan: Satoshi Tomiyama, Director General of the Correction Bureau’ in Dilip K Das and Philip Birch (eds), *Trends in Corrections: Interviews with Corrections Leaders Around the World* (Routledge 2020a) 138-143.

<sup>200</sup> MoJ, *2004 White Paper on Crime*, Fig 5-3-3-1. See also senior corrections officer Takayoshi Ariyama’s 6 October 2003 submission to CARC: MoJ Correction Bureau, *Gyōkei kaikaku kaigi dai-3 bunkakai dai-4-kai kaigi: besshi 2 - Keimukan no jinji kanri tō ni tsuite* (Materials 2: Corrections Administration Reform Council Subcommittee 3 Meeting 4: Corrections Officers - Human Resources Issues) (6 October 2003) [www.moj.go.jp/content/000002292.pdf](http://www.moj.go.jp/content/000002292.pdf) accessed 2 April 2023, 18.

<sup>201</sup> Sakamoto (1997) 159; *Labor Standards Act* 1947.

<sup>202</sup> MoJ Correction Bureau, Materials 2 CARC Subcommittee 3 Meeting 4 (2003) 18-19.

<sup>203</sup> Available at [www.japaneselawtranslation.go.jp/en/laws/view/4283](http://www.japaneselawtranslation.go.jp/en/laws/view/4283) accessed 2 April 2023. See further Kaido (2001) 428-429.

<sup>204</sup> Takashi Nishio, ‘Japan: Hierarchically Ordered Mutuality in a Semi-Hidden World’ in Christopher Hood, Oliver James, Guy Peters and Colin Scott (eds), *Controlling Modern Government: Variety, Commonality and Change* (Edward Elgar 2004) 39; Kaido (2001) 428-429.

<sup>205</sup> MoJ Correction Bureau, Materials 6 CARC Subcommittee 3 Meeting 5 (2003) 3-9, 9.

<sup>206</sup> World Prison Brief, ‘Data’ (nd).

up' policies was uncharacteristic, displacing the ironclad Correction Bureau control over corrections policy seen across the postwar era. Control shifted to an alliance of powerful public interest group and political actors, supported by criminal justice agencies in other parts of the penal chain. The secrecy surrounding Japan's prisons, as well as their rigidity and frugality made them highly susceptible to the stresses that accompanied this new penal populism.

### *Weak internal controls*

In theory, a range of external actors could exercise oversight of Japanese prisons at this point. While a handful of bureaucratic bodies outside the MoJ did perform various kinds of administrative monitoring, Nishio notes that these checks were too narrow and ritualistic to detect rogue activity.<sup>207</sup> The Correction Bureau itself sent a small internal inspection team to each prison at least once every two years, however these inspections were brief, performative and did no more than confirm that the facility met the Bureau's own performance standards.<sup>208</sup> Oversight by the National Diet House of Councillors Committee on Judicial Affairs was ineffective.<sup>209</sup> Despite an increasing number of prisoner lawsuits being heard, suits were difficult to file and the judiciary was reluctant to interfere.<sup>210</sup>

Meanwhile, public opinion remained in the grip of punitivism and vengeful victims of crime discourse. New information flows regarding Japanese prison conditions generated by NGOs and UN Human Rights Committee comments on Japan's periodic reports under the ICCPR met with the same public apathy that Elmer Johnson had noted in 1996, while the media still typically refrained from reporting on prisons in deference to the MoJ preferences.<sup>211</sup>

Internal Correction Bureau mechanisms fitting within Hood's 'mutuality' quadrant of controls inside government discussed in Chapter 2 were most likely to detect and prevent abuses.<sup>212</sup> These processes involve public officials holding one another accountable through constructive peer influence. However, interactions between staff in Japan follow militaristic, hierarchical patterns and while a regimented 'chain of command' structure of this kind can facilitate accountability, there were two inbuilt fissures. The first was between elite managerial-track corrections officers, whose tenure

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<sup>207</sup> Nishio (2004) 38-39.

<sup>208</sup> *ibid* 37.

<sup>209</sup> *ibid*.

<sup>210</sup> Ozawa (2014) 116; Nishio (2004) 38; Kōichi Kikuta, *Nihon no keimusho* (Japan's Prisons) (Iwanami Shoten 2002) 187-188.

<sup>211</sup> Philip Brator, 'Media Refuses to Aim Spotlight on Prison Life in Japan' *The Japan Times* (Tokyo, 17 November 2002) [www.japantimes.co.jp/news/2002/11/17/national/media-national/media-refuses-to-aim-spotlight-on-prison-life-in-japan/](http://www.japantimes.co.jp/news/2002/11/17/national/media-national/media-refuses-to-aim-spotlight-on-prison-life-in-japan/) accessed 2 April 2023. See Elmer Johnson (1996) 83. See for example Human Rights Watch (1995); Centre for Prisoners Rights (1998); UN Human Rights Committee, 'International Covenant on Civil and Political Rights – Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee - Japan' (19 November 1998) UN Doc CCPR/C/79/Add.102.

<sup>212</sup> Nishio (2004) 39-41.

at any prison is brief and locally hired custodial-track officers who stay in place for long periods.<sup>213</sup> The second was between the entire Correction Bureau and its leadership. The Director-General of the Correction Bureau had no corrections experience or expertise, being traditionally ‘helicoptered in’ from the pool of elite prosecutors that had been the traditional source of MoJ leaders.<sup>214</sup> This increased the likelihood that both custodial and managerial officers would perceive their superiors as disengaged and self-serving.

### 3.3 Conclusion

In this chapter, we have seen a set of distinctive, intractable pressures mounting in Japanese prisons, each with complex causes. All shed light on the deeply embedded ‘norms, values, beliefs and processes’ that Japan’s prison system has inherited and with which it remains firmly aligned<sup>215</sup> and influenced the unusual shape of Japan’s civil oversight system, as we will see in Chapter 4. The strong contrast with the historical origins of the ACT version, which are outlined in Chapter 5, contributes to making these jurisdictions an ideal comparative pairing, as is shown in Chapter 6. This chapter has also provided much needed context for the Japanese data, which is analysed in Chapters 7 through 9.

We have seen that the increasing pressures on Japanese prisons in the second half of the 20<sup>th</sup> century elevated some characteristics seen in all prisons to acute levels of intensity. These characteristics include an unusually direct connection between achieving exemplary, orderly prisons and Japan’s international reputation, as well as extraordinary levels of institutional secrecy and isolation. It is also the case that media and public support for ‘get tough on crime’ policies and victims of crime was also unusually intense, while apathy concerning prison conditions for both staff and prisoners was remarkably widespread. Meanwhile, Japanese prisons maintained an unusually rigid commitment to archaic, disciplinarian carceral and workplace practices, even as other industrialised jurisdictions transitioned to more liberal, evidence-based approaches – at least in part due to a political deadlock that prevented prisons adapting to sweeping economic and social change. In addition, internal and external oversight were suboptimal. Internal prisons administration inspections were infrequent and insubstantial, while schisms in the staff hierarchy made mutuality controls between staff unreliable, and there was no prospect of ‘smart’ networked regulatory solutions through active judicial or Diet oversight.

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<sup>213</sup> *ibid* 41.

<sup>214</sup> *ibid*.

<sup>215</sup> Valerie Braithwaite, ‘Closing the Gap Between Regulation and the Community’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 29.

Chapter 4 begins by introducing the Nagoya Prison Scandal of the winter of 2002-2003, which led to a breakthrough in the 50-year political deadlock over the *daiyō kangoku* (substitute prison) system. Civil oversight would be a key element of the reform package, as Japan yet again strove to create an exemplary, admired prison system.

## Chapter 4 Civil Prison Oversight in Japan: Design

We saw in Chapter 3 that the Ministry of Justice (MoJ) Correction Bureau was involved in international efforts to promote modernising prison reforms by 1980. However, Japan saw no such reforms in the 20th century. This was due to entrenched conflict over the retention of the *daiyō kangoku* (substitute prison) system, which allows the lengthy detention of suspects in police cells, with the Japan Federation of Bar Associations (JFBA) on one side and the MoJ, together with the National Police Agency, on the other. Meanwhile, prisons were under increasing pressure. Japan's economic malaise at the end of the century had seen crime tick up, leading to a widespread 'moral panic',<sup>1</sup> which was fanned by public and private actors whose interests were served by a 'get tough on crime' crackdown. This criminalised vulnerable cohorts and sent the prison population soaring.

This chapter traces the emergence of prison oversight in Japan against the backdrop of the historical trends mentioned in the last chapter. It begins by noting the unprecedented appetite for law reform that accompanied the turn of the millennium. We will see how the convergence of this new openness with an egregious prison abuse scandal in the winter of 2002-2003 led to a brief period of chaos, in which key stakeholders battled for influence.

Two themes intertwine as we follow events from that point through to the full implementation of Japan's Penal Institution Visiting Committee system in 2007 and beyond. The first is that the policy and legal responses to the crisis neatly illustrate the 'network' theories of how regulation emerges that are introduced in Chapter 2, as well as the distinctive qualities of Japan's version of regulatory state governance in the criminal justice domain. We will see that when powerful external ideas seized the agenda, making rapid prison reform inevitable, the MoJ deftly regained the upper hand, determining nature and speed of change by reasserting the 'intricate meshes' of influence that characterise Japanese governance.<sup>2</sup> This meant ensuring that when a reform council was formed, it comprised eminent yet mostly inexperienced citizens and was physically and structurally embedded within the Ministry of Justice – the agency with most at stake in the reform process. These steps made this policy body reliant on Ministry of Justice Correction Bureau assistance.

The second theme is that Japan's choices contrast with what we learned about effective responsive regulation in Chapter 2. For example, given Black and Baldwin's prerequisites for 'really responsive'

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<sup>1</sup> Stanley Cohen, *Folk Devils and Moral Panics* (Paladin 1972) 4.

<sup>2</sup> Rokurō Hidaka, 'Personal Retrospective' in Gavan McCormack and Yoshio Sugimoto (eds), *Democracy in Contemporary Japan* (ME Sharpe 1986) 228, 245.

and ‘risk-based’ regulation,<sup>3</sup> the Correction Bureau’s civil oversight design seems counter-intuitive. If we turn to the literature on effective persuasive mechanisms in Chapter 2, further contrasts appear. We know, that persuasive measures tend to prosper when the ‘relational distance’ between the regulatory authority and regulatees, in this case the Correction Bureau and prison staff – is minimal.<sup>4</sup> As the Wheel of Social Alignments shows,<sup>5</sup> persuasive regulation has the best chance of success when regulators build a co-regulatory relationship with regulatees based on trust, in which regulatees see any regulatory intermediaries as legitimate and the regulatory mechanism as beneficial, fair and worthy.<sup>6</sup> These contrasts raise a number of questions about the nature and impact of Japan’s oversight committees in prisons, which Chapters 7 through 9 address.

#### 4.1 Japan’s Civil Prison Oversight Catalyst: Prison Crisis

By June 2001, Japan’s judicial system was entering a period of profound change rivalling the earlier transformations of Japan’s legal system across the Meiji era (1868-1912) and again during the Allied Occupation under the Supreme Command of Allied Powers (1945-1952).<sup>7</sup> Two years of Justice System Reform Council (JSRC) deliberations had proposed sweeping reforms to Japan’s legal architecture, including a raft of measures to streamline criminal trials and a mixed jury initiative that would invite ordinary citizens to participate in the criminal justice system.<sup>8</sup> The lofty language of the JSRC’s *Final Recommendations* set a new tone, promising a revitalised, accountable judicial system that would inspire public confidence.<sup>9</sup> While the JSRC included three eminent legal figures whose professional interests fell on either side of the *daiyō kangoku* (substitute prison) battle lines, it also included seven members from diverse backgrounds, a first for a Japanese law reform body.<sup>10</sup> As a

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<sup>3</sup> Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59; Julia Black and Robert Baldwin, ‘Really Responsive Risk-Based Regulation’ (2010) 32(2) *Law and Policy* 181.

<sup>4</sup> Donald Black, *The Behaviour of Law* (Academic Press 1976) 40-41; Figure C.

<sup>5</sup> Figure D.

<sup>6</sup> Valerie Braithwaite, ‘Closing the Gap Between Regulation and the Community’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017).

<sup>7</sup> See generally Daniel H Foote, ‘Introduction and Overview: Japanese Law at a Turning Point’ in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007).

<sup>8</sup> Justice System Reform Council, *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21<sup>st</sup> Century* (12 June 2001) [https://japan.kantei.go.jp/policy/sihou/singikai/990612\\_e.html](https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html) accessed 2 April 2023, ch II pt 2, ch IV. See also Carol Lawson and Simon Thornley, ‘Translation: “Perceptions of the Current State of the Japanese Legal System” Interview with Kōji Satō, Chairman of Japan’s Judicial Reform Council’ (2002) 4(1) *Australian Journal of Asian Law* 76; Foote (2007).

<sup>9</sup> See JSRC (2001) Chapter I.

<sup>10</sup> An attorney, a former judge and a former prosecutor; the diverse representatives hailed from industry, labour and consumer interests and the literary world, while a final three members were legal academics. Only two of the 13 members were women: the literary author and the representative of the interests of ‘housewives’ as consumers: Foote (2007) xxi-xxii. See also Prime Minister of Japan and His Cabinet, ‘Members

result, while the final JSRC output limited its remarks on the *daiyō kangoku* issue to brief, tactful suggestions for compromise,<sup>11</sup> that diplomacy suggested a subtle shift towards pragmatism.<sup>12</sup>

Meanwhile, human rights had become newly topical.<sup>13</sup> A bill that would establish an independent Human Rights Commission in accordance with the United Nations Principles Relating to the Status of National Institutions (Paris Principles) was the subject of fierce debates.<sup>14</sup> As we saw in Chapter 3, Japan's initial report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Fifth Periodic Report under the International Convention on Civil and Political Rights (ICCPR), were in draft – and both were required to report on prison conditions.<sup>15</sup> However, prison overcrowding was reaching intolerable levels,<sup>16</sup> and an abuse scandal that unfolded in the winter of 2002-2003 would overtake these developments.<sup>17</sup>

#### 4.1.1 The Nagoya Prison Scandal 2002-2003

*Many guards at Nagoya Prison lost sight of the benevolent ethos of Japanese prisons...*<sup>18</sup>

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of the Justice System Reform Council' (*Prime Minister of Japan and His Cabinet*, nd)  
[https://japan.kantei.go.jp/policy/sihou/singikai/members\\_e.html](https://japan.kantei.go.jp/policy/sihou/singikai/members_e.html) accessed 2 April 2023.

<sup>11</sup> Suggesting retaining police cell detention but improving police accountability and protections for suspects' rights: JSRC (2001) Chapter II Part 2.4(2).

<sup>12</sup> See Dimitri Vanoverbeke, *Juries in the Japanese Legal System: the Continuing Struggle for Citizen Participation and Democracy* (Routledge 2015) 43.

<sup>13</sup> David T Johnson, 'Criminal Justice in Japan' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007b) 359; See generally Yūji Iwasawa, *International Law, Human Rights and Japanese Law* (Clarendon Press Oxford 1998); Eric A Feldman *The Ritual of Rights in Japan: Law, Society and Health Policy* (Cambridge University Press 2000); Ian Neary, *Human Rights in Japan, South Korea and Taiwan* (Taylor & Francis Group 2002); Leon Wolff, 'Do Human Rights Matter in Japan' (2003) 12(3) *Human Rights Defender* 15.

<sup>14</sup> HuRights Ōsaka, 'Focus Volume 28: Japanese National Human Rights Commission' (*HuRights Ōsaka*, June 2002) [www.hurights.or.jp/archives/focus/section2/2002/06/japanese-national-human-rights-commission.html](http://www.hurights.or.jp/archives/focus/section2/2002/06/japanese-national-human-rights-commission.html) accessed 2 April 2023; Koshi Yamazaki, 'The Draft Human Rights Protection Bill in Japan: Discussions Straying Off Course' [2005] *Asia Pacific Journal on Human Rights and the Law* 39. See also Osamu Koike, 'Reform of Human Rights Institutions in Japan' (2014) 22(3) *Yokohama Law Review* 77.

<sup>15</sup> UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; UNGA, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

<sup>16</sup> The first of four large new Private Finance Initiative prisons, planned to reduce overcrowding, would not open in Mine Yamaguchi Prefecture until 2007: Ministry of Justice (MoJ), *2004 White Paper on Crime* <https://hakusyo1.moj.go.jp/en/50/nfm/mokuji.html> accessed 2 April 2023, Section 5-3-3-2.

<sup>17</sup> See Koshi Yamazaki, 'The Draft Human Rights Protection Bill in Japan: Discussions Straying Off Course' [2005] *Asia Pacific Journal on Human Rights and the Law* 39 as to the fate of the draft Human Rights Bill submitted to the Diet in 2003. See also Osamu Koike, 'Reform of Human Rights Institutions in Japan' (2014) 22(3) *Yokohama Law Review* 77.

<sup>18</sup> Senior corrections officer Genshi Shibata to the members of the Correctional Administration Reform Council (CARC): MoJ, *Gyōkei kaikaku kaigi dai-2-kai kaigi: kaiji gaiyō* (Outline of the 2<sup>nd</sup> Meeting of CARC) (19 May 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_kaiji\\_gaiyou02.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_kaiji_gaiyou02.html) accessed 2 April 2023 (translation mine). See also Daniel H Foote, 'The Benevolent Paternalism of Japanese Criminal Justice' (1992) 80(2) *California Law Review* 317; John Haley, *The Spirit of Japanese Law* (University of Georgia Press 1998) ch 4; Daniel V Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005) ch 2; Daniel H Foote, '"Benevolent Paternalism" Revisited' (2021) 1(5) *USALI East-West Studies* 1.

On 8 November 2002, Nagoya District prosecutors made the first of what would be the arrests of eight corrections officers at Nagoya Prison on suspicion that small, overlapping groups among this number had abused prisoners isolated in ‘protection’ cells, used to confine disruptive or violent prisoners. The room is bare, with thick concrete walls and floor and an open latrine. Filtered daylight can enter through glass bricks, and there is a large Perspex observation window for prison staff, who control the temperature, lighting and flush mechanism for the latrine. Prisoners placed in protection cells must sit in a fixed, submissive posture on a thin cushion on the floor, typically in a restraint, until they become submissive, usually for periods of a few hours or days.<sup>19</sup> The leather-belt-with-handcuffs device then in use was European in origin and had been used by the Japanese prisons since 1908. It immobilised the prisoners’ hands, one in front of the body and the other behind, making eating and toileting difficult and humiliating.<sup>20</sup>

These first arrests related to permanent internal injuries suffered by a prisoner in September; officers had restrained him in a leather-belt-with-handcuffs device for 13 days, tightening the device six times during that period. Officers had targeted the prisoner for writing a *jōgan* (petition) complaining of ill treatment to the Minister of Justice, as was his right under *Kangoku hō* (Prison Act) 1908 art 7.<sup>21</sup> Prosecutors also uncovered two fatal incidents. In May 2002, a prisoner had died of liver damage after officers used the same restraint in the same way – as a torture device; and in December 2001, officers had directed a fire hose at a naked prisoner’s buttocks, causing death from rectal bleeding.<sup>22</sup> Facts emerged to show that staff were routinely brutalising prisoners – and retaliating against any who tried to complain.<sup>23</sup>

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<sup>19</sup> Human Rights Watch Asia, *Prison Conditions in Japan* (Human Rights Watch Asia 1995) [www.hrw.org/sites/default/files/reports/JAPAN953.PDF](http://www.hrw.org/sites/default/files/reports/JAPAN953.PDF) accessed 2 April 2023, xiv; Kōichi Kikuta, *Nihon no keimusho* (Japan’s Prisons) (Iwanami Shoten 2002) 149-155.

<sup>20</sup> Human Rights Watch (1995) xiv; Kikuta (2002) 137-140, 139.

<sup>21</sup> Hiroshi Matsubara, ‘Abused by Prison Guards, Ex-con Still Haunted by Trauma’ *The Japan Times* (Tokyo, 2 October 2003) [www.japantimes.co.jp/news/2003/10/02/national/abused-by-prison-guards-ex-con-still-haunted-by-trauma/](http://www.japantimes.co.jp/news/2003/10/02/national/abused-by-prison-guards-ex-con-still-haunted-by-trauma/) accessed 2 April 2023; Bunji Sawanobori, ‘Reforming Administration of Prisons in Japan: Human Rights and Japanese Prison Law’ (2005) 68(2) *Saskatchewan Law Review* 145, 149-150; Carol Lawson, ‘Reforming Japanese Corrections: Catalysts and Conundrums’ in Leon Wolff, Luke Nottage and Kent Anderson (eds), *Who Rules Japan?: Popular Participation in the Japanese Legal Process* (Edward Elgar 2015) 145-147; Sylvia Croydon, ‘Prison Law Reform in Japan: How the Bureaucracy was Held to Account Over the Nagoya Prison Scandal’ (2016b) 14(5) *Asia Pacific Journal: Japan Focus* 1, 3-4.

<sup>22</sup> Sawanobori (2005) 149-150; Lawson (2015) 145-147; Croydon (2016b) 3-4.

<sup>23</sup> Hiroshi Matsubara, ‘Victim of Prison Guards Angry at Being Ignored’ *The Japan Times* (Tokyo, 5 April 2003) [www.japantimes.co.jp/news/2003/04/05/national/victim-of-prison-guards-angry-at-being-ignored/](http://www.japantimes.co.jp/news/2003/04/05/national/victim-of-prison-guards-angry-at-being-ignored/) accessed 2 April 2023; Philip Brasor, ‘Media Refuses to Aim Spotlight on Prison Life in Japan’ *The Japan Times* (Tokyo, 17 November 2002) [www.japantimes.co.jp/news/2002/11/17/national/media-national/media-refuses-to-aim-spotlight-on-prison-life-in-japan/](http://www.japantimes.co.jp/news/2002/11/17/national/media-national/media-refuses-to-aim-spotlight-on-prison-life-in-japan/) accessed 2 April 2023. See also Lawson (2015); Croydon (2016a).



The story exploded in the domestic press, with swift international syndication.<sup>24</sup> Minister of Justice Mayumi Moriyama's prompt assurances that the incidents were 'isolated' and that no prisoners had ever complained to her office backfired, exposing the government to ridicule, and providing leverage for public interest group and political actors. Within weeks, it became clear that use of the restraint was ubiquitous, and that staff were confiscating all prisoner complaints and petitions to prevent them reaching the Minister.<sup>25</sup> The Japanese media, fascinated by Japan's prisons for the first time, stoked fierce public outrage amid a firestorm of criticism from around the globe.<sup>26</sup> The scandal revealed Japanese prisons as more pariah than paragon. The timing was disastrous – not only just before Japan's periodic reports were due under the ICCPR and CAT,<sup>27</sup> but also just ahead of the UN General Assembly's late 2002 adoption of the international prison inspection regime in the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).<sup>28</sup> Japan abstained from voting, making a circumspect statement as to its position.<sup>29</sup>

Early attempts at mollifying domestic anger might have preserved the status quo.<sup>30</sup> However, in February 2003, both senior Correction Bureau officials and Minister Moriyama were found to have

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<sup>24</sup> See for example Takuya Asakura, 'Prison Abuses in Spotlight Following Guard Arrests' *The Japan Times* (Tokyo, 13 November 2002) [www.japantimes.co.jp/news/2002/11/13/national/prison-abuses-in-spotlight-following-guard-arrests/](http://www.japantimes.co.jp/news/2002/11/13/national/prison-abuses-in-spotlight-following-guard-arrests/) accessed 2 April 2023; Jonathon Watts, 'Inhumane behaviour: Revelations of Systematic Abuse at Nagoya Jail may be just the Tip of the Iceberg for Japan's Overcrowded and Secretive Penal System' *The Guardian* (London, 15 November 2002) [www.theguardian.com/world/2002/nov/15/worlddispatch.japan](http://www.theguardian.com/world/2002/nov/15/worlddispatch.japan) accessed 2 April 2023.

<sup>25</sup> Lawson (2015) 147; Croydon (2016b) 4-12. See also Masaharu Ozawa, *Gyōkei no kindai: keiji shisetsu to jukeisha shōgū no hensen* (The Modernisation of Penal Administration: Penal Institutions and the Treatment of Prisoners in Transition) (Nihon Hyōronsha 2014) 345.

<sup>26</sup> See, for example, Amnesty International, *Japan: Prison Abuses Must Stop* (2002) Index No. ASA 22/009/2002, 20 November [www.amnesty.org/en/documents/asa22/009/2002/en/](http://www.amnesty.org/en/documents/asa22/009/2002/en/) accessed 2 April 2023; John De Boer, 'Prison Conditions in Japan under Scrutiny' *Europe Report #32* (Japanese Institute of Global Communications Global Communications Platform, 22 November 2002) [www.glocom.org/special\\_topics/eu\\_report/20021122\\_eureport\\_s32/index.html](http://www.glocom.org/special_topics/eu_report/20021122_eureport_s32/index.html) accessed 2 April 2023; Jeff Vize, 'Torture, Forced Confessions and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System' (2003) 20 *Pacific Basin Law Journal* 329; Nishio (2004) 41.

<sup>27</sup> UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); UNGA, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

<sup>28</sup> UNGA, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT).

<sup>29</sup> Brasor (2002); UNGA, 'Official Records' 57th Session 77th Plenary Meeting (18 December 2002) UN Doc A/57/PV.77:

'...The Government of Japan is fully and consistently committed to the prevention of torture, which must not happen at any time anywhere in the world.... [Japan's] government wishes to actively engage in such undertakings to have the visiting mechanism to be established under the Optional Protocol effectively carry out its activities'.

<sup>30</sup> Lawson (2015) 149; Croydon (2016b) 15-16. See also Ministry of Justice, *Gyōkei unei ni kansuru chōsa kentō i'inkai: 'Gyōkei unei no jitsujō ni kansuru chūkan hōkoku' ni tsuite (yōshi)* (Committee for Deliberation on

misled the Diet concerning the events at Nagoya Prison and four opposition parties called for her resignation.<sup>31</sup> Pressure exerted by articulate advocates, in this case JFBA human rights attorneys, a newly sympathetic media, a public with a suddenly voracious desire to know and opposition politicians made legislative change inevitable.<sup>32</sup> By 31 March 2003, Moriyama had appointed a deliberative body made up of eminent citizens, the Correctional Administration Reform Council (CARC) and tasked it with producing a proposal to replace the Prison Act 1908 with new legislation.<sup>33</sup>

#### 4.1.2 CARC and the Ministry of Justice

CARC's membership and advisory board, numbering 16 in total, drew heavily on elderly male legal elites who had been educated before World War II and were the beneficiaries of Japan's conservative status quo.<sup>34</sup> A number had occupied high office<sup>35</sup> or had – it seems – served on numerous similar bodies in the past.<sup>36</sup> At least four were closely aligned with the interests of the Ministry of Justice, prosecutors, the judiciary and victims.<sup>37</sup> Other members had backgrounds in business, literature, the media or medicine.<sup>38</sup>

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Investigation into Correctional Operations: Summary of 'Interim Report concerning the State of Correctional Operations) 31 March 2003.

<sup>31</sup> Japan Times, 'Opposition calls for Moriyama to resign over prison abuse case' *The Japan Times* (Tokyo, 20 February 2003) [www.japantimes.co.jp/news/2003/02/20/national/opposition-calls-for-moriyama-to-resign-over-prison-abuse-case/](http://www.japantimes.co.jp/news/2003/02/20/national/opposition-calls-for-moriyama-to-resign-over-prison-abuse-case/) accessed 2 April 2023; Lawson (2015) 149; Croydon (2016b) 8-11.

<sup>32</sup> Lawson (2015) 148-149; Croydon (2016b) 12-16.

<sup>33</sup> Lawson (2015) 149; Hiroshi Matsubara, 'New Correctional Reform Panel Launched' *The Japan Times* (Tokyo, 1 April 2003) [www.japantimes.co.jp/news/2003/04/01/national/new-correctional-reform-panel-launched/](http://www.japantimes.co.jp/news/2003/04/01/national/new-correctional-reform-panel-launched/) accessed 2 April 2023.

<sup>34</sup> CARC, *Gyōkei kaikaku shingikai teigen: kokumin ni rikai sare, sasaeraru keimusho e* (Correctional Administrational Reform Council Proposal: Towards Prisons that will be Understood and Supported by the People) (22 December 2003) 51; Lawson (2015) 149; Croydon (2016b) 16. Thirteen of the 16 appointees were male; at least eight were past retirement age; and at least eight were legally qualified. See Kent Anderson and Mark Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspective' (2004) 37 *Vanderbilt Journal of Transnational Law* 935, 966-970.

<sup>35</sup> For example, Masaharu Gotōda, a former Deputy Prime Minister was appointed as an advisor, while Hiroshi Miyazawa, a former Minister of Justice and Governor of Hiroshima Prefecture, served as chair: Matsubara (1 April 2003).

<sup>36</sup> For example, the Wikipedia page of Hiromasa Minami, a former President of Seijō University and Emeritus Professor of the Hitotsubashi University Faculty of Law, lists a lifetime of service on dozens of policy and advisory boards, beginning in 1962: Wikipedia, 'Minami Hiromasa' (*Wikipedia*, 19 February 2023) <https://ja.wikipedia.org/wiki/%E5%8D%97%E5%8D%9A%E6%96%B9> accessed 2 April 2023. See also Shigeru Takahashi, 'Minami Hiromasa Sensei no hito to gyōseki (Professor Hiromasa Minami as a Man and Scholar) (1993) 110(1) *Hitotsubashi Ronsō* 14 <https://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/10932/1/ronso1100100140.pdf> accessed 2 April 2023.

<sup>37</sup> In addition to Hiroshi Miyazawa, Kōichi Miyazawa, who served as a Correctional Administration Reform Council (CARC) subcommittee chair, a criminal law scholar, had been instrumental in the victims of crime movement in the 1990s; Kazutomo Ijima, was a former elite prosecutor and Supreme Court Justice; Yukio Nozaki was a former Chief Justice of the Nagoya High Court.

<sup>38</sup> Matsubara (1 April 2003); CARC Proposal (2003) 51.

Just two had a history of advocacy for prisoners' rights and specific knowledge of corrections law and policy: Kōichi Kikuta, the veteran prisons activist attorney and scholar mentioned in Chapter 3 and Kazumasa Kuboi, a former JFBA President.<sup>39</sup> The inclusion of these two members can be seen as an example of the regulatory tripartism introduced in Chapter 2, which invites concerned public interest groups to participate in regulation.<sup>40</sup> In this case, the historical antagonism between the interests with which Kuboi and Kikuta were aligned and the MoJ suggests that they were expected to be a vocal dissident minority – 'zealous' public interest group representatives whose views would be heard but, in all likelihood, lack influence.<sup>41</sup>

While CARC had a wide remit and ample budgets, its tenure was brief – less than nine months.<sup>42</sup> The standard for its deliberations, approaching corrections as a matter of 'community common sense' rather than 'complex theories' was determined by the Ministry in advance, and its goal was vague – to create prisons 'that are understood and supported by the people'.<sup>43</sup> Moreover, it was functionally dependent on the Correction Bureau, which provided meeting space as well as administrative and research assistance.<sup>44</sup> Meetings took place at the MoJ headquarters in Tokyo's Kasumigaseki district.<sup>45</sup> Each subcommittee had a mid-ranked elite-track Correction Bureau official assigned full-time to advise on law, policy and practice, including during overseas prison visits.<sup>46</sup> The MoJ would later give all three the opportunity to lead the Correction Bureau, a development that is covered further in Chapter 10.<sup>47</sup> A range of other senior Correction Bureau personnel also

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<sup>39</sup> Shōko Egawa, a noted journalist and writer, later became a frequent media commentator on conditions in Japanese prisons, with a focus on the needs of women prisoners. Her articles can be accessed via Yahoo Japan Nyūsu, 'Komente-ta- ichiran: Egawa Shōko' (List of Commentators: Shōko Egawa) (Tokyo, nd) <https://news.yahoo.co.jp/byline/egawashoko?page=1#artList> accessed 2 April 2023.

<sup>40</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) ch 3.

<sup>41</sup> *ibid* 74-78.

<sup>42</sup> This short tenure was intended from the outset: Matsubara (1 April 2003).

<sup>43</sup> CARC Proposal (2003) 1, 2.

<sup>44</sup> CARC Proposal (2003) 2.

<sup>45</sup> The public record shows that meetings were held at the MoJ's Kasumigaseki headquarters, including in Supreme Public Prosecutor's Office and Correction Bureau facilities. See, for example, MoJ, *Gyōkei kaikaku kaigi dai-2-kai kaigi: kaiji gaiyō* (Outline of the 2<sup>nd</sup> Meeting of CARC) (19 May 2003).

<sup>46</sup> The Subcommittee minutes show that Hiroshi Nishida assisted Subcommittee 3, Satoshi Tomiyama assisted Subcommittee 1 and Satoru Ōhashi assisted Subcommittee 2. Tomiyama accompanied the CARC visits to France and England; Ōhashi accompanied the visits to France and Germany: MoJ, *Gyōkei kaikaku kaigi dai-7-kai kaigi giji gaiyō: besshi 1 - Gyōkei kaikaku kaigi kaigai shisatsu kekka hōkokusho* (Outline Attachment 1: 7<sup>th</sup> Meeting of CARC - Report on Findings of Overseas Visits) (17 November 2003) [www.moj.go.jp/content/000002334.pdf](http://www.moj.go.jp/content/000002334.pdf) accessed 2 April 2023, 1.

<sup>47</sup> In 2014, Nishida became the first Director-General of the Correction Bureau to be appointed from within rather than from among elite prosecutors; Tomiyama became the third in 2016; Ōhashi became the fifth in 2020. See further Carol Lawson, 'Japan: Satoshi Tomiyama, Director General of the Correction Bureau' in Dilip K Das and Philip Birch (eds), *Trends in Corrections: Interviews with Corrections Leaders Around the World* (Routledge 2020).

provided briefings and gave their views on the challenges faced by prisons, with preferred solutions.<sup>48</sup>

In this way, despite CARC being independent of the Correction Bureau on paper, they were mutually embedded institutions in practice. This meant that issues that might have emerged as human rights concerns, albeit with operational implications, were primarily approached as operational problems. For example, discussions concerning the lack of social workers and psychologists were framed in terms of the difficulties that the lack of these specialists created for custodial officers.<sup>49</sup>

While CARC deliberations were as thorough, wide-ranging, and conscientious as possible in the circumstances, the stain on Japan's international reputation was also not far from mind. Comments made to the inaugural meeting by the CARC chair, Hiroshi Miyazawa – then aged 82 – are illustrative:

For the sake of the children who will rise to inherit the world, we should aim to realise correctional administration that does not embarrass us in front of other countries.<sup>50</sup>

All these factors allowed the Correction Bureau to place 'intricate meshes' of control over the content of the reforms.<sup>51</sup> At the end of CARC's tenure, CARC noted that most of its members knew little of prisons – and expressed appreciation for the Bureau's generous administrative assistance,<sup>52</sup> which had included information on its own long-cherished reform agenda and failed bills. The fierce activism of public interest group and political actors with overt human rights agendas across the winter of 2002-2003, magnified by Minister Moriyama's missteps, had determined the reforms' timing. However, the establishment of CARC as notionally independent, but physically embedded in and reliant on the Correction Bureau neatly captured the reform agenda and delivered it safely back into bureaucratic hands.<sup>53</sup>

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<sup>48</sup> See, for example, MoJ, *Gyōkei kaikaku kaigi dai-san bunkakai dai-4-kai kaigi: kaiji gaiyō* (Outline of the 4<sup>th</sup> Meeting of CARC Subcommittee 3 (6 October 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_bunka03\\_gaiyou04.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_bunka03_gaiyou04.html) accessed 2 April 2023; MoJ, *Gyōkei kaikaku kaigi dai-san bunkakai dai-4-kai kaigi: gijiroku* (Minutes of the 4<sup>th</sup> Meeting of CARC Subcommittee 3 (6 October 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_bunka03\\_gijiroku04.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_bunka03_gijiroku04.html) accessed 2 April 2023.

<sup>49</sup> MoJ Correction Bureau, *Gyōkei kaikaku kaigi dai-3 bunkakai dai-5-kai kaigi giji gaiyō: besshi 6 - Keimukan no shokumu to senmonkan sei no dōnyū ni suite* (Outline Attachment 6: 5<sup>th</sup> Meeting of CARC Subcommittee 3: Corrections Officers' Duties and the Introduction of Specialist Officers) (27 October 2003) [www.moj.go.jp/content/000002298.pdf](http://www.moj.go.jp/content/000002298.pdf) accessed 2 April 2023.

<sup>50</sup> MoJ, *Gyōkei kaikaku kaigi dai-1-kai kaigi: kaiji gaiyō* (Outline of the 1st Meeting of the CARC) (14 April 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_kaiji\\_gaiyou01.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_kaiji_gaiyou01.html) accessed 2 April 2023, (translation mine).

<sup>51</sup> Hidaka (1986) 245.

<sup>52</sup> CARC Proposal (2003) 5-6.

<sup>53</sup> See Lawson (2015). In this context, 'capture' refers to where the regulator, in this case CARC, frames issues from the perspective of the regulated industry, in this case the corrections sector, rather than the broader public interest: John Braithwaite and Peter Grabosky, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press 1986) 198-200; Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12(1) *Journal of Public Policy* 61.

The use of policy councils dominated by older male legal elites to capture and control law reform agendas is not limited to the corrections context in Japan. Studies by Noble;<sup>54</sup> Anderson and Nolan;<sup>55</sup> and Kojima, North and Weathers;<sup>56</sup> have all noted the deployment of this governance technique to ensure that policy recommendations track closely to bureaucratic and ruling party preferences.

#### *CARC's workflow*

Given an entire penal system to redesign in under nine months, CARC members set about their activities with vigour. They held public consultations; heard public interest group submissions – including from Amnesty International Japan and the Centre for Prisoners Rights; visited six Japanese prisons; and instructed the Correction Bureau to conduct prisoner and staff surveys and report the results – while also meeting ten times as a whole and eight or nine times as subcommittees.<sup>57</sup> Having subcommittees helped to cover the range of topics needing attention; it also facilitated brief visits to local prisons as well as those in Europe and the United Kingdom.<sup>58</sup>

Expanding civil participation in criminal justice was a guiding principle of the newly launched justice system reforms under the *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21<sup>st</sup> Century*,<sup>59</sup> and we saw in Chapter 3 that a basic proposal for wardens to consider the opinions of external advisors on prison operations was part of the failed 1993 reform bill. It followed that there was no resistance to a JFBA request through Kuboi for the inclusion of civil oversight.<sup>60</sup>

Subcommittee 2 members sought briefings before visiting prisons and administrative bodies in England, France and Germany to assess the merits of the soft civil oversight mechanisms in each jurisdiction.<sup>61</sup> When a Correction Bureau official briefed Subcommittee 2 on all three models it was clear that the French Commission de Surveillance for each prison met as little as once each year and

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<sup>54</sup> Gregory Noble, 'Freer Discussion of Predetermined Agendas: Reform and Continuity in Japan's *Shingikai* Deliberation Councils' in JAA Stockwin, Jennifer Amyx and Gregory Noble (eds), *Toward Reform and Transparency in Policymaking Processes* (Australia Japan Research Centre 2000).

<sup>55</sup> Kent Anderson and Mark Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspective' (2004) 37 *Vanderbilt Journal of Transnational Law* 935, 966-970.

<sup>56</sup> Shinji Kojima, Scott North and Charles Weathers, 'Abe Shinzō's Campaign to Reform the Japanese Way of Work' (2017) 15(23) 3 *The Asia-Pacific Journal: Japan Focus* 1.

<sup>57</sup> CARC (2003) 6-7, 56-59.

<sup>58</sup> *ibid* 59.

<sup>59</sup> JSRC (2001) ch IV.

<sup>60</sup> Kazumasa Kuboi, *Gyōkei kaikaku kaigi dai-4-kai kaigi giji gaiyō: besshi 8 – Gyōkei kaikaku no arikata ni tsuite* (Outline Attachment 8: 4<sup>th</sup> Meeting of the CARC: Japan's Corrections Administration: The Best Way Forward) (7 July 2003; submitted 14 July 2003) [www.moj.go.jp/content/000002316.pdf](http://www.moj.go.jp/content/000002316.pdf) accessed 2 April 2023.

<sup>61</sup> These visits took place across 8-19 October 2003: CARC Proposal (2003) 59.

when visited, French staff openly contradicted their prisons administration,<sup>62</sup> although the French prison appealed as a relaxed, normalised institution.<sup>63</sup> As the JFBA had proposed a powerful, independent oversight body,<sup>64</sup> the Subcommittee invited a Japanese scholar, Masakazu Doi, to present on the various prison oversight bodies in the United Kingdom.<sup>65</sup> However, CARC members visited only the UK Independent Monitoring Board (IMB) head office, finding that the IMBs had only just emerged from the previous Boards of Visitors structure and were struggling to recruit volunteer overseers, while Whitemoor, a maximum-security prison, was a tense, dangerous facility.<sup>66</sup>

#### *Anstaltsbeiräte advisory boards model*

German law expert Kōichi Miyazawa attended a Subcommittee 2 meeting to present an approving scholarly appraisal of the German soft civil oversight arrangements from a legal and administrative perspective.<sup>67</sup> He described the *Anstaltsbeiräte* advisory boards as a stable oversight institution,<sup>68</sup> which had fulfilled a limited but supportive role for German prisons since 1846.<sup>69</sup> Visits to two prisons in Berlin provided a positive impression of the normalised, dormitory-like atmosphere and constructive relationship between staff and prisoners.<sup>70</sup> It also appeared that *Anstaltsbeiräte* had three aims, to increase the transparency of prison operations, to support the warden – including by mediating in disputes and persuading prisoners to understand the prison’s position and to raise awareness in the local community of the prison’s contribution to society.<sup>71</sup>

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<sup>62</sup> MoJ Correction Bureau, *Gyōkei kaikaku kaigi dai-2 bunkakai dai-2-kai kaigi giji gaiyō: besshi 2 - jōhō no kōkai to gyōkei shisetsu o kanshi suru tame no i'inkai ni tsuite* (Outline Attachment 2: 2<sup>nd</sup> Meeting of CARC Subcommittee 2: Concerning Freedom of Information and Monitoring Committees for Penal Facilities) (22 September 2003) [www.moj.go.jp/content/000002262.pdf](http://www.moj.go.jp/content/000002262.pdf) accessed 2 April 2023, 4-5.

<sup>63</sup> MoJ, *Gyōkei kaikaku kaigi dai-2 bunkakai dai-5-kai kaigi: gijiroku* (Minutes of the 5th Meeting of CARC Subcommittee 2) (28 October 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_bunka02\\_gijiroku05.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_bunka02_gijiroku05.html) accessed 2 April 2023. ‘Normalisation’ is a key European penological concept that involves ensuring that life in prison resembles life in the community to the greatest degree possible. See generally Ram Subramanian and Alison Shames, ‘Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States’ (2014) 27(1) *Federal Sentencing Reporter* 33.

<sup>64</sup> Kuboi (2003).

<sup>65</sup> Masakazu Doi, *Gyōkei kaikaku kaigi dai-2 bunkakai dai-5-kai kaigi giji gaiyō: besshi 1 - Igirisu ni okeru keimusho no tōmeisei no kakuho ni tsuite* (Outline Attachment 1: 5<sup>th</sup> Meeting of CARC Subcommittee 2: Securing Prison Accountability in England) (29 September 2003) [www.moj.go.jp/content/000002263.pdf](http://www.moj.go.jp/content/000002263.pdf) accessed 2 April 2023.

<sup>66</sup> MoJ (28 October 2003).

<sup>67</sup> Kōichi Miyazawa, *Gyōkei kaikaku kaigi dai-2 bunkakai dai-4-kai kaigi giji gaiyō: besshi 1 - Shisetsu shingikai (Anstaltsbeirät) to kenri kyūsai (Rechtsbehelfe)* (Outline Attachment 1: 4<sup>th</sup> Meeting of CARC Subcommittee 2 - Institutional Advisory Boards (Anstaltsbeirät) and Legal Remedies (Rechtsbehelfe)) (6 October 2003) [www.moj.go.jp/content/000002265.pdf](http://www.moj.go.jp/content/000002265.pdf) accessed 2 April 2023.

<sup>68</sup> See also Chapter 1.

<sup>69</sup> Kōichi Miyazawa (2003) 1-2.

<sup>70</sup> MoJ (28 October 2003).

<sup>71</sup> MoJ (28 October 2003).



Public interest groups also offered their own ideas. The Keiji Rippō Kenkyūkai (Society for Penal Reform) published its edited volume on civil participation in penal settings while CARC was meeting in mid-2003, including a detailed annotated version of its own updated legislative proposal.<sup>72</sup> The CD-ROM included in this work contains a dramatisation of how Japan's prisons would apply the proposal at each stage of a sentence as modern, therapeutic institutions prioritizing prisoner dignity and autonomy.<sup>73</sup>

However, the report submitted to CARC as a whole by the members who had travelled to Europe and England on 17 November 2003 recommended the German model.<sup>74</sup> Prisons activist CARC member Kōichi Kikuta, who served on Subcommittee 1, made a written submission late in the year, objecting to the support of Subcommittee 2 for the German model and calling for a powerful, independent body in line with the JFBA proposal put forward by Kuboi.<sup>75</sup>

We saw in Chapters 1 and 2 that Germany's multi-layered external prison oversight landscape has long played a practical, human rights-focused role in the 'smart' networked regulation of prisons. The Constitutional Court has become increasingly protective of prisoners' rights under the 1949 Constitution.<sup>76</sup> Having acceded to the Council of Europe in 1950 and ratified the European Convention on Human Rights in 1952,<sup>77</sup> Germany is also under the jurisdiction of the European Court of Human Rights, which has also become more interventionist over time, including in its application of the European Prison Rules, originally adopted in 1973.<sup>78</sup> The first federal prisons legislation in

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<sup>72</sup> Following earlier proposals in 1991 and 1996, which are discussed in Chapter 3: Keiji Rippō Kenkyūkai (ed), *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Standard and Citizen Participation) (Nihon Hyōronsha 2003) 76, 79.

<sup>73</sup> *ibid* 67-75.

<sup>74</sup> MoJ, *Gyōkei kaikaku kaigi dai-7-kai kaigi giji gaiyō: besshi 1 - Gyōkei kaikaku kaigi kaigai shisatsu kekka hōkokusho* (Outline Attachment 1: 7<sup>th</sup> Meeting of CARC - Report on Findings of Overseas Visits) (17 November 2003) [www.moj.go.jp/content/000002334.pdf](http://www.moj.go.jp/content/000002334.pdf) accessed 2 April 2023, 74-75, 78.

<sup>75</sup> Kōichi Kikuta, *Gyōkei kaikaku kaigi dai-2 bunkakai dai-8-kai kaigi giji gaiyō: besshi 3 - Bunkakai hōkoku (11-gatsu 17-nichi) ni taisuru ikensho* (Outline Attachment 3: 8<sup>th</sup> Meeting of CARC: Opinion regarding the CARC Subcommittees Report of 17 November 2003) (25 November 2003) [www.moj.go.jp/content/000002276.pdf](http://www.moj.go.jp/content/000002276.pdf) accessed 2 April 2023.

<sup>76</sup> Basic Law for the Federal Republic of Germany 1949; Frieder Dünkler and Christine Morgenstern, 'The Monitoring of Prisons in German Law and Practice' (2018) 70 *Crime Law and Social Change* 93; Mary Rogan and Christine Morgenstern, '"One Always Looks for a Compromise..." Senior Prison Managers Views of Law, Human Rights and Oversight in Germany' (2021) Freie Universität Empirical Legal Studies Center Working Paper No. 9, [www.jura.fu-berlin.de/en/forschung/fuels/Research-Output/Working-Papers/FUELS\\_WP\\_Prisons\\_Human\\_Rights.pdf](http://www.jura.fu-berlin.de/en/forschung/fuels/Research-Output/Working-Papers/FUELS_WP_Prisons_Human_Rights.pdf) accessed 2 April 2023.

<sup>77</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (ECHR).

<sup>78</sup> Council of Europe Committee of Ministers, Recommendation Rec (2006) 2-rev of the Committee of Ministers to Member States on the European Prison Rules, 1 July 2020 (EPR); Gaëtan Cliquennois and Sonja Snacken, 'European and United Nations Monitoring of Penal and Prison Policies as a Source of an Inverted Panopticon?' (2018) 70 *Crime Law and Social Change* 1, 3-15.

Germany, the Prison Act 1976 also significantly strengthened protections.<sup>79</sup> Three layers of external inspection were established when Germany ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1990,<sup>80</sup> and followed with OPCAT ratification in 2008.<sup>81</sup> In sum, even as of 2003, there had long been a profound societal consensus in Germany, established in the long shadow of Nazism, which had made enforcing prisoners' human rights a national imperative, resulting in prisons that were overtly therapeutic, emphasising normalisation, autonomy and dignity.<sup>82</sup>

However, there is no suggestion of any association between this inspiring outcome and the activities of the *Anstaltsbeiräte* advisory boards. Rather, they emerge as an historical relic, in quiet decline over decades<sup>83</sup> as the 'smart' regulatory network above them grew in rigour and influence.

Accordingly, CARC's decision to emulate this regulatory mechanism meant selecting an outmoded model that sat outside the well-developed and integrated contemporary regulatory landscape surrounding German prisons. It seems that several factors mitigated in the low-key *Anstaltsbeiräte* model's favour: its compatibility with known MoJ preferences; Kōichi Miyazawa's approving scholarly appraisal; and the CARC members' superficial impression of the role of these bodies as having a benign role in German prison governance, gained during their brief visit to Europe.

#### 4.1.3 CARC's oversight proposal

One of the rationales for establishing CARC was to dampen the public outrage that had erupted in November 2002. This goal found expression in the new Correction Bureau slogan, articulated by Minister of Justice Moriyama at CARC's first meeting as the primary goal of the reforms: 'Prisons that are Understood and Supported by the People'.<sup>84</sup> Setting up this deliberative body was the first salvo in a sustained public relations campaign aimed at rebranding Japanese prisons; replacing revelations

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<sup>79</sup> Act on the Execution of Prison Sentences and Measures of Reform and Prevention involving Deprivation of Liberty (Prison Act) 1976; Dünkel and Morgenstern (2018); Rogan and Morgenstern (2021).

<sup>80</sup> Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126 (ECAT). See generally Malcolm D Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press 1998)

<sup>81</sup> OPCAT (2002).

<sup>82</sup> For a contemporaneous study, see Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford University Press 2004).

<sup>83</sup> See generally Jon Vagg, *Prison Systems: A Comparative Study of Accountability in England, France, Germany and The Netherlands* (Clarendon Press 1994); Frieder Dünkel and Dieter Rossner, 'Germany' in Dirk van Zyl Smit and Frieder Dünkel (eds), *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* (2nd edn, Kluwer Law International 2001) 318.

<sup>84</sup> MoJ, *Gyōkei kaikaku kaigi dai-1-kai kaigi: gijiroku* (Minutes of the 1st Meeting of the Correctional Administration Reform Council) (14 April 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_kaigi\\_gijiroku01.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_kaigi_gijiroku01.html) accessed 2 April 2023.



of cruelty and abuse with comforting, appealing narratives.<sup>85</sup> As David Johnson has noted, in the ‘matter[s] immensely’ in Japanese criminal justice.<sup>86</sup>

Reassuring the public and existing stakeholders after a crisis is also a pragmatic strategy. In Japan’s prisons, overcrowding was yet to peak and putting the entire system under severe strain, but the Correction Bureau was now obliged to demonstrate good faith by hiring a significant number of new staff – with a range of skills.<sup>87</sup> Prisons mired in tales of Gothic horror are hardly employers of choice. Prisons also had to retain and protect the mental health of existing staff, who were demoralised by the scandal and prepare them for unfamiliar expectations under new legislation.<sup>88</sup> Moreover, prisons could not afford to lose the small army of volunteers on whom they had always relied, including charitable visitors and prison chaplains,<sup>89</sup> not to mention their relationships with the manufacturing businesses that supplied work to prison factories.<sup>90</sup> The oversight committees would contribute to two new public relations strategies repeatedly discussed by CARC; regular disclosure of benign information on prison operations and connecting each prison with local community leaders.<sup>91</sup>

### *Framing prisoners*

Although CARC had the Correction Bureau conduct a prisoner survey on its behalf during its tenure,<sup>92</sup> it did not perceive offenders as stakeholders. Japanese prisons have no prisoner representative bodies,<sup>93</sup> and there are no ex-offenders among Japanese prisons scholars. There were also no ex-offenders among the CARC members. Moreover, CARC did not speak to the individual who had survived the Nagoya Prison Scandal, although they did hear short oral submissions by two former prisoners, both of whom had published prison memoirs.<sup>94</sup>

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<sup>85</sup> Lawson (2015) 37-39.

<sup>86</sup> David T Johnson, ‘Criminal Justice in Japan’ in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007b) 363.

<sup>87</sup> CARC Proposal (2003) 47-48.

<sup>88</sup> *ibid.*

<sup>89</sup> MoJ Correction Bureau (22 September 2003) 15-16.

<sup>90</sup> See generally Setsuo Miyazawa, ‘The Private Sector and Law Enforcement in Japan’ in William T Gormley (ed), *Privatisation and its Alternatives* (University of Wisconsin Press 1991).

<sup>91</sup> MoJ Correction Bureau (22 September 2003) 2; CARC Proposal (2003) 10, 29-31.

<sup>92</sup> Results were reported on 20 October 2003. See MoJ, *Gyōkei kaikaku kaigi dai-6-kai kaigi: kaiji gaiyō* (Outline of the 6<sup>th</sup> Meeting of CARC) (20 October 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_kaigi\\_gaiyou06.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_kaigi_gaiyou06.html) accessed 2 April 2023.

<sup>93</sup> In an historical exception, an unauthorised Tōitsu Gokuchūsha Kumiai (Japan Prisoner Union) was founded in 1974 by prisoners associated with Japan’s New Left and Red Army and their supporters: Emi Akiyama, ‘Minority and Human Rights: Torture, Penal Reform and Prisoners’ Rights’ in Jennifer Chan (ed), *Another Japan is Possible: New Social Movements and Global Citizenship Education* (Stanford University Press 2008) 302. See also Kōji Takazawa, Shirō Sanaga and Ryōichi Matsumura (eds), *Sengo kakumei undō jiten* [Dictionary of Japan’s Postwar Revolutionary Movement] (Shinchōsha 1985).

<sup>94</sup> Jōji Abe (1937-2019) and Kazuichi Hanawa (1947- ). See *Gyōkei kaikaku kaigi dai-2-kai kaigi: gijiroku* (Minutes of the 3<sup>rd</sup> Meeting of CARC (16 June 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_kaigi\\_gijiroku03.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_kaigi_gijiroku03.html) accessed 2 April 2023.

Yet perceptions of prisoners as inherently deserving harsh treatment weakened in some quarters,<sup>95</sup> even as the victims' rights lobby continued to dominate public and political sympathies. The human rights discourse encouraged by Japanese and international NGOs in the 1990s concerning Japanese prison conditions now influenced a wider range of scholarly works as criminology and penology research communities re-evaluated Japanese corrections.<sup>96</sup>

In December 2003, as CARC presented its Proposal to the new Minister of Justice, Daizō Nozawa,<sup>97</sup> the publication of former Diet member Joji Yamamoto's prizewinning prison memoir added weight to the nascent sympathy for at least some prisoners.<sup>98</sup> Yamamoto wrote of his dismay at the complex, unmet needs of fellow prisoners with physical or intellectual disabilities, or chronic mental illness, who had spent much of their adult lives incarcerated due to their poor coping skills and a lack of welfare-based alternatives.<sup>99</sup> Yamamoto's high profile and compelling prose meant this work reached political and policy-making circles.

#### *Framing oversight committees*

The CARC Proposal 2003 sketched out the aims and proposed features of the new oversight committees. They were to 'deepen ties with the local community'; help prisons become institutions that 'are understood and supported by the people'; and 'increase transparency'.<sup>100</sup> Prisons were to 'consider' their oversight committee's views in order to 'reflect society's common sense'.<sup>101</sup> The Proposal states that Japan's need is for German-style bodies that support the prison administration.<sup>102</sup> These bodies would help to improve governance by listening to individual prisoners' concerns, and relaying any concerns to wardens.<sup>103</sup> Knowing that information about

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<sup>95</sup> Lawson (2015).

<sup>96</sup> Notably, Keiji Rippō Kenkyūkai (ed), *Nyūmon Kangoku Kaikaku* (Introduction to Prison Reform) (Nihon Hyōronsha 1996); Keiji Rippō Kenkyūkai, *21-seiki no keiji shisetsu: gurōbaru sutanda-do to shimin sankā* (21<sup>st</sup> Century Penal Institutions: Global Perspective and Citizen Participation) (Nihon Hyōronsha 2003).

<sup>97</sup> CARC Proposal (2003); MoJ, *Gyōkei kaikaku kaigi dai-10-kai kaigi: gijiroku* (Minutes of the 10<sup>th</sup> Meeting of CARC) (22 December 2003) [www.moj.go.jp/shingi1/kanbou\\_gyokei\\_kaigi\\_gijiroku10.html](http://www.moj.go.jp/shingi1/kanbou_gyokei_kaigi_gijiroku10.html) accessed 2 April 2023.

<sup>98</sup> Jōji Yamamoto, *Gokusōki* (Prison Diary) (Poplar 2003) won the Shinchō Document Prize in 2004 and was dramatised by TBS Television in April 2005: Jōji Yamamoto, *Gokusōki* (Prison Diary) 114 mins (Susumu Ōoka dr, TBS 2005).

<sup>99</sup> *ibid.* See also Masami Itō, 'Jōji Yamamoto: Time to Serve' *The Japan Times* (Tokyo, 5 December 2004); Jōji Yamamoto, *Keimusho shika ibasho ga nai hitotachi: gakkō de wa oshiete kurenai shōgai to hanzai no hanashi* (The People Who have Nowhere Else to Go but Prison: What they Don't Teach You in School about Disability and Crime) (Ōtsuki Shoten 2018).

<sup>100</sup> CARC (2003) 10

<sup>101</sup> *ibid* 10-11.

<sup>102</sup> *ibid.*

<sup>103</sup> *ibid* 27.

misconduct might reach the outside world through oversight committees would help staff ‘reflect on their conduct’ and self-regulate.<sup>104</sup>

The oral assurance given to the new Minister by Hiromasa Minami, Subcommittee 2 chair, during the final CARC meeting in late 2003 encapsulates CARC’s view on the proper role of civil oversight.<sup>105</sup>

While we have proposed civil oversight bodies ... namely Visiting Committees and Appeals Boards ... this is not intended to hamper correctional administration but to increase prisons’ self-governance capacity and public confidence.

Overall, CARC’s tenure saw the Correction Bureau decisively regain control of the correctional domain, wrenching it out of the hands of the public, the victims of crime movement, the media and the political forces that had passed ‘tough on crime’ reforms, not to mention the hands of the police, prosecutors, and courts. In other words, the Nagoya Prison Scandal offered the Correction Bureau a timely opportunity to reassert its expertise and reorient prisons towards its internal priorities.

#### 4.2 Penal Institution Visiting Committees in the Penal Detention Act 2005

The Diet enacted Japan’s new prisons legislation in two stages, a year apart,<sup>106</sup> due to the protracted negotiations needed to settle the future of the ‘substitute prison’ system. By June 2007, the new legislation was complete and in force as the *Keiji shūyo shisetsu oyobi shūyōsha to no shogū ni kansuru hōritsu* (Act on Penal Detention Facilities and the Treatment of Inmates and Detainees) 2005 (Penal Detention Act).<sup>107</sup> In the end, the JFBA had withdrawn its opposition on the condition of strict separation between arresting and custodial officers and the replication of the Visiting Committee system for police cells.<sup>108</sup> As Kawai notes, changes in Japanese law that may appear sudden are typically not.<sup>109</sup> The new legislation largely tracked to the existing Correction Bureau reform agenda, with additional touches approved by CARC, including a diluted version of the German *Anstaltsbeiräte*

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<sup>104</sup> *ibid* 27-29.

<sup>105</sup> MoJ (22 December 2003) (translation mine).

<sup>106</sup> The *Keiji shisetsu oyobi jukeisha no shōgū ni kansuru hōritsu* (Act on Penal Institutions and the Treatment of Sentenced Inmates 2005 which took effect in May 2006, covered only prisons. In June 2006, an amending act, which took effect in May 2007, changed the name of the new prisons legislation to its current form and extended this legislation to the detention of unsentenced and death row prisoners in Detention Houses and suspects in police cells.

<sup>107</sup> A provisional English translation is available at [www.japaneselawtranslation.go.jp/en/laws/view/2796](http://www.japaneselawtranslation.go.jp/en/laws/view/2796) accessed 2 April 2023.

<sup>108</sup> See Penal Detention Act 2005 arts 16, 20-24. As of 2004, over 98% of suspects remained in police cells pending charge, a drop from 18.5% in 1971: MoJ, *Dai 1-kai miketsu kōkinsha no shogū to ni kansuru yūshikisha kaigi – haifu shiryō: ryūchi higisha no kōchisho e no ryūchi wariiai no sui’i* (1st Meeting of the Expert Committee on the Treatment of Unsentenced Detainees: Trends in Share of Suspects Transferred to Detention Houses) (6 December 2005) [www.moj.go.jp/KYOUSEI/SYOGU/shiryo01-01.pdf](http://www.moj.go.jp/KYOUSEI/SYOGU/shiryo01-01.pdf) accessed 2 April 2023, 6-1. See also Croydon (2016a).

<sup>109</sup> Kawai (2014) 115.

advisory boards model.<sup>110</sup> The frequent references to prisoners' 'humanity' and 'human rights' in the CARC Proposal 2003 are trimmed to four references to 'human rights': one in Article 1 and the others in provisions referring to staff training for corrections officers, police and coast guard officers.<sup>111</sup>

The Penal Detention Act 2005 art 7(1) established oversight committees in each of Japan's then 77 main prisons and detention houses.<sup>112</sup> Under art 7(2), committees have only two statutory duties. They are to 'inspect' the prison and provide their 'opinions' to the warden, on the 'administration' of the penal institution. In a subtle shift of emphasis, which situates prisons rather than prisoners at the centre of overseers' concerns, references to the administration of the prison appear four times in the few provisions concerning the oversight system.<sup>113</sup> Art 8(1) stipulates a maximum of 10 members. Art 8(2) stipulates that members should be 'persons with a high level of integrity and insight', who are 'are enthusiastic about improving the administration of penal institutions'.<sup>114</sup> Arts 8(3) and (4) stipulate a one-year renewable term.

As is common with Japanese legislation, the text is compact, with *gyōsei shidō* (administrative guidance) supplying detailed instructions on how it is to be implemented. All Japanese ministries are authorised by *Kokka gyōsei soshiki hō* (National Government Organisation Act) 1948 art 14(2)<sup>115</sup> and Chapter IV of the *Gyōsei tetsutsuki hō* (Administrative Procedure Act) 1993<sup>116</sup> to issue various types of *gyōsei shidō* (administrative guidance). This 'guidance' is not formally binding, but in practice regulates the relevant field.<sup>117</sup>

The MoJ Correction Bureau instructs the actors who animate the civil oversight system through two kinds of administrative guidance. The first comprises ministerial instructions to wardens issued on 23 May 2006, the *Heisei 18-nen 5-gatsu 23-nichi Homushō kyōsō tsūtatsu dai 3255 gō* (Ministry of

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<sup>110</sup> For example, *Anstaltsbeiräte* advisory board members may visit prisoners privately in their cells unaccompanied: Vagg (1994) 37. See further Chapter 7.

<sup>111</sup> Penal Detention Act 2005 art 1 provides:

The objective of this Act is to ensure the adequate treatment of inmates, detainees, and Coast Guard detainees by respecting their human rights and taking into account their circumstances, as well as appropriately managing and administering penal detention facilities ...

See also arts 13, 16 and 26.

<sup>112</sup> Japan had 73 penal institutions and 105 branch facilities in April 2022: MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) <https://hakusyo1.moj.go.jp/jp/69/nfm/mokuji.html> accessed 2 April 2023, Section 2-4-1.

<sup>113</sup> Penal Detention Act 2005 arts 7(2), 8(2), 9(1) and 9(2).

<sup>114</sup> The current provisional English translation mistranslates *netsui* (zeal, enthusiasm) as 'have an interest in'. See also Aya Kuwayama 'Exploring the Possibility of Designating a National Preventative Mechanism in Japan' (2010) 6 *Essex Human Rights Review* 125, 126.

<sup>115</sup> A provisional translation is available at [www.japaneselawtranslation.go.jp/en/laws/view/3766](http://www.japaneselawtranslation.go.jp/en/laws/view/3766) accessed 2 April 2023.

<sup>116</sup> A provision translation is available at [www.japaneselawtranslation.go.jp/en/laws/view/2874](http://www.japaneselawtranslation.go.jp/en/laws/view/2874) accessed 2 April 2023.

<sup>117</sup> This is in contrast to 'ministerial ordinances' under Penal Detention Act 2005 art 8(5), which are delegated legislation with binding force.

Justice Correction Bureau General Affairs Division Directive No. 3255 of 23 May 2006; Directive to Wardens), which is a publicly available document.<sup>118</sup> The second is a slim Correction Bureau manual distributed solely to new committee members, the *Heisei 27-nen 8-gatsu 11-nichi Hōmushō kyōseikyoku keiji shisetsu shisatsu i'inkai katsudō no tebiki* (Guide for Penal Institution Visiting Committee Activities 11 August 2015; Ministry Guide for Overseers).<sup>119</sup>

A *tsūtatsu* (directive) is a type of administrative guidance that conveys detailed instructions from the upper echelons of a ministry to those charged with administering legislation and regulations.<sup>120</sup> In contrast, the Ministry Guide for Overseers has no formal legal status. The JFBA offers its own alternative guide for new Visiting Committee members<sup>121</sup> and twice-annual training days in Tokyo for Visiting Committee chairs, who are typically attorneys, as we will see in Chapter 7.<sup>122</sup>

#### 4.2.1 Control through ‘administrative guidance’

As two administrative guidance documents both flesh out and limit the application of the legislative provisions, the blueprint for the Japanese oversight system can only be assessed by viewing the statutory provisions and the administrative guidance in tandem.

Neither of the MoJ administrative guidance documents mention prisoners’ ‘human rights’ although the Ministry Guide for Overseers 2015 cites two of the portions of the CARC Proposal 2003 that refer to ‘prisoners’ humanity’.<sup>123</sup> The Ministry Guide does emphasise overseers’ ‘neutrality’<sup>124</sup> and ‘independence.’<sup>125</sup> However, it is Correction Bureau officials who approve, hire and pay overseers and Ministry Guide 2015 also states that as they are appointed as casual<sup>126</sup> civil servants, they are covered by the workers compensation scheme – and bound by the duty of secrecy – that apply to these personnel.<sup>127</sup>

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<sup>118</sup> Amended three times, all prior to this study. See [www.moj.go.jp/content/000074535.pdf](http://www.moj.go.jp/content/000074535.pdf) accessed 2 April 2023.

<sup>119</sup> While the Ministry Guide for Overseers is subject to a basic secrecy classification, the Correction Bureau made a copy available for research purposes. This document is updated periodically. This study refers to the August 2015 version.

<sup>120</sup> Colin PA Jones and Frank S Ravitch, *The Japanese Legal System* (West Academic Publishing 2018) 134.

<sup>121</sup> *Keiji shisetsu shisatsu i'inkai no katsudō jūjitsu no tame ni* (Enhancing the Activities of Penal Institution Visiting Committees) (Japan Federation of Bar Associations 2015) [www.nichibenren.or.jp/library/ja/publication/booklet/data/keijishisetsuiinkai.pdf](http://www.nichibenren.or.jp/library/ja/publication/booklet/data/keijishisetsuiinkai.pdf) accessed 2 April 2023.

<sup>122</sup> I quietly observed the JFBA training sessions for Committee chairs on 13 July 2016. They attend from across Japan at their own expense.

<sup>123</sup> Ministry Guide for Overseers 2015, 1.

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid* 9, citing the CARC Proposal (2003).

<sup>126</sup> The term ‘part-time’ in the provisional translation of Penal Detention Act 2005 art 8(5) is a mistranslation.

<sup>127</sup> *ibid* 1, 6, 15. See *Kokka kōmuin hō* (National Public Service Act) 1947 [www.japaneselawtranslation.go.jp/en/laws/view/4283](http://www.japaneselawtranslation.go.jp/en/laws/view/4283) accessed 2 April 2023, art 100.

The Ministry Guide 2015 also specifies that there is only budget for committees to receive their modest allowance per attendance for up to six meetings at the prison each year, although they are free to attend more often.<sup>128</sup> While Arts 9(2) and (3) impose an obligation on wardens to allow committees to tour the secure custodial areas of the prison, the Ministry Guide communicates an expectation that overseers will do this no more than once a year. It does this by suggesting an agenda for each of the six meetings, although the Guide also notes that overseers are free to enter secure areas more often.<sup>129</sup> The agenda similarly suggests that overseers collect and read prisoner letters just three times annually in May, July and September.<sup>130</sup>

The Ministry Guide for Overseers 2015 states that prisons are to provide ample locked *teianbako* (suggestion boxes) for prisoners to use to contact the committee.<sup>131</sup> Both the Ministry Guide for Overseers 2015<sup>132</sup> and the Directive to Wardens 2006<sup>133</sup> stipulate that the keys to these boxes are to be held by a specified corrections officer, who is only to open them on the overseers' request. Art 9(4) stipulates that prisoners' letters to overseers are exempt from the censorship of letters that prisoners send and receive that art 127 permits, while the *Keiji shisetsu oyobi shūyōsha no shogū ni kansuru kisoku* (Regulations for Penal Institutions and Treatment of Inmates) 2006 (Penal Institution Regulations) art 79 state that these prisoner letters fall outside the restrictions on the number of letters prisoners may write.<sup>134</sup> The Ministry Guide for Overseers 2015 makes it clear that prisoners writing letters need not disclose their identity,<sup>135</sup> and there is no obligation for committees to reply, whether to individual prisoners or to prisoners as a whole.

Penal Detention Act 2005 arts 9(2) and (3) require wardens to allow committees to conduct private interviews with prisoners 'to understand the state of penal institutions', which either prisoners or overseers can initiate.<sup>136</sup> Some context is useful. Even now, personal visits to Japanese prisoners remain 'boxed' non-contact visits – communication is through a clear panel in a dividing wall, with an

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<sup>128</sup> *ibid* 2. The amount is likely to be similar to the amount paid to members of the police Detention Facilities Visiting Committees, also established by the Penal Detention Act 2005. The amount is set at prefectural level and disclosed in *jōrei* (prefectural ordinances) for these police cell oversight bodies. See, for example, *Ōsakafu ryūchi shisetsu shisatsu i'inkai jōrei* (Ōsaka Prefecture Detention Facility Inspection Committee Order) 2007 [www.pref.osaka.lg.jp/houbun/reiki/reiki\\_honbun/k201RG00001401.html](http://www.pref.osaka.lg.jp/houbun/reiki/reiki_honbun/k201RG00001401.html) accessed 2 April 2023, art 5 which sets an amount of JPY 16,800 (roughly AUD 185) per meeting.

<sup>129</sup> Ministry Guide for Overseers 2015, 3.

<sup>130</sup> *ibid* 3.

<sup>131</sup> *ibid* 4, 6, 16.

<sup>132</sup> Ministry Guide for Overseers 2015, 4.

<sup>133</sup> Directive to Wardens 2006, cl 10(3).

<sup>134</sup> A provisional translation is available at [www.japaneselawtranslation.go.jp/en/laws/view/3227](http://www.japaneselawtranslation.go.jp/en/laws/view/3227) accessed 2 April 2023.

<sup>135</sup> Ministry Guide for Overseers 2015, 16 shows a suggested form for prisoners to use to write to overseers which states 'You do not need to write your name'.

<sup>136</sup> Ministry Guide for Overseers 2015, 4.

officer seated just behind each prisoner taking notes. Attorney visits are also ‘boxed’ but officers observe out of earshot. These provisions imply that committee interviews will take the most liberal format, in an ordinary room across an open table, with officers observing out of earshot.<sup>137</sup>

The Penal Detention Act art 9(1) and Penal Institution Regulations 2006 art 6 together prescribe the warden’s obligations in terms of informing the committee. The warden must give a written report at the first meeting of the fiscal year on 15 items of information ‘regarding the state of [the penal institution’s] administration’, including those concerning prison conditions, staffing and facilities. Wardens are also to provide committees with this information in writing if there have been marked changes in the prison; the Committee has requested an explanation; or the warden has taken steps in response to the Committee’s opinions. Penal Institution Regulations 2006 art 6-2 imposes a soft duty on the warden to ‘so far as possible, endeavour’ to ensure the committee’s opinions are ‘reflected’ in the prison’s operations.<sup>138</sup>

The Ministry Guide for Overseers 2015 notes that committees may report directly to the Minister of Justice.<sup>139</sup> However, the Minister has no duty to reply. Penal Detention Act 2005 art 10 provides for the Correction Bureau to publish annual summaries of committees’ opinions and wardens’ responses. The level of detail in and accuracy of these reports have been disputed.<sup>140</sup> From 2008, they have consisted of a lengthy tabulation briefly outlining each opinion received against the wardens’ response and a basic descriptive data analysis.<sup>141</sup> There is no national umbrella organisation and committees have no secretariat. Penal Institution Regulations 2006 art 5 and the Directive to Wardens 2006 provide that the warden is to appoint a liaison officer from the prison’s General Affairs Section (*shomuka*) to ‘handle the committee’s affairs’.<sup>142</sup>

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<sup>137</sup> Religious counselling and some charitable visits were private and unboxed even under the *Kangoku hō* (Prison Act) 1908. While Penal Institution Regulations 2006 art 70 permits unboxed family visits, the Correction Bureau interprets this narrowly, wary of contraband, except for family visits in the final two weeks of sentences at Japan’s small number of ‘open’ prisons, such as Ichihara Traffic Prison, which are held in the prison garden.

<sup>138</sup> This provision is a 2011 amendment following JFBA charges that a warden had ignored overseers’ views concerning abusive practices by a prison physician that led to a prisoner’s suicide: Yūichi Kaido, ‘Keiji shisetsu shisatsu i’inkai setsuritsugo 3-nenkan no katsudō seika to kongo no kadai’ (Results of the First 3 Years of Penal Institution Visiting Committee Activities and Issues Going Forward) [2010] Jan-Feb *Niben Frontier* 48, 50.

<sup>139</sup> Ministry Guide for Overseers 2015, 5.

<sup>140</sup> Kuwayama (2010) 136; Satoshi Mishima, ‘Ōsaka iryō keimusho shisatsu i’inkai no 2011 nendo no katsudō jōkyō ni tsuite’ (Activities of the Ōsaka Medical Prison Penal Institution Visiting Committee in Fiscal 2011) (2014) 60(2) *Ōsaka Shiritsu Daigaku Hōgaku Zasshi* 694, 506.

<sup>141</sup> MoJ Correction Bureau, ‘Jukeisha ni taisuru shakuhōji anke-to shūkei kekka’ (Aggregated Results of Prisoner Pre-Release Surveys) (Ministry of Justice Correction Bureau nd)

[www.moj.go.jp/kyousei1/kyousei\\_kyouse26.html](http://www.moj.go.jp/kyousei1/kyousei_kyouse26.html) accessed 2 April 2023.

<sup>142</sup> Directive to Wardens 2006, cl 2.



Some forms of civil participation in Japanese criminal justice, such as jury service, involve randomised selection from the electoral roll.<sup>143</sup> Others, such as the Volunteer Probation Officer system, the lay Human Rights Commissioner system and the prison chaplain system use careful preselection from among well-respected local citizens.<sup>144</sup> Oversight committees are also populated using this latter method. Members cannot apply for the role; each warden accesses suitable candidates through an *ateshoku* (ex officio) process, which involves formally asking local organisations to each nominate a potential member. The Directive to Wardens 2006 states that wardens must approach the local Bar and Medical Associations and a local public body.<sup>145</sup> In practice, the Japanese *ateshoku* process means that appointment to a certain position within a local organisation comes with an inescapable obligation to fulfill a specific public service role. This method serves as a proxy for merit-based assessment implied by Penal Detention Act 2005 art 8(2) as to whether a nominee fulfills the ‘integrity...insight and enthusiasm’ criteria.

Each warden exercises control over their prison’s committee in three ways. Firstly, wardens can decide which additional local bodies to approach for nominees beyond the three who are mandatory.<sup>146</sup> Secondly, wardens can reject a nomination and request a new name to forward to the Minister of Justice. The Directive to Wardens 2006 simply instructs wardens to prevent their committee from becoming skewed in terms of gender, age, occupation or other attributes; to approach local bodies that are appropriate in light of local circumstances; and to ensure candidates meet generic National Public Service Act 1947 criteria.<sup>147</sup> They must also be neither current nor former prison staff or prisoners, nor in any way affiliated with current or former staff or prisoners – a prohibition that includes attorneys who have acted for prisoners in civil suits seeking damages

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<sup>143</sup> See generally Stacey Steele and others, ‘Lay Participation in Japanese Criminal Justice: Prosecution Review Commissions, the Lay-Judge System and Penal Institution Visiting Committees’ (2020) 7(1) *Asian Journal of Law and Society* 159.

<sup>144</sup> See generally Anderson and Nolan (2004) 966-70; Frank K Upham, *Law and Social Change in Postwar Japan* (Harvard University Press 1987) 16-27, 162-163. See also Lawrence W Beer, ‘Human Rights Commissioners (*Jinken Yōgo I’in*) and Lay Protection of Human Rights in Japan’ (1985) republished in *Human Rights Constitutionalism in Japan and Asia: The Writings of Lawrence W Beer* (Global Oriental 2009) 159-160; Andrew Watson, ‘Probation and Volunteers in Japan’ (2019) 7 *Advancing Corrections Journal* 46, 49; Adam Lyons, *Karma and Punishment: Prison Chaplaincy in Japan* (Harvard University Asia Centre 2021) 214-219.

<sup>145</sup> Directive to Wardens 2006, cl 3(2)(b).

<sup>146</sup> *ibid.*

<sup>147</sup> See Directive to Wardens 2006, cl 3(2) and Attachment, which outlines the reasons for disqualification in art 38 of the *Kokka kōmuin hō* (National Public Service Act) 1947 [www.japaneselawtranslation.go.jp/en/laws/view/4283](http://www.japaneselawtranslation.go.jp/en/laws/view/4283) accessed 2 April 2023. The reasons include being an adult ward or under curatorship; being sentenced to imprisonment or more severe punishment where the sentence has not been fully served; being an employee who has been subject to a disciplinary measure in the previous two years; and employment by or membership of a political party or like organization that supports political violence.



against the state.<sup>148</sup> Thirdly, wardens can control the level of administrative support provided to committees, as they determine their prison's *shomuka* General Affairs Division budget.<sup>149</sup>

These selection and eligibility requirements bypass the individual commitment, aptitude, experience and expertise criteria commonly used when selecting civil prison overseers within European-origin human rights-based frameworks.<sup>150</sup> However, they do ensure that each committee contains members from a range of professional backgrounds, including a member of the local bar.

#### **4.2.2 Regulatory design strengths and weaknesses**

We can pause at this point to evaluate Japan's civil prison oversight design on paper. The chosen design clearly creates unprecedented opportunities for communication between internal and external actors in what was a hermetically sealed environment, even if the infrequency of these opportunities and written mode of communication rule out dialogue in real time.<sup>151</sup> This previously inconceivable channel allows prisoners to disclose problematic treatment and conditions to local community leaders, possibly with quasi-anonymity.<sup>152</sup> It also obliges each warden to divulge basic operational information to these local leaders, as well as to receive, consider and potentially incorporate their feedback in prison operations, at least during that warden's tenure.

These features can be seen as implementing the heady CARC Proposal 2003 language foreshadowing reforms that would 'shine light on a dark world that time left behind' and give 'voice' to those 'locked behind walls of silence'. This design seems to be primarily concerned with producing these new information flows, in the belief that they will 'open prisons up' so that 'prisoner complaints reach the ears of those outside' and 'lower the prison walls', so that staff then hear 'the peoples' voice'.<sup>153</sup>

On paper, it seems possible that some prisoners will find it comforting to write to and potentially speak with overseers, or even use the system to resolve issues concerning prison conditions or their treatment. There also seems to be some potential for staff to gain new insights into how the community perceives prisons and how they should self-regulate.

It also seems as if the oversight committee system might allow prisons to build collaborative relationships with local professions and institutions for the first time, replacing fear and resentment

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<sup>148</sup> *ibid* Attachment.

<sup>149</sup> Kuwayama (2010) 127.

<sup>150</sup> See for example Anne Owers, 'Comparative Experiences of Implementing Human Rights in Closed Environments: Monitoring for Rights Protection' in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (The Federation Press 2014).

<sup>151</sup> See further Lawson (2015) 139, 146-148, 153-154.

<sup>152</sup> The existence of a prescribed Correction Bureau form for prisoners wishing to contact the overseers via the suggestion boxes makes it likely that prisons will insist that prisoners request it each time they wish to complain, hence identifying themselves to staff even if they do not write their name on the form.

<sup>153</sup> CARC Proposal (2003) 1-3, 10-11, 27.

with familiarity and support.<sup>154</sup> From the Correction Bureau's standpoint, the system might provide a steady stream of information about prisoner concerns directly from quasi-independent actors – information that prison officials have not been able to sanitise or obstruct. This might serve as an early warning system, alerting the prisons administration of dysfunction before a full-blown crisis. Finally, all these benefits, if realised, could ripple through Japanese society, rebuilding public trust in prisons and allowing these stabilised institutions to garner the societal cooperation needed to modernise in their own way, on their own schedule.<sup>155</sup>

### *Regulatory insights*

Returning to the first of the two themes articulated at the beginning of this chapter, the Japanese regulatory design also sheds light on Japan's distinctive version of regulatory state governance in the criminal justice domain – where the state 'steers' regulatory responses but has private actors implement them or 'row'. What we have seen in this chapter is a state keen to go further than engaging private sector actors to deliver regulation, while monitoring their performance at arm's length. The instructions are exhaustive and supervision pervasive. It seems that committee members are handpicked and embedded inside complex machinery that heavily curtails their autonomy.

The story of how Japan's design emerged also illustrates the two 'network' theory explanations for how regulation takes shape introduced in Chapter 2. The 'power of ideas' theory explains how civil prison oversight entered the reform agenda. Firstly, the JFBA and other overlapping public interest groups built on Dando's early efforts by advocating for its inclusion in the 1990s. They shared the powerful belief that proceduralisation was bound to occur; that independent prison monitoring would improve Japan's siloed, archaic penal institutions – and lobbied for its adoption. When diverse media, public and political actors also became convinced in the winter of 2002-2003, this powerful idea gained additional impetus. Its rhetorical power was now strong enough to allow the bureaucracy to extract a compromise from the JFBA on the vexed *daiyō kangoku* (substitute prison) issue in return for establishing Visiting Committees and allocating a seat on each for a JFBA member.<sup>156</sup>

At this point, institutional theories on how regulation takes shape become more useful. The MoJ was the institution that would both have jurisdiction over and be subject to the new mechanism. It deftly

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<sup>154</sup> Prisons in remote areas of Japan are an exception, having traditionally been welcome as vectors of prosperity: Pia Vogler, 'Blurring the Boundaries: Prisons and Settler Society in Hokkaido' (2005) 39 *International Institute for Asian Studies Newsletter* 8. This includes the recently built PFI prisons: David T Johnson, 'Crime and Punishment in Contemporary Japan' (2007a) 36 *Crime & Justice* 371, 383. See also Kazuyoshi Shigematsu, *Zukan Nihon no kangokushi* (A History of Japanese Prisons) (Yūzankaku 1985)

<sup>155</sup> Carol Lawson, 'The Gradual Transformation of Japanese Prisons: A Distinctive Asian Model' (19<sup>th</sup> Annual Asian Law Institute Conference, Tokyo, May 2022).

<sup>156</sup> Croydon (2016a) 95-96, 98.

captured the reform impetus through CARC, which was dependent on the Correction Bureau. This facilitated the Bureau to weave ‘intricate’ yet subtle ‘meshes’ of influence<sup>157</sup> over the shape of the civil prison oversight proposal, allowing it to secure outcomes that it desired and sidestep those it saw as risks.

Intriguing questions arise when we consider the second theme raised at the outset of this chapter – the contrasts between the theory on effective regulatory mechanisms in Chapter 2 and Japan’s choices. For example, several criteria for regulatory legitimacy articulated by Baldwin, Cave and Lodge in 2012 seem absent. Missing features include a performance review system for oversight committees, including through a national body, which would also train overseers to ensure that they have the expertise they need. It is also not clear how ‘fair, accessible and open’ oversight will be, or if overseers will be ‘efficient’ – given their various limitations.<sup>158</sup>

Black and Baldwin’s work on ‘risk-based’ regulation raises more questions. In May 2005, when the Diet passed the legislation establishing the civil oversight system, there had only been 30 months since the discovery of the catastrophic failures at Nagoya Prison and overcrowding had not yet peaked.<sup>159</sup> This gives good reason for pause. While the design seen in this chapter might serve its public relations purpose, it would seem to be an oddly weak regulatory response to a risk of the magnitude and severity seen in those failures.

If we restrict our focus to the literature in Chapter 2 on persuasive regulatory mechanisms, more contrasts emerge. Effective informal regulatory mechanisms at the base of the regulatory enforcement pyramid require low relational distance,<sup>160</sup> typified by a ‘horizontal relationship of trust.’<sup>161</sup> In this relationship, grassroots regulatees work closely with the regulator to design a regulatory system they regard as beneficial, fair and worthy of compliance.<sup>162</sup> However, no such trust-based collaboration is evident in the birth of Japan’s civil prison oversight system. Rather, a deliberative body with little corrections expertise sketched the broad outlines, after which elite bureaucrats filled in the details in Kasumigaseki in central Tokyo, far from the staffrooms of Japan’s

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<sup>157</sup> Hidaka (1986) 228, 245.

<sup>158</sup> Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2<sup>nd</sup> edn, Oxford University Press 2012) 27-39 at 27.

<sup>159</sup> Overcrowding peaked at 106.5% at end 2002: MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-2; the prison population peaked at 81,255 at end 2006: MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) Table 2-4-2-1. See Figure F.

<sup>160</sup> See Figure C.

<sup>161</sup> Julien Etienne, 'Ambiguity and Relational Signals in Regulator - Regulatee Relationships' (2013) 7 *Regulation & Governance* 30, 39.

<sup>162</sup> See Figure D.

widely dispersed penal institutions.<sup>163</sup> In addition, its design does not seem to incorporate ways to measure compliance and escalate to coercive measures when needed.<sup>164</sup>

Finally, the regulatory intermediary roles built into the design suggest increased risks. On the prison side, it seems that overseers must direct their concerns to wardens, who are powerful intermediaries able to shield other staff from overseers' input. Given that the overseers too are, in effect, regulatory intermediaries – in their case acting for the Correction Bureau, the arrangement that saw a local attorney included on each committee seems to invite the 'zealous' public interest group risk identified by Ayres and Braithwaite.<sup>165</sup> Given that their first loyalty is to the JFBA, which is in a traditionally antagonistic relationship with the MoJ, attorneys may spoil the oversight system's persuasive aims by persistently adopting the adversarial 'identity of a knight on a white charger'.<sup>166</sup>

The empirical data introduced in Chapters 7 through 9 provide insights into the consequences of these design choices. We can draw this initial examination of the Japanese civil prison oversight design to a close here with a snapshot of its launch and early years, which sets the scene for the empirical analysis in those chapters.

#### *Launch and early years*

The centralised nature of the design process outlined above prompts questions about how the demoralised rank-and-file staff at Japanese prisons learned about this unfamiliar regulatory mechanism, conceived far from their daily grind. After their peers committed unthinkable acts, staff who had been accustomed to operating in an isolated world, which ran according to its own logic, were asked to tolerate scrutiny by outsiders. If this were not intimidating enough, each group of outsiders would include an attorney affiliated with their employer's fiercest critic. Moreover, the new legislation would also require many other adjustments to standard practices at the same time.

Realising the risks to morale and compliance, the Correction Bureau planned a training blitz ahead of the new legislation coming into effect in May 2006.<sup>167</sup> For months, senior officials from the central prisons administration travelled repeatedly to each penal institution, delivering extended onsite staff

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<sup>163</sup> The legislative design was confirmed by further deliberative councils with memberships largely overlapping with CARC. See MoJ, 'Gyōkei kaikaku suishin i'inkai komon kaigi' (Advisory Council for Promoting Correctional Administration Reform) (MoJ, nd) [www.moj.go.jp/shingi1/kyousei\\_komon\\_index.html](http://www.moj.go.jp/shingi1/kyousei_komon_index.html) accessed 2 April 2023; MoJ, 'Miketsu kōkinsha no shōgū tō ni kansuru yūshikisha kaigi' (Expert Council on the Treatment of Unsented Detainees) (MoJ, nd) [www.moj.go.jp/KYOUSEI/SYOGU/index.html](http://www.moj.go.jp/KYOUSEI/SYOGU/index.html) accessed 2 April 2023.

<sup>164</sup> Ayres and Braithwaite (1992) 4-5.

<sup>165</sup> Ayres and Braithwaite (1992) 70-71, 74-78.

<sup>166</sup> Ayres and Braithwaite (1992) 75.

<sup>167</sup> Interview with Satoshi Tomiyama, former Director-General of the Correction Bureau (Tokyo, 7 August 2019); Interview with Satoru Ōhashi, whose appointment as Director-General of the Correction Bureau was pending (Tokyo, 20 September 2019).

training for both custodial officers and managers.<sup>168</sup> Their aim was to lay the groundwork for compliance, informing and educating; explaining the rationale behind each change; and recruiting staff to the prison administration's belief in the new legislation's merits.<sup>169</sup> They assured staff that the new legislation was not only 'intended to improve prisons' but certain to deliver that outcome and that they 'had nothing to fear'.<sup>170</sup> Where civil oversight was concerned, the emissaries' chief concern was that staff accustomed to a cloak of secrecy and immunity from scrutiny might openly resist overseer visits.<sup>171</sup>

From a regulatory theory perspective, this intensive Correction Bureau effort to explain the reforms to staff and recruit them to the prison administration's vision seems to have been a belated attempt to shorten the relational distance between the as-yet-unseen overseers who would serve as regulator-side intermediaries and the staff who would be in the role of regulatees. In particular, senior officials foresaw the risk that the system they had designed would stoke the flames of the historically adversarial relationship between prisons and criminal defence attorneys.<sup>172</sup>

When the first oversight committees appeared at prison gates in May 2006, staff apprehension was high, making initial visits stiff, tense affairs. Many of the mid-ranked staff and wardens who were interviewed in the preliminary phase of this study in 2015 remembered frenetic preparations ahead of these initial visits and staff anxiety and awkwardness associated with them.<sup>173</sup>

Prisons immediately encountered clashes between their established practices and overseers' expectations. Former Director-General of the Correction Bureau, Satoshi Tomiyama, noted that staff all over Japan realised that 'what they saw as common sense was nonsense in eyes of public and what the public saw as common sense was nonsense in the eyes of staff'.<sup>174</sup> His 2005 appraisal of the launch was sanguine, suggesting that staff would be invigorated by overseers' fresh perspectives, while overseers would see the challenges staff faced with their own eyes and empathize.<sup>175</sup> However, his 2007 and 2008 evaluations accepted that the profound differences in staff and overseer views had in some cases led to years of adversarial posturing, with human rights-advocate overseers locked in Sisyphean conflict with prisons determined to defend their traditional practices.<sup>176</sup>

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<sup>168</sup> Tomiyama Interview (2019); Lawson (2015) 151-152.

<sup>169</sup> Tomiyama Interview (2019).

<sup>170</sup> *ibid.*

<sup>171</sup> *ibid.*

<sup>172</sup> Ōhashi Interview (2019).

<sup>173</sup> See further Chapters 6 and 7.

<sup>174</sup> Tomiyama Interview (2019).

<sup>175</sup> Satoshi Tomiyama, 'Keiji shisetsu shisatsu i'inkai ni tsuite' (Concerning Penal Institution Visiting Committees) [2005] *Keisei* (Correctional Association Journal) 116.

<sup>176</sup> Satoshi Tomiyama, 'Keiji shūyō shisetsu hō no unyōjō no kadai' (Act on Penal Detention Facilities and Treatment of Inmates and Detainees: Implementation Issues) (2007) *Keisei* (Correctional Association Journal)

However, by 2019, Tomiyama's perspective was that both sides gradually learned to listen to one another and reach consensus through constructive dialogue.<sup>177</sup> He spoke of attorneys tempering their hostility and accepting the realities of prison operations, while individual prisons adjusted prison practices as required – concluding that the oversight system had achieved its stated goals.<sup>178</sup>

Tomiyama cited an often-publicised, anodyne example of oversight bringing the common sense that the CARC Proposal 2003 lauded into prisons:<sup>179</sup> overseers achieving compromises in prisons that required prisoners to use chopsticks to eat semi-liquid foods as cutlery could be weaponised.<sup>180</sup> Satoru Ōhashi, who would serve as Director-General of the Correction Bureau across 2020-2021, expressed a similar sense of satisfaction in 2019, but did not claim regulatory success. Instead, his comments focused on the civil oversight system having helped prisons to build ties with local communities.<sup>181</sup>

Evaluations of the initial years of operations by Japanese commentators was less confident. For example, Maiko Tagusari, an attorney and Centre for Prisoners Rights activist published evaluations in 2008 that reveal civil prison oversight as a site of ongoing cycles of contestation between attorney-led committees and prison staff.<sup>182</sup> Satoshi Mishima, the firebrand attorney chair of the Ōsaka Medical Prison Penal Institution Visiting Committee went further, publishing a series of detailed, critical 'annual reports' of that body's activities in a scholarly journal, also from 2008.<sup>183</sup> In 2010, Kuwayama noted that committees suffered from compromised independence and authority; aims and standards that were vague and disputed; a lack of expertise; under-resourcing; an absence of national coordination; opaque reporting to the public and a lack of access for prisoners – and had already failed to prevent serious harms. Meanwhile Japan had filed its overdue periodic reports under the ICCPR and CAT, citing the new oversight system as a measure to protect prisoners' rights and prevent torture.<sup>184</sup> However, the comments of the UN Committee Against Torture and the UN Human Rights

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118; Satoshi Tomiyama, 'Keiji shisetsu shisatsu i'inkai no genjō to kadai' (Penal Institution Visiting Committees: Current State and Issues) (2008) 155 *Hanzai to Hikō* (Crime and Delinquency Journal) 20.

<sup>177</sup> Tomiyama Interview (2019).

<sup>178</sup> *ibid.*

<sup>179</sup> CARC Proposal (2003) 1-2.

<sup>180</sup> *ibid.* See, for example, Casey Baseel, 'Runny Curry, No Pudding Spoons Among Complaints of Japanese Prison Inmates' *Japan Today* (Tokyo, 13 September 2015) <https://japantoday.com/category/crime/runny-curry-no-pudding-spoons-among-complaints-of-japanese-prison-inmates> accessed 2 April 2023.

<sup>181</sup> Ōhashi Interview (2019).

<sup>182</sup> See, for example, Maiko Tagusari, 'Keiji shisetsu shisatsu i'inkai 2-nenme o mukaete' (Penal Institution Visiting Committees After Two Years) (2008) 54 *Quarterly Keiji Bengo* 117.

<sup>183</sup> See, for example, Satoshi Mishima, 'Ōsaka iryō keimusho shisatsu i'inkai: nenji hōkokusho ken iken: 2006 nendo - 2007 nendo ni tsuite' (Ōsaka Medical Prison Visiting Committee: Fiscal 2006 and 2007 Annual Reports and Opinions for Fiscal 2006 and 2007) (2008) 55(1) *Ōsaka Shiritsu Daigaku Hōgaku Zasshi* 406.

<sup>184</sup> Government of Japan, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - First Periodic Report' (20 December 2005) UN Doc CAT/C/JPN/1.

Committee in response were also critical, on similar grounds.<sup>185</sup>

The new prisons legislation included a clause requiring a review five years after implementation.<sup>186</sup> However, the changes made were few and modest;<sup>187</sup> Japan's civil prison oversight mechanism proved to be strikingly unresponsive regulation. While minor adjustments were made over time, they were typically made at ministerial level and accommodated demands made by the JFBA, not feedback from the regulatee staff. For example, Tomiyama recalled in 2019 that the Correction Bureau had accommodated demands to increase an initial four paid meetings annually to six; for wardens to add further statistical items to their annual committee briefings; and for the Bureau to provide more detail in its annual reports published online.<sup>188</sup> No significant changes had occurred since.

We saw in Chapter 2 that Sparrow<sup>189</sup> and Black and Baldwin<sup>190</sup> have noted that to be effective, regulatory systems must incorporate mechanisms for continuous updating so that they evolve over time and integrate with existing performance management and improvement processes. However, Japan's mechanism does not include these design features.

### 4.3 Conclusion

The genesis of Japan's civil prison oversight system neatly illustrates the two regulatory network theories on how regulation emerges that are explained in Chapter 2. Yet it is also striking that these processes in Japan departed from what we know about producing regulation with a good prospect of success, particularly when the regulatory mechanism will rely on nothing more than persuasion.

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Government of Japan, Revised Fifth Periodic Report under the International Covenant on Civil and Political Rights (20 December 2006) UN Doc CCPR/C/JPN/CO5.

<sup>185</sup> UN Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19 Paragraph 1 of the Convention: Conclusions and Recommendations – Initial Report of Japan (3 August 2007) UN Doc CAT/C/JPN/CO/1; UN Human Rights Committee, 'International Covenant on Civil and Political Rights – Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations – Fifth Periodic Report of Japan (18 December 2008) UN Doc CCPR/C/JPN/CO/5. See also Kuwayama (2010) 133.

<sup>186</sup> Croydon (2016a) 98.

<sup>187</sup> See for example, the 2010 call by Kaido for a duty on wardens to consider committees opinions, which led to the insertion of Penal Institutions Regulations (2006) art 6-1 in 2011: Yūichi Kaido, 'Keiji shisetsu shisatsu i'inkai setsuritsugo 3-nenkan no katsudō seika to kongo no kadai' (Results of the First 3 Years of Penal Institution Visiting Committee Activities and Issues Going Forward) [2010] Jan-Feb *Niben Frontier* 48, 50.

<sup>188</sup> Tomiyama Interview (2019). See also Kuwayama (2010) 136 n 42.

<sup>189</sup> Sparrow M, *The Regulatory Craft: Controlling Risks, Solving Problems & Managing Compliance* (Brookings Press 2000)

<sup>190</sup> Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law and Policy* 181.

Corrections leaders insist that its launch and early years proved successful, but domestic and international critics offer a different narrative. Their concerns echo aspects of Power's warning in 2000 that many monitoring mechanisms have flimsy foundations and are isolated from proven performance management processes, making it likely that they will lead to empty ritualism and a false sense of security.<sup>191</sup>

However, it is worthwhile to reflect on the early trajectory of Japanese prison reform outlined in Chapter 3, when Japan resolved its unequal treatment by Western powers by emulating contemporary Western penal science, including in the Prison Act 1908. In contrast, in 2003, Japan was more confident in its own correctional methods, which strip prisoners of autonomy rather than empowering them. The Correction Bureau had had ample time to observe the persistent violence and disorder in Western prisons despite the diffusion of the human rights-oriented European-origin civil prison oversight norms that emerged in the aftermath of World War II. As Chapter 3 also demonstrates, safety and orderliness are non-negotiable attributes of Japan's prisons, which are closely tied to the country's soft power in the criminal justice domain. A preference for the 19th century *Anstaltsbeiräte* advisory boards oversight model suggests a rational desire for a less disruptive way to reassure critics in the 21<sup>st</sup> century. It also signals a conscious decision to focus on stabilising Japan's highly stressed prisons before progressing to reforming them – on terms and at a pace that their rigid, dated carceral culture would tolerate.

In Chapter 5, we examine the genesis of the Australian Capital Territory (ACT) civil prison oversight system and the process leading to its design, again in light of the regulatory theory introduced in Chapter 2. This will provide crucial comparative insights, given that the design that the ACT selected wholeheartedly embraced the European-origin human rights-based models that Japan sidestepped.

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<sup>191</sup> Michael Power, 'The Audit Society: Second Thoughts' (2000) 4(1) *International Journal of Auditing* 111.



## Chapter 5 Civil Prison Oversight in the ACT: Design

This chapter examines the path that led the Australian Capital Territory (ACT) to adopting soft civil prison oversight. It shows that while this path was as long as that in Japan, the ACT's regulatory design was as flexible as the Japanese design was rigid.

We will see that the network theories of regulation that are useful for understanding Japan's trajectory also explain how the ACT's mechanism emerged. However, in the ACT, the 'powerful idea'<sup>1</sup> that civil prison oversight would protect prisoners' human rights influenced policy makers too – not just public interest groups. Chapter 4 outlined how the human rights focus evident at the policy formation stage in Japan was diluted in the legislative design that emerged from the Ministry of Justice (MoJ) Correction Bureau. However, in the ACT, this shared belief meant that the legislative design that emerged from the Directorate of Justice and Community Safety (JACS) sought to strengthen that human rights-oriented ethos. The ACT design gave overseers ample resources, access and discretion. In other words, the ACT version of regulatory state governance in this criminal justice domain was liberal; when it outsourced the delivery of regulation to private actors, it not only asked them to 'row', but also invited them to help 'steer'.<sup>2</sup>

However, when we evaluate the ACT system in light of the features of effective co-regulatory mechanisms introduced in Chapter 2, the results are mixed. The ACT design echoes the Japanese design in that it establishes a high relational distance between the regulator and the regulatee staff. For example, JACS designed the system without involving the regulatee prison staff, the regulator-side intermediaries again lacked corrections industry expertise and the legislative design imposed criminal penalties on uncooperative wardens. As in Japan, this suggests that the ACT design might be inconsistent with the Wheel of Social Alignments model for persuasive regulatory success.

Viewing the ACT system's design against the criteria for 'really responsive' and 'risk-based' regulation again reveals dissonance. It appears, for example, to be tailored to the demands of external stakeholders, rather than focused on staff – the people whom it is meant to persuade. However, the ACT mechanism is more promising when viewed through a 'smart regulation' lens.<sup>3</sup> It contemplates multiple ACT regulatory bodies sharing information and resources to achieve a shared regulatory

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<sup>1</sup> See Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2<sup>nd</sup> edn, Oxford University Press 2012) Table 4.3; cf Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials*, Cambridge University Press 2007) ch 2.

<sup>2</sup> This pattern has some features of the 'post-regulatory' state, a third mode of governance that is outside the scope of this thesis. See generally David Levi-Faur, 'The Odyssey of the Regulatory State: From A "Thin" Monomorphic Concept to A "Thick" and Polymorphic Concept' (2013) 35(1-2) *Law & Policy* 29.

<sup>3</sup> See generally Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press 1998).

goal. This factor and its progressive ethos raise the possibility that the ACT mechanism might achieve at least some of its aims.

The chapter begins by exploring the historical stimuli that led to the ACT officially announcing that it would build a prison in late 2003,<sup>4</sup> as well as an existing local model for civil prison oversight that proved influential. It then explores the emergence of the ACT's pioneering Human Rights Act 2004 (ACT) (HRA 2004), before examining how these prison building and human rights initiatives converged in the ACT's version of civil prison oversight. The chapter ends with an account of the mechanism's launch and early years, as well as an initial assessment of its strengths and weaknesses in light of the regulatory theory introduced in Chapter 2.

## 5.1 The ACT Prison: A Long Time Coming

Even in the 1890s, before Australian Federation, the colourful parliamentarian King O'Malley had envisioned the ACT as a place where 'human freedom, human justice and human rights' could flourish.<sup>5</sup> This vision progressed in 1901, when the six self-governing British colonies federated to form the modern Commonwealth of Australia. They shared a vision for a neutral capital district, which would contain a grand and innovative seat of government, planned in the tradition of the United States capital in Washington DC.<sup>6</sup> The ACT was the result, carved from sprawling southern New South Wales pastureland in 1911.<sup>7</sup> The belief that the jurisdiction was destined for greatness persisted in early Territorians in the 1920s, with some feeling that the ACT would 'ennoble' individuals in ways that the states could not.<sup>8</sup>

These sentiments set the scene for the idealistic belief in an ACT exceptionalism that is a recurring theme in this chapter. The idea that the jurisdiction is – and should be – a national exemplar shaped the reasoning of both public and private stakeholders during ACT's path to civil prison oversight. We will see that while this confidence has some merit, it has also hampered the ACT's penal ambitions.

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<sup>4</sup> Monika Boogs, 'Plans for 350-bed ACT Jail' *Canberra Sunday Times* (Canberra, 26 June 2003).

<sup>5</sup> Nicholas Brown, *A History of Canberra* (Cambridge University Press 2014a) 40.

<sup>6</sup> District of Columbia. See Terry Birtles, 'Contested Places for Australia's Capital City' (11<sup>th</sup> Annual Planning History Conference, Barcelona, July 2004) [www-etsav.upc.es/personals/iphs2004/pdf/017\\_p.pdf](http://www-etsav.upc.es/personals/iphs2004/pdf/017_p.pdf) accessed 2 April 2023.

<sup>7</sup> The Constitution of Australia 1901 (Cth) s 125 provides for the power to establish a federal capital. The Seat of Government Act 1908 (Cth) selected an area in southern New South Wales (NSW). The Seat of Government (Administration) Act 1910 (Cth) legislated its acquisition. The Federal Parliament moved from Melbourne to Canberra in 1927. The Federal Minister for Territories administered the ACT under the *Constitution* 1901 (Cth) s 122, until it became self-governing on 11 May 1989: See ACT Legislative Assembly, 'Establishing the Nation's Capital' (ACT Legislative Assembly, nd) [www.parliament.act.gov.au/visit-and-learn/resources/factsheets/establishing-the-nations-capital](http://www.parliament.act.gov.au/visit-and-learn/resources/factsheets/establishing-the-nations-capital) accessed 2 April 2023.

<sup>8</sup> Nicholas Brown, 'Never Lost for Words: Canberra's Archives' (2014b) 21 *Public History Review* 81.

### 5.1.1 Riots and reforms

The ACT population was sparse until 1957, when the National Capital Development Commission began 30 years of intensive institution and infrastructure building.<sup>9</sup> This design did not include a prison.<sup>10</sup> While the ACT has always provided its own community corrections services locally,<sup>11</sup> a custodial sentence meant a prisoner would be transferred to a New South Wales (NSW) prison, with a few dozen ACT offenders typically in NSW at any one time.<sup>12</sup> In an administrative sense, this was a logical, thrifty arrangement, which ACT administrators saw as a major factor in the jurisdiction's very low incarceration rates – making it remarkably durable, despite disadvantages for prisoners and hardship for their families.<sup>13</sup> However, calls for a local ACT prison had begun as early as 1955, emerging from a federal Department of the Interior proposal.<sup>14</sup>

Like Japan, Australia was an active and willing participant in the unanimous adoption of the Standard Minimum Rules on the Treatment of Prisoners 1955 (SMR),<sup>15</sup> sending a three-person delegation to the First UN Congress on the Prevention of Crime and the Treatment of Offenders<sup>16</sup> and contributing three papers on prison personnel recruitment and open prisons.<sup>17</sup> Yet as Grabosky notes, 'many ugly vestiges' of the authoritarian, inhumane penal practices that characterised Australia's colonial history persisted in NSW prisons for decades after World War II.<sup>18</sup>

A July 1970 Cabinet submission by the Minister for the Interior and the Attorney-General again favoured a local prison, which led to the July 1973 approval of a plan to build a remand centre.<sup>19</sup> By

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<sup>9</sup> Philip Grundy and others, *Reluctant Democrats: The Transition to Self-Government in the Australian Capital Territory* (Federal Capital Press 1996) 46-49.

<sup>10</sup> The ACT's juvenile penal institutions are outside the scope of this study.

<sup>11</sup> See Community Restorative Centre, 'The History of the Community Restorative Centre' (Community Restorative Centre 2018) [www.crcnsw.org.au/about-us/crc-history/](http://www.crcnsw.org.au/about-us/crc-history/) accessed 2 April 2023.

<sup>12</sup> The daily average from 1969 to 1978 was just under 40 ACT prisoners in custody; the 1979 ACT incarceration rate per 100,000 of population was just 16.0. See Australian Law Reform Commission (ALRC), Discussion Paper 10: *Sentencing - Reform Options* (Australian Law Reform Commission 1979) [22]-[29]. See also Hugh Smith, *'Fair Go': A History of Prisoners Aid (ACT) 1963-2020* (Prisoners Aid ACT 2020).

<sup>13</sup> ALRC (1979) [32]-[36]. See also David Biles and Geoff Cuddihy, *A Survey of ACT Prisoners in NSW Prisons* (Australian Institute of Criminology 1984)

<sup>14</sup> ALRC (1979) [41].

<sup>15</sup> First UN Congress on the Prevention of Crime and Treatment of Offenders 'Standard Minimum Rules for the Treatment of Prisoners: Observations and Proposals of the Secretariat' (14 February 1955) UN Doc A/CONF.6/C.1/L.1 (SMR).

<sup>16</sup> First UN Congress on the Prevention of Crime and the Treatment of Offenders, 'List of Participants' (19 August 1955) UN Doc A/CONF.6/INF.3, 1-2.

<sup>17</sup> First UN Congress on the Prevention of Crime and the Treatment of Offenders, 'List of Document' (20 August 1955) UN Doc A/CONF.6/INF.4, 3, 6.

<sup>18</sup> Peter Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector* (Australian Institute of Criminology 1989) 27.

<sup>19</sup> Peter J Nixon and Thomas EF Hughes, 'Establishment of a Prison in the Australian Capital Territory' Cabinet Submission No. 225 (13 April 1970); Cabinet Minute, 'Submission No. 473 Remand Facilities in the Australian Capital Territory' Cabinet Decision No. 1078 (20 July 1973).

1974, the federal Attorney-General had also called for an ACT prison, without success.<sup>20</sup> However, revelations of anachronistic conditions and brutality were about to cause a widespread loss of confidence in NSW prisons and create a turning point in Australian corrections. A traditional common law restriction barring prisoners from seeking relief from the courts had persisted in NSW,<sup>21</sup> while prisons had remained largely unchanged for 80 years.<sup>22</sup> The Bathurst Gaol Riot erupted in February 1974 after earlier protests at the ‘Dickensian’<sup>23</sup> conditions, had led to inaction and violent reprisals.<sup>24</sup> Prisoners threw petrol bombs and staff returned fire with rifles, wounding more than ten and paralysing one prisoner.<sup>25</sup> A major part of the Gaol burned down.<sup>26</sup>

The facts surrounding this watershed Australian prison crisis had striking similarities to the Nagoya Prison Scandal three decades later. The NSW Corrective Services Department (Corrective Services) operated under ‘obsessive secrecy’, with no external oversight and no public relations arm.<sup>27</sup> Corrective Services had even prohibited stakeholders likely to inform the public about NSW prison conditions from visiting, including politicians, lawyers, prison officials from other states, ‘reputable private citizens’ and the media.<sup>28</sup> Conditions were austere and outdated, with a prevailing culture of gratuitous deprivation and harsh enforcement of trivial rules, including with a belt-with-handcuffs restraint.<sup>29</sup> The prisons administration prioritised strict physical control over prisoners, while staff laboured under autocratic commands, unrealistic expectations, chronic understaffing, overcrowding and a lack of broader expertise.<sup>30</sup> Finally, Corrective Services portrayed improving conditions for prisoners as a threat to security and staff safety;<sup>31</sup> kept the Minister uninformed; and responded to revelations after the Riot with persistent denials and attempts to deflect responsibility.<sup>32</sup>

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<sup>20</sup> Andrew Hopkins, Anne Schick and Stephen White, ‘A Prison for the Australian Capital Territory?’ (1977) 10 *Australian and New Zealand Journal of Criminology* 205 Hopkins and others, 1977: 205, 205.

<sup>21</sup> ALRC, Report No 44: *Sentencing* (Australian Government Publishing Service 1988) 133-134.

<sup>22</sup> Vivien Stern, *A Sin Against the Future: Imprisonment in the World* (Northeastern University Press 1998) 259.

<sup>23</sup> Grabosky (1989) 31. See also Mark Findlay, *The State of the Prison: A Critique of Reform* (Mitchellsearch 1982); Tony Vinson, *Wilful Obstruction: The Frustration of Prison Reform* (Methuen Australia 1982); George Zdenkowski and David Brown, *The Prison Struggle: Changing Australia’s Penal System* (Penguin Books 1982).

<sup>24</sup> John Ramsland, *With Just but Relentless Discipline: A Social History of Corrective Services in New South Wales* (Kangaroo Press 1996): 315; David Brown, ‘The Nagle Royal Commission 25 Years On: Gaining Perspective on Two and a Half Decades of NSW Prison Reform’ (2004) 29 *Alternative Law Journal* 135.

<sup>25</sup> John HF Nagle, *Report of the Royal Commission into NSW Prisons* (1978) <https://justiceaction.org.au/wp-content/uploads/2020/09/naglerpt301112.pdf> accessed 2 April 2023, 117; Ramsland (1996) 319.

<sup>26</sup> *ibid.*

<sup>27</sup> Grabosky (1989) 35-36.

<sup>28</sup> Nagle (1978) 187. See also Brown (2004)

<sup>29</sup> Grabosky (1989) 27-28, 30-31.

<sup>30</sup> Fiori Rinaldi *Australian Prisons* (F&M Publishers 1977) 197-213. See also James Hemphill, ‘Participatory Management in Gaols’ in David Biles (ed), *Current Australian Trends in Corrections* (The Federation Press 1988); Sean O’Toole, ‘Prison Officer Training: The Link with Prison Reform’ (2000) 51 *Journal of Correctional Education* 282.

<sup>31</sup> Grabosky (1989) 30, 38. See also Rinaldi (1977) 106-109, 110, 117.

<sup>32</sup> Grabosky (1989) 34-36, 38-40.

## *ACT response*

The ACT government saw the crisis as a 'unique opportunity' to distinguish its policies from NSW.<sup>33</sup>

The first step was to forge ahead with the remand centre project, emphasising qualitatively superior design and practices. When the Belconnen Remand Centre opened in 1976, reports heralded it as 'enlightened' on the basis that it gave unprecedented weight to detainee dignity and autonomy.<sup>34</sup>

The Australian Law Reform Commission (ALRC) soon described it as a successful example of the 'social experimentation' that had 'played a significant part' in the capital's 'overall development'.<sup>35</sup>

The second step was to refrain from building a prison. An ACT government discussion paper noted the 'Nothing Works' movement, international loss of faith in prisons as rehabilitative institutions,<sup>36</sup> as well as the worrying persistence of popular demands for prisons to inflict retributive suffering. It recommended retention of the ACT policy of using imprisonment 'as a last resort'.<sup>37</sup> In 1977, three Canberra scholars also urged caution, arguing for an open prison at most, while noting that local judges and magistrates strongly agreed with this position,<sup>38</sup> which was consistent with the growing prison abolition movement.<sup>39</sup> While Mackay has stated that the 'Nothing Works' movement simply passed the ACT by, it arguably did have some impact, by delaying the building of a prison.<sup>40</sup>

Meanwhile, in NSW, prolonged bureaucratic 'delay and obfuscation'<sup>41</sup> after the Bathurst Gaol Riot sparked the emergence of a newly invigorated array of 'norm entrepreneurs'.<sup>42</sup> Investigative journalists, ex-prisoners, students, criminal defence lawyers, opposition politicians and scholars formed alliances and became influential, capitalising on public distaste for prison abuses and the anti-establishment sentiment of the 1970s.<sup>43</sup>

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<sup>33</sup> Department of the Capital Territory (1975) *The Future of Corrective Services in the ACT: Discussion Paper Prepared at the Direction of the Minister for the Capital Territory* (Public Seminar, 2-3 May) 4.

<sup>34</sup> ALRC (1979) [42].

<sup>35</sup> *ibid* [44].

<sup>36</sup> See generally Robert Martinson, 'What Works? Questions and Answers about Prison Reform' (1974) 35 *The Public Interest* 22; Francis T Cullen and Paul Gendreau, 'From Nothing Works to What Works: Changing Professional Ideology in the 21<sup>st</sup> Century' (2001) 81(3) *The Prison Journal* 313.

<sup>37</sup> Department of the Capital Territory (1975) *The Future of Corrective Services in the ACT* Discussion Paper Prepared at the Direction of the Minister for the Capital Territory (Public Seminar, 2-3 May) 4.

<sup>38</sup> Hopkins, Schick and White (1977); ALRC (1979).

<sup>39</sup> See generally Angela Y Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (Seven Stories Press 2011).

<sup>40</sup> Anita Mackay, 'The Road to the ACT's First Prison (the Alexander Maconochie Centre) Was Paved with Rehabilitative Intentions' (2012) 11 *Canberra Law Review* 33, 48-52.

<sup>41</sup> Brown (2004) 135.

<sup>42</sup> Cass R Sunstein, 'Social Norms and Social Roles' (1996) 96(4) *Columbia Law Review* 903, 909. Sunstein's term describes people who strive to change social norms.

<sup>43</sup> Brown (2004) 135-136; Colin R Bevan (ed), *Minimum Standard Guidelines for Australian Prisons* (Australian Institute of Criminology 1978); Colin R Bevan (ed), *Minimum Standard Guidelines for Australian Prisons* Discussion Paper (Australian Institute of Criminology 1984) 3; Gordon Hawkins and John Ellard 'The Nagle

This activism produced a government response, which led to the 1978 publication of the 650-page Report of the Royal Commission into New South Wales Prisons (Nagle Report) and then in the same year, the first version of the SMR localised for Australian prisons, then known as the Minimum Standard Guidelines for Australian Prisons (Australian Guidelines).<sup>44</sup> The former highlighted the archaic, substandard conditions, administrative ‘ineptitude’,<sup>45</sup> and systematised retributive violence against prisoners in NSW prisons.<sup>46</sup> Both went further than the 1955 SMR,<sup>47</sup> by calling for an independent national prison oversight body to protect prisoners’ rights.<sup>48</sup> Justice Nagle made 252 recommendations, many of which had been made by earlier inquiries dating back to 1861, without successful implementation.<sup>49</sup> New South Wales promptly launched an intensive period of ‘root and branch’ prison reforms, led by progressive social scientist Tony Vinson, which attempted to force most of the recommendations into effect in just three years, despite corrections officers’ protests.<sup>50</sup> Later in 1978, a letter to the *Canberra Times* accused ACT correctional authorities of being ‘themselves prisoners of the NSW system’.<sup>51</sup> In 1979, the Chief Judge of the ACT Supreme Court stated publicly that he and all his fellow judges agreed that the ACT should have its own prison,<sup>52</sup> and the ALRC joined the call for an ACT prison.<sup>53</sup> By this point, there had been a sharp rise in the cost paid to NSW per day per transferred prisoner.<sup>54</sup>

The discourse around the ACT’s need for its own prison focussed on the ACT regaining control of local offenders’ prison conditions and becoming a national exemplar in the prisons domain.<sup>55</sup> However, three factors acted as a brake. Firstly, there were fears that the ACT incarceration rate would spike if local prison beds were available.<sup>56</sup> Secondly, any prison would be costly and complex,

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Report: Before and After’ in Bill Cullen, Michael Dowding and John Griffin (eds), *Corrective Services in NSW* (The Law Book Company 1988) 36.

<sup>44</sup> Nagle (1978); Bevan (1984); Correctional Administrators, Minimum Standard Guidelines for Corrections in Australia and New Zealand (1986); Correctional Administrators, Minimum Standard Guidelines for Corrections in Australia (Revised 1992); Standard Guidelines for Corrections in Australia (Revised 2012) (Australian Guidelines) [www.ics.act.gov.au/data/assets/pdf\\_file/0015/1310631/30.pdf](http://www.ics.act.gov.au/data/assets/pdf_file/0015/1310631/30.pdf) accessed 2 April 2023.

<sup>45</sup> Grabosky (1989) 35.

<sup>46</sup> Nagle (1978) 17-20.

<sup>47</sup> cf SMR (1955) arts 36(2)-(4), 55.

<sup>48</sup> Nagle (1978) 207; Bevan (1984) 19-20, 23-24.

<sup>49</sup> Nagle (1978) 40-41.

<sup>50</sup> Vinson (1982) 55; Zdenkowski and Brown (1982) 90; Stern (1998) 259-262. See also Brown (2004).

<sup>51</sup> JO Ballard, ‘Letter to the Editor: Prison Reform’ *The Canberra Times* (Canberra, 16 September 1978) 2.

<sup>52</sup> See ALRC (1979) [39] citing a letter written by Blackburn CJ to ‘Professor Chappell’ in November 1978.

<sup>53</sup> ALRC (1979) [44]; Editorial, ‘One and All Ill Served’ *The Canberra Times* (Canberra, 30 November 1978) 2.

<sup>54</sup> From just under AUD 10 in 1972-1973 to over AUD 30 in 1977-1978: ALRC (1979) 20. Outsourcing incarceration cost ‘around [AUD] 10 million a year’ by the 2008 official opening of the ACT prison: Jon Stanhope, ‘New Maconochie Centre Officially Opened’ (*Jon Stanhope Media Releases*, 11 September 2008).

<sup>55</sup> ALRC (1979) [44]

<sup>56</sup> *ibid* [33].

needing to house many different categories of prisoner, each small in number.<sup>57</sup> Lastly, public opposition, which had complicated the building of earlier detention facilities, might make choosing a site difficult.<sup>58</sup>

While the late 1970s also saw growing support for compensating ACT victims of crime, stakeholders saw this as properly complementing a humane, rehabilitative prison – not as a competing priority.<sup>59</sup> The proposed prison would be an unprecedented *moral* opportunity for the ACT; the first in Australia to comply with contemporary international human rights norms and a beacon for peer jurisdictions as they emerged from the long shadow of colonial penal excesses.<sup>60</sup>

While NSW prison programs, facilities and staff training improved, the 1980s saw some Nagle Report reform proposals left unaddressed due to repeated industrial action by corrections officers;<sup>61</sup> resurgent penal populism amidst prison riots and unrest<sup>62</sup> and severe overcrowding.<sup>63</sup> The rapid reforms had generated deep resentment among corrections personnel by granting prisoners' rights without modernising staff roles. Staff perceived the reforms as 'handing over control of the prisons to the prisoners'.<sup>64</sup> This served as a cautionary tale for the ACT.

Calls for an ACT prison continued. Walmsley and Coull authored a review of ACT welfare services in 1985 with Tony Vinson, the social scientist who had led the troubled NSW prison reforms.<sup>65</sup> They condemned what were now 'gross shortcomings' in the facilities and management of the Belconnen Remand Centre and recommended that an ACT prison be built for minimum and medium security offenders.<sup>66</sup> The authors recorded the 'outspoken' opposition of William Clifford, former Director of the Australian Institute of Criminology on the grounds that any prison built would be soon filled.<sup>67</sup> However, by 1988 the ALRC *Report on Sentencing* had echoed their recommendation.<sup>68</sup>

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<sup>57</sup> *ibid* [31]-[32], [61].

<sup>58</sup> *ibid* [43].

<sup>59</sup> *ibid* pt VI.

<sup>60</sup> *ibid* [44].

<sup>61</sup> Hawkins and Ellard (1988) 40-47.

<sup>62</sup> David Grant, 'Twenty Years of Prison History' in David Biles (ed), *Current Australian Trends in Corrections* (The Federation Press 1988) 2-4; David Grant, *Prisons: The Continuing Crisis in NSW* (The Federation Press 1992); Ramsland (1996) 327; David Brown and Meredith Wilkie (eds), *Prisoners as Citizens: Human Rights in Australian Prisons* (The Federation Press 2002); Brown (2004). See generally Julian Roberts and others, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press 2002).

<sup>63</sup> The NSW prison population rose by 51% in the three years to September 1991, giving NSW an incarceration rate of 100 per 100,000 of population. In 1993, NSW held 43% of all Australian prisoners: Grant (1992) 197.

<sup>64</sup> Grant (1988) 3.

<sup>65</sup> Robyn Walmsley, Victor Coull and Tony Vinson, *Review of Welfare Services and Policies in the ACT: Report - Beyond the Image* (Australian Government Publishing Service 1985).

<sup>66</sup> Walmsley, Coull and Vinson (1985) 201-202, 251.

<sup>67</sup> *ibid* 192-193.

<sup>68</sup> ALRC (1988) [250]-[263].

### *Penal transportation*

At this point, the idea that the ACT had ‘abandoned’ its duty to care for and help rehabilitate local offenders gained influence.<sup>69</sup> There was an ignominious sense of complicity in perpetuating the colonial practice of penal transportation.<sup>70</sup> Advocates positioned local access to therapeutic programs, family support and work release as welfare rather than correctional services – and essential for reducing recidivism among ACT offenders.<sup>71</sup> Garland notes that this ‘penal welfarism’ approach to the state’s carceral power, theorising the prison as a site of rehabilitation rather than punishment, dominated in English-speaking jurisdictions from late Victorian times until it eroded in the ‘Nothing Works’ era,<sup>72</sup> which lasted roughly two decades until the mid-1990s.<sup>73</sup> While we will see in Chapter 11 that Japan has only recently begun to integrate welfarist approaches with its corrections apparatus, welfarism was clearly always central to the ACT prison-building movement.

The ALRC *Report on Sentencing* 1988 noted two strong arguments against a local prison that we have seen also appeared in the ALRC’s *Sentencing: Reform Options* paper of 1979: it was likely to encourage unnecessary use of custodial sentences; and it would be far more expensive than outsourcing to NSW.<sup>74</sup> Nonetheless, the majority found the argument that the ACT was subjecting local offenders to substandard NSW conditions persuasive and prioritised ‘humane containment’ locally.<sup>75</sup> The majority easily dismissed the risks of a spiking ACT incarceration rates through overuse of custodial sentences,<sup>76</sup> as well as the risks of ‘drug abuse, sexual assault, violence and intimidation’.<sup>77</sup> This was despite knowing that the Vinson Report had already recommended alterations to the relatively new Belconnen Remand Centre – and that this facility still remained ‘far from ideal’ after their implementation.<sup>78</sup>

#### **5.1.2 Early civil prison oversight models**

Legal academic George Zdenkowski’s minority view in the ALRC *Report on Sentencing* 1988 paid far more attention to the risks in any prison enterprise. He advocated ‘extreme prudence’, citing the enduring failures of prisons as institutions, the ALRC’s professed support for prison abolitionism and

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<sup>69</sup> ALRC (1988) [251]-[252].

<sup>70</sup> ALRC (1988) [251]-[255]; Walmsley, Coull and Vinson (1985) 200-202.

<sup>71</sup> *ibid* [253]-[255]; *ibid*.

<sup>72</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001) ch 2. See also Victor Bailey, *The Rise and Fall of the Rehabilitative Ideal 1895-1970* (Routledge 2019).

<sup>73</sup> Cullen and Gendreau (2001) 330.

<sup>74</sup> ALRC (1988) [256]-[259]

<sup>75</sup> *ibid* [258].

<sup>76</sup> *ibid* [256]

<sup>77</sup> *ibid* [257].

<sup>78</sup> *ibid* [260] n 14.



recent prison scandals across Australia.<sup>79</sup> The fact that the *Royal Commission into Aboriginal Deaths in Custody* was then underway gave him further reason for pause.<sup>80</sup>

Zdenkowski stressed the need for express provisions in any ACT prisons legislation to subject the prison to 'guiding principles' based on the Australian Guidelines and to list prisoners' rights.<sup>81</sup> He also recommended that it establish an intrusive oversight mechanism – allowing those with authority to sentence offenders, the 'Commonwealth Ombudsman's staff' and 'any official visitor' to enter 'any part of' the prison 'at any time' without notice. He felt that this mechanism should guarantee private interactions with prisoners and staff, as well as allow the visitor to report and make recommendations directly to the relevant Minister.<sup>82</sup>

NSW had introduced an Official Visitor Scheme as a trial in 1985 and in full from 1988.<sup>83</sup> However, the NSW design had less authority and independence than the system Zdenkowski proposed for the ACT. To illustrate, NSW Official Visitors were subject to a Department of Corrective Services performance agreement, under which visits were only possible after three days' notice to all staff and prisoners, while wardens could postpone visits proposed for 'inappropriate' times.<sup>84</sup> The stated goals framed Official Visitors as serving the Department's needs, not improving human rights compliance. The 'expected outcomes' were resolving staff and inmate complaints on site; reducing the NSW Ombudsman's caseload; and pinpointing 'potential problem areas' early.<sup>85</sup>

#### *Early ACT Official Visitors*

Meanwhile, the ACT had established a detainee-centred Official Visitor Scheme in 1987 at the Belconnen Remand Centre and the Court Transport Unit through amendments to subordinate legislation.<sup>86</sup> This mechanism expanded over time to include the two small auxiliary remand and periodic detention facilities.<sup>87</sup> There were two Official Visitors, who were civilians when recruited and had 'qualifications or experience' relevant to 'the performance' of Official Visitor 'duties', appointed for renewable three-year terms.<sup>88</sup> They had both oversight and soft administrative review functions,

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<sup>79</sup> *ibid* [263].

<sup>80</sup> *ibid*.

<sup>81</sup> ALRC (1988) [263]; Bevan (1984) Preface.

<sup>82</sup> ALRC (1988) [263]; Mackay (2012) 36.

<sup>83</sup> NSW Department of Corrective Services Official Visitor Scheme, *Official Visitor Manual* (1992) 1.

<sup>84</sup> *ibid* 5, 9.

<sup>85</sup> *ibid* 15-16.

<sup>86</sup> See Remand Centres (Amendment) Ordinance 1987 (ACT); Remand Centres (Amendment) Ordinance 1987 Explanatory Statement (ACT); Remand Centres Regulations (Amendment) 1987 (ACT).

<sup>87</sup> The Temporary Remand Centre and the Periodic Detention Centre, both established at Symonston in the 1990s. See Remand Centres Act 1976 (ACT) Republication 11.

<sup>88</sup> Remand Centres Act 1976 (ACT) ss 6A and 6B; s6C provided for Official Visitor resignations and removal from office.

which a visiting magistrate had previously fulfilled.<sup>89</sup> In their oversight function under Remand Centres Act 1976 (ACT) s 24, Visitors were to inspect remand centres and make *ad hoc* reports to the relevant Minister as to their compliance with nine detainee 'entitlements' listed in s 20.<sup>90</sup> These 'entitlements' mapped to the remand conditions stipulated in the 1955 SMR, but did not mention human rights.

The administrative review function heard complaints made by or on behalf of detainees concerning six matters made up of four specific administrative dispositions and two broad concerns: 'his or her treatment at a remand centre' and 'the manner in which a remand centre is conducted'.<sup>91</sup> Visitors were to 'inspect' the Centre 'at least' weekly and 'inquire into' any detainee complaints,<sup>92</sup> which detainees could make directly to Official Visitors, in private.<sup>93</sup> Custodial officers had a duty to inform Official Visitors of detainee complaints 'as soon as practicable',<sup>94</sup> while the mechanism required the Centre administrator to allow the Visitors to see all operational orders and instructions.<sup>95</sup> Official Visitors could make 'recommendations' regarding complaints to the Centre administrator, as well as *ad hoc* reports directly to the Minister if needed.<sup>96</sup>

The ACT incarceration rate had hovered around 30 per 100,000 of population from the late 1970s but rose to 40 in the late 1980s.<sup>97</sup> The rise in the crime rate over the same period was roughly 50%.<sup>98</sup>

### 5.1.3 Impetus from self-governance

Canberra has long had a distinctive populace, thought to be an experiment in 'municipal socialism'.<sup>99</sup> Residents tend to be better paid and educated, as well as more socially progressive than those in other Australian cities.<sup>100</sup> What is more, the proximity of 'affluent, informed, articulate' politicians,

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<sup>89</sup> See Remand Centres (Amendment) Ordinance 1987 (ACT). The ACT Chief Magistrate had 'expressed concern regarding the potential for conflicts between a magistrates' judicial role' and 'function as a visitor': Remand Centres (Amendment) Ordinance 1987 (ACT) Explanatory Statement, 1.

<sup>90</sup> Detainees were entitled to send mail and receive mail and reading materials, the reasonable use of a telephone, receive food from outside the centre, wear their own clothes, receive treatment from their own medical professionals, perform work in the Remand Centre when available, participate in recreational activities.

<sup>91</sup> Remand Centres Act 1976 (ACT) s 25(1).

<sup>92</sup> *ibid* ss 24(1), 25(3).

<sup>93</sup> *ibid* s 25(2).

<sup>94</sup> *ibid* s 26.

<sup>95</sup> *ibid* s 8(2)(b).

<sup>96</sup> *ibid* s 25(3).

<sup>97</sup> John Walker Consulting, *ACT Prison Projections 2001* (March 2001). The abolition of partial remission for good behaviour contributed to the rise: Steering Committee for the Review of Government Service Provision, *Report on Government Services 1995* (Productivity Commission 1995) 489.

<sup>98</sup> Satyanshu Mukherjee and Dianne Dagger, *The Size of the Crime Problem in Australia* (2nd edn, Australian Institute of Criminology 1990) 15.

<sup>99</sup> Brown (2014b) text to n 11.

<sup>100</sup> Christabel Young, 'Canberra - the Demographic Experiment' (1985) 2 *Journal of Population Research* 85.

bureaucrats, researchers and media commentators in the compact ACT jurisdiction has fostered a vibrant public interest group landscape and general interest in governance.<sup>101</sup> After the ACT achieved self-governance in 1989,<sup>102</sup> this human capital and a desire to break free of the era of paternalistic federal control,<sup>103</sup> gave the project to build a model local prison considerable impetus.

In early 1991, the final report of Australia's *Royal Commission on Aboriginal Deaths in Custody* (RCADIC) underscored the inadequacy of NSW prisons when it found that all five of the Indigenous deaths that it investigated in NSW prisons had been preventable, given appropriate medical and psychiatric care.<sup>104</sup> In late 1991, the ACT Corrections Review Committee expressed strong support for a public prison as part of an 'exemplary' ACT corrections service and recommended the appointment of an ACT Official Visitor to visit ACT prisoners in NSW prisons,<sup>105</sup> although this idea did not gain traction. In 1992, the Shadow ACT Attorney-General, Gary Humphries, sounded a rare note of scepticism, suggesting that a private prison would be more economical.<sup>106</sup>

In 1996, an ACT Attorney-General's Department discussion paper stated that the 'Nothing Works' era was over, the belief that prisons could rehabilitate was again normative and the Belconnen Remand Centre was expensive, poorly designed and overcrowded.<sup>107</sup> An interagency Corrections Steering Committee produced an evaluation of needs, costs and options in 1997.<sup>108</sup> This output observed that the ACT incarceration rate had risen to 49 per 100,000 of population and supported the timely construction of a '300-bed multi-purpose' prison, partly due to the Belconnen Remand Centre Official Visitor having repeatedly raised concerns over conditions.<sup>109</sup> At this point Australia's national incarceration rate was approaching 100 per 100,000 of population.<sup>110</sup>

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<sup>101</sup> Brown (2014b) text to n 2.

<sup>102</sup> Under federal legislation passed late in 1988 in place of an ACT constitution: the Australian Capital Territory (Self-Government) Act 1988 (Cth). See generally Barry Price, 'Looking Back at the Advent of ACT Self-Government: Six Perspectives' (2005) 47 *Canberra Historical Journal* 16.

<sup>103</sup> Grundy and others (1996) chs 9-10.

<sup>104</sup> J Hal Wootten, *Royal Commission into Aboriginal Deaths in Custody (RCIADC) Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (Australian Government Publishing Service 1991) 14-15

<sup>105</sup> ACT Corrections Review Committee, *Paying the Price: A Review of Adult Corrective Services and Juvenile Justice in the ACT* (ACT Government 1991) xix-xx, xxii, 145.

<sup>106</sup> Gary Humphries, *Private Prisons Public Options: A Report on the Options Available to Establish a Cost Effective and Humane Prison and Remand Facilities in the ACT* (ACT Legislative Assembly 1992).

<sup>107</sup> ACT Attorney-General's Department, Discussion Paper: The Possible Establishment of a Correctional Facility in the Australian Capital Territory (ACT Government 1996) ii, x.

<sup>108</sup> ACT Corrective Services, *The Future Correctional Needs of the Australian Capital Territory to the Year 2020: Evaluation of the Current System and Alternatives* (ACT Government 1997)

<sup>109</sup> *ibid* 2, 7.

<sup>110</sup> Adam Graycar, 'Crime in Twentieth Century Australia' (*Australian Bureau of Statistics*, 25 January 2001) [www.abs.gov.au/ausstats/abs@.nsf/lookup/4524a092e30e4486ca2569de00256331](http://www.abs.gov.au/ausstats/abs@.nsf/lookup/4524a092e30e4486ca2569de00256331) accessed 2 April 2023, 7.

### *Reform turning point*

By late 1997, the ACT Legislative Assembly Standing Committee on Justice and Community Safety (SCJACS) had tabled the results of an inquiry made of its own motion into building an ACT prison.<sup>111</sup> Originally sceptical, SCJACS declared strong support after observing disturbingly ‘overcrowded and poor-quality’ conditions at Belconnen Remand Centre, ‘humanitarian and caring’ penal practices interstate and the growing size of the ACT’s penal transportation problem.<sup>112</sup> At this point, NSW hosted an average of just over 100 ACT prisoners at an annual cost of AUD 6.3 million, with up to 55 detainees in custody at the Belconnen Remand Centre.<sup>113</sup> In September 1998, SCJACS received formal terms of reference, enabling deliberation on all aspects of the prison project.<sup>114</sup>

The SCJACS deliberations prioritised public debate and community involvement through four public inquiries held from 1999 to 2001.<sup>115</sup> The reports from these inquiries show a pervasive concern with ensuring ‘the highest standards’ of transparency and accountability.<sup>116</sup> SCJACS saw this as the ‘highest priority’ across the entire project<sup>117</sup> and dozens of public interest group participants agreed. Many expressed goodwill, indicating a desire to be involved at every stage and contribute to offenders’ rehabilitation, including through restorative justice and prisons research.<sup>118</sup> Gary Humphries, then the ACT Attorney-General, also positioned excellence in public accountability as a way for the ACT to occupy the high ground in Australian corrections.<sup>119</sup>

A former Official Visitor for the ACT’s juvenile detention facility and member of the Quaker community, Bill Aldcroft, was an influential actor in the SCJACS process, making multiple submissions

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<sup>111</sup> ACT Legislative Assembly, ‘Legal Affairs – Standing Committee - Inquiry into Correctional Facility in the ACT’ *Hansard* Week 9 (4 September 1997) [2903]-[2909].

<sup>112</sup> *ibid* [2904].

<sup>113</sup> *ibid* [2906]-[2907].

<sup>114</sup> ACT Legislative Assembly, ‘Questions without Notice: Proposed ACT Prison’ *Hansard* Week 8 (27 October 1998) [2274]-[2276]; Peter Clack, ‘ACT Jail to Open in Three Years’ *The Canberra Times* (Canberra, 26 October 1998) 1.

<sup>115</sup> ACT Legislative Assembly Standing Committee on Justice and Community Safety, ‘First Interim Report in the Prison Series: Inquiry into the Establishment of an ACT Prison: Justification and Siting’ Report No. 3 (ACT Legislative Assembly July 1999) (Justification Report); ACT Legislative Assembly Standing Committee on Justice and Community Safety, ‘Second Interim Report in the Prison Series: The Proposed ACT Prison Facility: Philosophy and Principles’ Report No. 4 (ACT Legislative Assembly October 1999) (Philosophy Report); ACT Legislative Assembly Standing Committee on Justice and Community Safety, ‘Third Interim Report in the Prison Series: Committee Visit to Western Australia, The Northern Territory and South Australia’ Report No. 11 (ACT Legislative Assembly December 2000) (Interstate Visits Report); ACT Legislative Assembly Standing Committee on Justice and Community Safety, ‘Fourth Interim Report in the Prison Series: The ACT Prison Project: Operational Models, Strategic Planning and Community Involvement’ Report No. 16 (ACT Legislative Assembly August 2001) (Planning Report).

<sup>116</sup> SCJACS (1999) Philosophy Report [5.1]-[5.18], [5.13].

<sup>117</sup> *ibid* [4.80].

<sup>118</sup> See, for example, *ibid* [1.16], [1.5], [2.11-2.12], [2.31-2.32], [2.4-2.7], [3.49-3.52].

<sup>119</sup> *ibid* [1.13].

and participating in public hearings.<sup>120</sup> The Official Visitor for the existing ACT remand and periodic detention facilities, Geoffrey Potts, also participated.<sup>121</sup> Aldcroft described ‘murder, suicide and violence amongst prisoners and against warders’ as well as sexual assaults against prisoners in the NSW prison system.<sup>122</sup> Aldcroft argued strongly that private sector involvement would make exemplary transparency and accountability unachievable<sup>123</sup> and in doing so articulated the issue that was the ‘elephant in the room’ in all SCJACS processes. This was that the ACT’s inexperience in running a prison would make the new facility a risk-laden enterprise – in this context due to risk of malfeasance by experienced private prison operators. On siting, Aldcroft argued persuasively that remote ACT sites were unsuitable due to the need to ensure easy access.<sup>124</sup>

SCJACS visited a powerful new prisons inspectorate in Western Australia in August 2000.<sup>125</sup> This body is organisationally independent of the prisons administration; may enter prisons at will; may pursue thematic inquiries of its own motion; and reports directly to Parliament.<sup>126</sup>

The ACT government included the serving and prior Official Visitors when it established a formal community consultation committee to assist with designing the new prison, including oversight arrangements.<sup>127</sup> This body, the Prison Community Panel, concluded in late 2000 that the Remand Centre Official Visitor scheme ‘works well’ and recommended a similar but enhanced mechanism, including a dedicated Indigenous Official Visitor.<sup>128</sup> Importantly, the Panel also endorsed a powerful independent Prison Inspectorate, positioning Official Visitors as auxiliary monitors with ‘direct access to ... the Inspector, the Minister and the Department on a day-to-day basis.’<sup>129</sup> In the ACT’s prison project’s long history, the Panel’s recommendations were the first to use the language of prisoner ‘rights’ and international human rights law rather than ‘administrative review’ when discussing prison conditions and prisoner complaints.<sup>130</sup>

Overall, the SCJACS stage produced a distinct change in focus. The sober language of public administration that had characterized reports on the issue for 30 years receded. Discussions under

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<sup>120</sup> Under Children’s Services Act 1986 (ACT). See, for example, SCJACS (1999) Philosophy Report [4.72], Appendix A, Appendix B.

<sup>121</sup> SCJACS (1999) Philosophy Report, Appendix A.

<sup>122</sup> SCJACS (1999) Justification Report [2.13].

<sup>123</sup> SCJACS (1999) Philosophy Report [4.72]. See also [4.71]–[4.80], [5.3].

<sup>124</sup> SCJACS (1999) Justification Report [2.22], [3.10].

<sup>125</sup> SCJACS (2000) Interstate Visits Report, 7–9.

<sup>126</sup> See Western Australia Office of the Inspector of Custodial Services, ‘What We Do’ (*Office of the Inspector of Custodial Services* 2018) [www.oics.wa.gov.au/about-oics/what-we-do/](http://www.oics.wa.gov.au/about-oics/what-we-do/) accessed 2 April 2023; Inspector of Custodial Services Act 2003 (WA).

<sup>127</sup> SCJACS (1999) Philosophy Report [6.4]

<sup>128</sup> ACT Prison Community Panel, *An ACT Prison “Getting it Right”- Report of the ACT Prison Community Panel* (December 2000) 1 [11.2.2.2].

<sup>129</sup> *ibid* [9.3.1] [9.3.4].

<sup>130</sup> See, for example, *ibid* [9.3.7], [11.2.3].

this utilitarian rubric had focused on duty – on keeping the public safe, ensuring proper punishment, restraining expenditure and optimising rehabilitative outcomes through modern penal practices.<sup>131</sup> In contrast, SCJACS focused on inspiring visions of prisoner welfare and institutional transparency in order to break with Australia’s troubled prison history and position the ACT as exceptional even suggesting having interstate prisoners complete essays on ‘designing an ideal prison for rehabilitation’.<sup>132</sup>

The SCJACS process was certainly earnest and benefitted from the broad support for a ‘rehabilitative, restorative and reintegrative’ prison from the legislature, executive and public interest groups that was typical in the ACT at this time also, despite the punitivism seen elsewhere.<sup>133</sup> However, it is difficult to overlook the lack of input from those with prison management experience and the lack of attention to operational matters at this crucial stage. Perspectives grounded in corrections industry expertise are largely absent from the 240 pages of SCJACS reports. Only a few words address the utility of consulting existing detention centre staff.<sup>134</sup>

As the ACT prison project turned towards implementation in 2001, reported crime rates had been stable for several years,<sup>135</sup> with some offences declining in number despite population growth.<sup>136</sup> Reported personal and property crime rates were between a third and half those seen in NSW.<sup>137</sup> However, the ACT remand centres were often close to their 99-bed capacity.<sup>138</sup> Moreover, as of 30 June 2001, the Indigenous incarceration rate per 100,000 of population was 19.3 times the non-Indigenous rate for remandees and 7.5 times that for sentenced prisoners.<sup>139</sup> While overall incarceration rates remained lower than all other Australian jurisdictions at 34 per 100,000 for remandees and 53.5 per 100,000 for sentenced prisoners, they were rising, having nearly quadrupled

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<sup>131</sup> See, for example, Nixon and Hughes (1970).

<sup>132</sup> SCJACS (1999) Philosophy Report [6.21]-[6.23].

<sup>133</sup> See generally Chris Cunneen and others, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Ashgate 2013); SCJACS (1999) Philosophy Report.

<sup>134</sup> SCJACS (1999) Philosophy Report [6.7].

<sup>135</sup> John Walker Consulting (2001) 23-24.

<sup>136</sup> The annual population growth rate for the ACT for the five years to 2001 was 0.7%. See Australian Bureau of Statistics (ABS) *Regional Population Growth Rate, Australia 1996-2006*, (27 July 2007) [www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3218.0Main%20Features31996%20to%202006?opendocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3218.0Main%20Features31996%20to%202006?opendocument) accessed 2 April 2023, Population Change – States and Territories.

<sup>137</sup> ABS, *1370.0 - Measuring Australia’s Progress 2002* (19 June 2002) [www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/44e7066a7d173a95ca256bdc0012241f!OpenDocument](http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/44e7066a7d173a95ca256bdc0012241f!OpenDocument) accessed 2 April 2023, Crime: State/Territory Differences.

<sup>138</sup> 99 beds: Government of Australia, Written Replies to the List of Issues (CAT/C/AUS/Q/4) to be Taken Up in Connection with the Consideration of the Fourth Periodic Report of Australia (CAT/C/67/Add.7) (13 September 2007) UN Doc CAT/C/AUS/Q/4/Add.1, [411]-[412].

<sup>139</sup> ABS, *1301.0 - Year Book Australia No. 85* (2003) [www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/03B93A4654A2D371CA256CB70081FBE6/\\$File/13010\\_2003.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/03B93A4654A2D371CA256CB70081FBE6/$File/13010_2003.pdf) accessed 2 April 2023, Table 11.33 Indigenous Imprisonment - 30 June 2001.

for remandees over a decade and risen by 50% for sentenced prisoners.<sup>140</sup> In 2001, one ACT prison population forecast saw 375 prisoners by 2010, then 390 by 2016, with a small possibility of a total population over 450 by that year.<sup>141</sup> However SCJACS advised the ACT government to ‘be more optimistic’ in its estimates, noting that ‘prison should always be a last resort’.<sup>142</sup>

The next section examines the rise of a second law reform movement that was gathering pace in the ACT just as the prison project turned towards implementation. This was the resurgence of a ten-year effort to make the ACT the first Australian jurisdiction to enact a statutory bill of rights.

## 5.2 The ACT Commitment to Human Rights

Australia has been a ‘champion’ of international human rights on the global stage across the post war era,<sup>143</sup> signing or ratifying all major international human rights treaties,<sup>144</sup> and mentioning the appointment of Official Visitors in state and territory prisons in its periodic reports under them since the 1980s.<sup>145</sup> Yet its domestic implementation of international human rights law has been characterised as ‘famously backward’.<sup>146</sup> A statement of compatibility with Australia’s international human rights obligations has been part of the federal legislative process since 2011.<sup>147</sup> Moreover, Australian courts do consider arguments based on international human rights treaties.<sup>148</sup> However, Australia does not formally recognise these treaties as a source of law unless they are ‘transformed’ into domestic law through enabling legislation.<sup>149</sup> Australia remains the only democratic country

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<sup>140</sup> ABS, 4517.0 - Prisoners in Australia 2001 (26 March 2002) [www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/3D05115FFD321B3ECA256B870082E837/\\$File/45170\\_2001.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/3D05115FFD321B3ECA256B870082E837/$File/45170_2001.pdf) accessed 2 April 2023, Prisoner Characteristics – By States and Territories 1991-2001, 30-31.

<sup>141</sup> John Walker Consulting (2001) 2.

<sup>142</sup> SCJACS (2001) Planning Report, 17

<sup>143</sup> George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (4th edn, New South Publishing 2017) 22-24.

<sup>144</sup> See United Nations Human Rights Office of the High Commissioner, ‘Status of Ratification Interactive Dashboard - Australia’ (UNOHC, nd) <http://indicatorsohchr.org/> accessed 2 April 2023.

<sup>145</sup> See, for example, Government of Australia, ‘International Covenant on Civil and Political Rights – Second Periodic Report (14 May 1987) UN Doc CCPR/C/42/Add.2, [214]; ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Second Periodic Report (19 October 1999) UN Doc CAT/C/25/Add.11, [113].

<sup>146</sup> Bronwyn Naylor, ‘Prisons, Overcrowding and Rights’ *Castan Centre Symposium* (Melbourne, 6 November 2014) 5.

<sup>147</sup> See Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

<sup>148</sup> See generally Michael Kirby, ‘Domestic Implementation of International Human Rights Norms’ (1999) 5(2) *Australian Journal of Human Rights* 109.

<sup>149</sup> *ibid.*

without a national bill of rights,<sup>150</sup> with attempts to address this issue having failed many times since 1944.<sup>151</sup>

Eventually, the Australian states and territories began take their own initiatives, the ACT becoming the first to succeed with a statutory bill of rights in 2004.<sup>152</sup> This section briefly introduces the federal impasse, and then explores how the intractability of this issue contributed to the groundbreaking Human Rights Act 2004 (ACT), before considering the impact of this legislation in the prison context.

### 5.2.1 Contested proposals for a federal bill of rights

The prevailing view in the decade leading up to Australian Federation and the Constitution 1901 (Cth) was that the Australian commitment to democratic principles was already so deeply ingrained that provisions protecting individual rights were ‘unnecessary’.<sup>153</sup> Ironically, a further rationale revealed a fallacy in the first. This further rationale was that constitutional protections would have hampered Australia’s ability to discriminate against Asian workers and the Indigenous population.<sup>154</sup>

Australia’s difficulties persist over a century later. The literature on both sides is voluminous, but the ‘unnecessary’ argument has proven resilient. Proponents include former Prime Minister John Howard, whose position is that the suggestion that Australia needs external supervision is ‘offensive’ and ‘humiliating’.<sup>155</sup> There have also been various ‘undesirable’ arguments warning of potential harms to judicial impartiality, State rights and federal parliamentary sovereignty.<sup>156</sup> Reform attempts at the federal level failed in 1973, 1981, 1985, 1988 and 2011.<sup>157</sup>

Bailey positions a bill of rights as a preventive measure, arguing that when norms are not enshrined in domestic legislation, the legislature, executive and judiciary easily overlook human rights issues.<sup>158</sup>

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<sup>150</sup> Williams and Reynolds (2017) 17.

<sup>151</sup> See Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press 2009) ch 2; Bridget Griffin-Foley, ‘Four More Points than Moses’: Dr HV Evatt, the Press and the 1944 Referendum’ (1995) 65 *Labour History* 63. There were ten unsuccessful attempts at federal and state levels between 1890 and 2004: Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths 2009) 142.

<sup>152</sup> Human Rights Act 2004 (ACT). See also the Charter of Human Rights and Responsibilities Act 2006 (VIC); Human Rights Act 2019 (QLD).

<sup>153</sup> *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* (1992) 108 ALR 577, 591-2.

<sup>154</sup> Byrnes, Charlesworth and McKinnon (2009) 25. See also First Nations National Constitutional Convention, *Uluru Statement from the Heart* (Central Land Council Library 2017) <https://ulurustatement.org/the-statement/view-the-statement/> accessed 2 April 2023.

<sup>155</sup> John Howard, ‘Proposed Charter of Rights’ *Menzies Lecture* (Perth, 26 August 2009) [www.mannkal.org/downloads/guests/johnhoward.pdf](http://www.mannkal.org/downloads/guests/johnhoward.pdf) accessed 2 April 2023.

<sup>156</sup> Byrnes, Charlesworth and McKinnon (2009) 29. Williams and Reynolds (2017) 198-199; cf Julian Leaser and Ryan Haddrick (eds), *Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited 2009).

<sup>157</sup> These efforts produced only the Human Rights Commission Act 1986 (Cth) and the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth): Bailey (2009) 144-148.

<sup>158</sup> Bailey (2009) 6-7.



He observes that the risk of abuse is rising as governance increasingly transitions to the regulatory state mode, which outsources decision-making to non-state actors with weak connections to traditional oversight mechanisms.<sup>159</sup> In contrast, Brandis argues the ‘unnecessary’ case, which asserts that post-breach judicial remedies are already sufficient and accessible to citizens, who can rely on the various provisions in the *Constitution* 1901 (Cth) that may grant rights,<sup>160</sup> various federal acts and the common law in combination.<sup>161</sup>

Australia’s treatment of vulnerable persons in closed environments continues to attract criticism on human rights grounds.<sup>162</sup> These environments have included criminal justice facilities, especially those holding Indigenous Australians, immigration detention centres and aged care facilities.<sup>163</sup>

### 5.2.2 Human Rights Act 2004 (ACT): setting the stage

The ACT did not experience the prolonged debates concerning the need for a bill of rights seen in other Australian jurisdictions, partly because enacting such a bill was moot before self-governance. An early suggestion that a bill of rights be part of the devolution of power did not eventuate.<sup>164</sup> A 1993 proposal by a Labour-led ACT administration won public support, prompting a 1995 private member’s bill – but when power changed hands, this too fell flat.<sup>165</sup> Outside the ACT, bill of rights proposals have generated deep divisions across political lines among legal scholars, the judiciary and the public, frustrating efforts in three other states before the ACT’s success.<sup>166</sup>

In the ACT, Labour regained power in late 2001 on a progressive platform that expressly included reviving the bill of rights project,<sup>167</sup> moving quickly to appoint an ACT Bill of Rights Consultative Committee in early 2002. After extensive public consultation, media debates and expert commentary

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<sup>159</sup> *ibid.*

<sup>160</sup> Bailey (2009) 143.

<sup>161</sup> George Brandis, ‘The Debate We Didn’t Have to Have: The Proposal for an Australian Bill of Rights’ *Address to James Cook University Law School* (Townsville, 14 August 2008) [www.austlii.edu.au/au/journals/JCULRev/2008/2.pdf](http://www.austlii.edu.au/au/journals/JCULRev/2008/2.pdf) accessed 2 April 2023. Brandis was federal Attorney-General across 2013-2017.

<sup>162</sup> See for example, UN Human Rights Council (UNHRC), ‘Report of the Working Group on the Universal Periodic Review - Australia’ (31 May 2011) UN Doc A/HRC/17/10; UNHRC, ‘Report of the Working Group on the Universal Periodic Review- Australia’ (29 February 2016) UN Doc A/HRC/31/14; UNHRC, Report of the Working Group on the Universal Periodic Review – Australia’ (24 March 2021) UN Doc A/HRC/47/8.

<sup>163</sup> Williams and Reynolds (2017) 1-11; Janani Muhunthan, Anne-Marie Eades and Stephen Jan, ‘UN-led Universal Periodic Review Highly Critical of Australia’s Record on Human Rights and Health for Indigenous Australians’ (2016) 1 *BMJ Global Health* 1.

<sup>164</sup> Philip Grundy and others (1996); See also Hilary Charlesworth, ‘Australia’s First Bill of Rights: the Australian Capital Territory’s Human Rights Act’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds) *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing 2017).

<sup>165</sup> ACT Bill of Rights Consultative Committee (ACTBORCC), *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (ACT Government 2003) [1.3]. See also Bailey (2009) 151.

<sup>166</sup> Victoria in 1992; Queensland in 1998; NSW in 2001: See ACTBORCC (2003) [1.4].

<sup>167</sup> Chris Monnox, *ACT Labour 1929-2009* (Ginninderra Press 2013)

across 2002, it was clear that the Consultative Committee's proposal had majority public support.<sup>168</sup> It came into force as the Human Rights Act 2004 (ACT) (HRA 2004) in mid-2004. This statutory bill of rights focuses on the human rights protected by the 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>169</sup> In particular, HRA 2004 s 10(1) incorporates the ICCPR prohibition on torture, while the Preamble and s 22(1) refer to the Kantian principle of human beings' 'inherent dignity' that features in ICCPR art 10(1).

The HRA 2004 takes a conservative approach, adopting the weaker 'dialogic' form of human rights legislation favoured by British Commonwealth jurisdictions.<sup>170</sup> It aims to promote a 'human rights-conscious culture...in public life and the community'.<sup>171</sup> Accordingly, the HRA 2004 initially required only that the three arms of government engage in open 'dialogue' on implications for the protected human rights arising from their work, including when proposing, passing and implementing laws.<sup>172</sup>

When submitting a government bill to the Legislative Assembly, the Attorney-General must now, under HRA 2004, submit a Compatibility Statement addressing whether the bill is consistent with the protected rights (s 37). Bills may limit human rights to a 'reasonable' degree if the limit is 'demonstrably justified in a free and democratic society' (s 28). A Legislative Assembly Standing Committee must report to the Assembly regarding the human rights implications of bills (s 38). Courts and other actors who interpret ACT statutes and exercise discretion must do so in a manner consistent with human rights (s 30). The HRA 2004 empowers the Supreme Court to issue a Declaration of Incompatibility regarding an ACT statute, to which the Attorney-General must respond (ss 32, 33), but which does not invalidate the statute. However, it did not originally provide individuals with standing to sue or remedies. It did however establish an independent ACT Human Rights Office to monitor implementation.<sup>173</sup>

A 2006 evaluation of the first year of the HRA 2004 concluded that the required Legislative Assembly Standing Committee on Human Rights scrutiny of human rights compatibility had already brought

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<sup>168</sup> ACTBORCC (2003) [1.6]-[1.18], [1.9]; Williams and Reynolds (2017) 142.

<sup>169</sup> UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); 2012 amendments to the HRA 2004 added the right to education. See UNGA, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>170</sup> Sara Jackson, 'Designing Human Rights Legislation: "Dialogue", the Commonwealth Model and the Roles of Parliaments and Courts' [2007] *Auckland University Law Review* 89; Hilary Charlesworth, Andrew Byrnes and Gabrielle McKinnon, *The Human Rights Act 2004 (ACT): The First Five Years of Operation - A Report to the ACT Department of Justice and Community Safety* (Australian National University 2009) 13-14. See also Sara Jackson, 2007.

<sup>171</sup> ACTBORCC (2003) 2.

<sup>172</sup> Charlesworth, Byrnes and McKinnon (2009) 6-7.

<sup>173</sup> ACTBORCC (2003) 3. See generally, Human Rights Bill 2004 Explanatory Statement (ACT). The Human Rights Office became the Human Rights Commission in 2005.

international human rights norms to the forefront in ACT policy-making and legislative processes. However, mention of these norms was still rare in ACT courts.<sup>174</sup>

Amendments in 2008 added criteria in s 28 for deciding if a human rights restriction is reasonable, along with Part 5A, which imposes a duty on public authorities to consider and act in a manner compatible with human rights (ss 40, 40A, 40B). It gives individuals a cause of action against these authorities and the Supreme Court power to grant relief as it sees fit, excluding damages (s 40C).

The five-year review in 2009 confirmed that the legislation's impact on the executive and legislature had been to cultivate a 'lively, if fragile' and incomplete 'human rights culture' in those two arms of government, while the impact on the courts remained minimal.<sup>175</sup> This review recommended adding a limited right to damages as in the United Kingdom,<sup>176</sup> a change that remains pending. In 2010, Watchirs and McKinnon described the legislation's impact as 'gradual' and 'small-scale', yet significant.<sup>177</sup>

The ACT's short, consensus-driven experience of legislating for human rights was unusual in the Australian context. Even implementation went smoothly, possibly due to the cautious, dialogic approach taken. Allowing legislation to limit rights on reasonable grounds, delaying the question of standing to sue and excluding damages claims lowered the risk of disruptive impacts, making resistance less likely. With all arms of government receiving preventive roles, the first five years of operationalisation helped normalise consideration of international human rights norms in day-to-day governance, including when considering sentencing policy, ex-offenders' eligibility for the public service and prisoners' voting rights.<sup>178</sup> This may have been less likely had the HRA 2004 relied solely on aggrieved individuals with time and resources pursuing their rights in the courts.

#### *Early relationship with civil prison oversight*

Since 1991, Australia has mentioned the work of 'Official Prison Visitors' in all states and territories in its periodic reports under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as well as in periodic reports under the ICCPR since 1999.<sup>179</sup> It first

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<sup>174</sup> ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve Month Review – Report* (ACT Government 2006) 11-14.

<sup>175</sup> Charlesworth, Byrnes and McKinnon (2009) 6-7; cf Bailey, 2009: 884-886.

<sup>176</sup> Charlesworth, Byrnes and McKinnon (2009) 8 and 24. See further Chapter 11.

<sup>177</sup> Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136, 137.

<sup>178</sup> Byrnes, Charlesworth and McKinnon (2009) 90.

<sup>179</sup> UNGA, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Government of Australia, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - First Periodic

mentioned the ACT Official Visitors is in its Second Periodic Report under CAT submitted in 1999, adding a three-paragraph explanation in its Third Periodic Report submitted in 2005.<sup>180</sup>

The ACT Human Rights Commission (HRC) had conducted its first human rights audit in that year, at the ACT's juvenile detention facility.<sup>181</sup> A further HRC audit of the ACT's adult detention facilities in 2007 was damning, making 98 recommendations of which nine were marked 'urgent'.<sup>182</sup> However, the ACT Attorney-General assured the legislature that if the audit was viewed as a checklist for the forthcoming prison, it 'measures up admirably'.<sup>183</sup>

The ACT human rights legislation was enacted just as the ACT prison project transitioned to the legislative drafting stage. The next section explores the Corrections Management Act 2007 (ACT) (CMA 2007) which established the rules and principles that would govern ACT corrections, including the new prison's operations, in this bold new human rights-recognising regulatory landscape.

### **5.2.3 Corrections Management Act 2007 (ACT): human rights focus**

The ACT Government had announced its decision to build a prison in mid-2003,<sup>184</sup> in what would be one of its costliest capital works to that date.<sup>185</sup> The prison's name, announced in mid-2004 as the 'Alexander Maconochie Centre' (AMC), evoked the achievements of a notable colonial prison reformer, again signalling the ACT government's belief that it would be an exceptional prison,<sup>186</sup> the 'first Australian prison built according to human rights principles'.<sup>187</sup>

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Report (27 August 1991) UN Doc CAT/C/9/Add.8; Government of Australia 'International Covenant on Civil and Political Rights - Third Periodic Report (22 July 1999) UN Doc CCPR/C/AUS/98/3, [651]-[652].

<sup>180</sup> Government of Australia, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Second Periodic Report (19 October 1999) UN Doc CAT/C/25/Add.11, [113], appendix 3.2; Government of Australia, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Third Periodic Report (7 April 2005) UN Doc CAT/C/67/Add.7, [13]-[15].

<sup>181</sup> ACT Human Rights Commission, *Human Rights Audit of Quamby Youth Detention Centre* (ACT Human Rights Commission 2005).

<sup>182</sup> ACT HRC (2007) Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation (ACT Human Rights Commission 2007) 6-14. See also Watchirs and McKinnon (2010) 165.

<sup>183</sup> ACT Legislative Assembly, 'Human Rights Audit - Paper and Statement by Minister - Mr Corbell (Molonglo) *Hansard* (21 Aug 2007) Week 7 Part 1 [1741]-[1742].

<sup>184</sup> Boogs (2003).

<sup>185</sup> Stanhope (2008); 'New ACT Jail Awaits Inmates' (ABC News, 12 September 2008) [www.abc.net.au/news/2008-09-11/new-act-jail-awaits-inmates/507128](http://www.abc.net.au/news/2008-09-11/new-act-jail-awaits-inmates/507128) accessed 2 April 2023.

<sup>186</sup> Jon Stanhope, 'Media Release: ACT Prison to be Named "Alexander Maconochie" Centre' 11 August (ACT Government 2004); See further John Barry, *Alexander Maconochie of Norfolk Island: A Study of a Pioneer in Penal Reform* (Oxford University Press 1958) 146-150; Norval Morris, *Maconochie's Gentlemen*, (Oxford University Press 2002); John Moore, 'Alexander Maconochie's "Mark System"' (2011) 198 *Prison Service Journal* 38.

<sup>187</sup> Jon Stanhope, 'Media Release: New Maconochie Centre Officially Opened' 11 September (ACT Government 2009).

By mid-2007, the CMA had passed as a statute ‘conceived, designed and constructed’ to embody the HRA 2004 principles.<sup>188</sup> We have seen above that while the drive to establish a local prison far predated the campaign to establish a statutory bill of rights, the Prison Community Panel had positioned it as part of that human rights movement in 2000. Accordingly, the CMA 2007 came with lofty language, with the Explanatory Statement even citing Martin Luther King.<sup>189</sup> This striking contrast to the straightforward wording of Japan’s 2005 prisons legislation, which we saw in Chapter 4, met with acclaim in the ACT. The legislature’s first Scrutiny Report 2007 commended the Minister for seeing to ‘ensure that [prisoners] are treated ‘with humanity’ and ‘respect for the inherent dignity of the human person’.<sup>190</sup> Veteran human rights policymaker and scholar, Peter Bailey, felt that a prison operating under the 2007 legislation was an ‘exciting prospect’,<sup>191</sup> while officials involved in the project were hopeful that it could ‘reap great social progress’.<sup>192</sup>

The CMA 2007 is at pains to establish clarity, certainty, and transparency regarding AMC prison conditions. Details that were left to bureaucratic discretion in Japan are ‘spelled out’ in a text that exceeds 200 pages. Further, CMA 2007 s 14 gives all corrections policies and procedures ‘notifiable instrument’ status, which means that all ACT Corrective Services guidance regarding how the oversight system was to operate would be open to public scrutiny via the ACT Legislation Register.<sup>193</sup>

As Bartels and Boland argue, the HRA 2004 and CMA 2007 together create an innovative ‘template’ for protecting human rights in prison.<sup>194</sup> The Preamble and ss 8 and 9 emphasise prisoners’ rights without overlooking the need for ‘security and good order’, as well as due consideration of victims. These provisions again reinforce the Kantian principle of human beings’ ‘inherent dignity’.<sup>195</sup> They reference the protections in the HRA 2004 and at international law, incorporating the principle developed by Ulpian in Roman times and repeated in the SMR since 1955, that offenders enter prison ‘as punishment, not for punishment’.<sup>196</sup> Other principles on prisoner treatment in s 9 stipulate

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<sup>188</sup> Sean Moysey and John Paget, ‘A Prison Built on Human Rights’ (2007) 81 *Precedent* 37. See also Bailey (2009) 913.

<sup>189</sup> Corrections Management Bill 2007 Explanatory Statement (ACT), 3.

<sup>190</sup> ACT Legislative Assembly, ‘Legal Affairs - Standing Committee - Scrutiny Report 37’ (12 February 2007) 7. See also ACT Legislative Assembly, ‘Legal Affairs - Standing Committee - Scrutiny Report 41’ (28 May 2007).

<sup>191</sup> Bailey (2009) 910, 915.

<sup>192</sup> Moysey and Paget (2007) 37.

<sup>193</sup> Nearly 250 CMA 2007 (ACT) policy instruments were available on the ACT Legislation Register as of May 2023.

<sup>194</sup> Lorana Bartels and Jeremy Boland, ‘Human Rights and Prison: A Case Study from the Australian Capital Territory’ in Leanne Weber, Elaine Fishwick and Marinella Marmo (eds), *The Routledge International Handbook of Criminology and Human Rights* (Routledge 2016) 560.

<sup>195</sup> CMA 2007 s 8(c).

<sup>196</sup> CMA 2007 s 9(d); *Digest of Justinian* Book 48 19 8: 9, *ad continendos homines non ad puniendos haberi*, cited in Kaspar K Riemschneider, ‘Prison and Punishment in Early Anatolia’ (1977) 20(1) *Journal of the Economic and Social History of the Orient* 114, 114; 1955 SMR, cl 57; UN General Assembly, Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (8 January 2016) UN Doc A/RES/70/175. See also Alexander

that the prison is obliged to ‘ensure... decent, humane and just treatment’; prevent ‘torture or cruel, inhuman or degrading treatment’; provide the ‘minimum living conditions’ stipulated in s 12 and ‘promote... rehabilitation and reintegration’ for offenders.<sup>197</sup> Tempering language in the s 12 standards allows the prison discretion on grounds of sufficiency, reasonableness or suitability and in some cases, security. However, many standards are ‘entitlements’, which continue uninterrupted even while a prisoner is under disciplinary measures.<sup>198</sup>

CMA 2007 Chapter 6 elaborates on these ‘minimum conditions’. It obliges the Director-General of Corrective Services to ‘ensure’ that: prisoners are not hungry (s 40); can shower with enough privacy for dignity and self-respect (s 42); can ‘access... the open air’ and exercise for at least an hour daily (s 45); and can maintain frequent contact with friends and family under ss 46 and 49 – including on weekends.<sup>199</sup> Prisoners can, in principle, send and receive ‘as much [postal] mail as they wish’ under s 49(1). Mail and telephone call monitoring is permitted in some situations (ss 103-105). With permission, prisoners may undertake education or training, including at tertiary level (s 52). The Director-General must also ensure that the prisoners’ health care standards are ‘equivalent’ to other ACT residents and that treatment is ‘timely’ (s 53).

More than a dozen provisions regulate frisk, strip and body cavity searches (ss 70, 107-121) – and transgender prisoners may choose the gender with which they wish to be identified (s 79). The CMA 2007 devotes considerable space to disciplinary provisions (Ch. 10). Segregation (solitary confinement) as punishment is prohibited (s 89) and external reviews of disciplinary charges are heard by ‘judicially-qualified’ adjudicators, with Supreme Court appeals possible (ss 177-180).

### 5.3 Civil Prison Oversight Launches in the ACT

From 2007 to 2012, the ACT Official Visitors scheme operated under a handful of CMA 2007 provisions.<sup>200</sup> These provisions obliged the Minister for Corrections to appoint at least one Official Visitor, for up to three years at a time, but ‘only if satisfied’ that they had ‘suitable qualifications or experience’: CMA 2007 s 57(1), (2), 58(4). Explanatory Statements available on the ACT Legislation

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Patterson and S.K. Ruck, *Paterson on Prisons* (1951) 23. See generally Tony Honoré, *Ulpian: Pioneer of Human Rights* (2<sup>nd</sup> edn, Oxford University Press 2002).

<sup>197</sup> Drawing on the 1955 SMR and Correctional Administrators, Minimum Standard Guidelines for Corrections in Australia (Revised 1992).

<sup>198</sup> CMA 2007 ch 7, note to ch 7.

<sup>199</sup> Stanhope (2008). See generally Corrections Management (Visits) Policy 2016 (No 2) (ACT).

<sup>200</sup> Provision numbers in this section refer to the first version of the CMA in force from 18 December 2007. See also Corrections Management (Official Visitor) Policy 2009.

Register defended each appointee's credentials in detail.<sup>201</sup> The Minister was to set the remuneration for the position (s 57(5)). Public employees were ineligible (ss 57(3)(5), 61(2)), although appointment would give appointees public servant status, making them subject to a duty of confidentiality.<sup>202</sup> Misconduct, failing to visit the prison, or incapacity could lead to dismissal (s 61(1)).

The CMA 2007 mimicked the civil oversight system in the Remand Centres Act 1976 (ACT) in that Visitors were required to 'visit each correctional centre' to 'inspect' them (s 58(1), (2)(a)(b)). It did not specify visit frequency or duration. Visitors could conduct visits without notice 'at any reasonable time' (s 58(2)(c)).<sup>203</sup> Staff were obliged to provide Visitors with 'any reasonable help' the Visitor requested to exercise their functions, but there were no penalties for failure to cooperate (s58(4)).

The CMA 2007 required the prison to 'explain' the overseers' role to prisoners 'as soon as practicable' after admission, 'in language the prisoner can readily understand' (s 66(1)(b), (2), (3)). Prisoners could 'complain' to a Visitor about 'any aspect' of their 'detention or treatment' (s 59(1)). A complaints policy specified that prisoners could ask to see a Visitor in three ways: directly by leaving a voice message or via a verbal or written request to the prison.<sup>204</sup> The prisoner did not need to give a reason and the legislation required that the prison pass the request on to the Visitor 'as soon as practicable' (s 59(3), (4)). The CMA 2007 protected the privacy of Visitors' communications with prisoners, whether face-to-face, by postal mail or electronic means (ss 51(b); 103(1), (5)(b); 105). It was a disciplinary offence for a prisoner to make a false complaint, or for staff to 'interfere' with a prisoner's complaint.<sup>205</sup>

Visitors were to investigate all prisoner complaints, except those the Visitor felt 'on reasonable grounds' were 'frivolous or vexatious' (s 60(1)). All reporting lines were internal: Visitors could make a 'recommendation' to the warden (s 60(2)(a)); or contact the Minister if the Visitor felt it 'appropriate' (s 60(2)(b)). In addition, two types of written reports were mandatory. The first was a written report to the Minister if a Visitor believed 'on reasonable grounds' that a prisoner's detention breached the CMA 2007 (s 58(3)). The second involved quarterly written summaries for the Minister of complaints received, any investigated and the outcomes (s 60(3), (4)) and JACS Annual Reports included a basic one-page report by the Official Visitor for public consumption.<sup>206</sup>

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<sup>201</sup> See, for example, Corrections Management (Official Visitor) Appointment 2008 (No 2) Explanatory Statement (ACT).

<sup>202</sup> See generally Public Sector Management Act 1994 (ACT) s 9(2).

<sup>203</sup> A time that would impede a search of the prison was cited as an unacceptable time.

<sup>204</sup> Corrections Management (Prisoner Requests, Complaints and Grievances) Policy 2007: [5.2]-[5.3], [4.1]-[4.2].

<sup>205</sup> Corrections Management (Prisoner Requests, Complaints and Grievances) Policy 2007: [3.3], [7.1].

<sup>206</sup> See for example, ACT Department of Justice and Community Safety, *Annual Report 2008-09* vol 1 (ACT Government 2009) 209.

In essence, the original AMC Official Visitors system mimicked the 1987 prototype established at the Belconnen Remand Centre. The key difference was the explicit benchmarking of oversight to the international human rights norms articulated by the HRA 2004 and CMA 2007. This was in line with community expectations and governance norms in the progressive ACT environment.<sup>207</sup> Senior official Sean Costello described the system as originally conceived to provide the Minister with ‘fresh, independent’ and ‘separate, discrete’ input on what was happening inside the prison.<sup>208</sup> They would also be onsite fixers, resolving ‘lower-level grievances directly with management’ to prevent them escalating beyond the prison, while rapidly alerting the Minister to serious incidents.<sup>209</sup> It is worth noting that when the corrections legislation passed in 2007, the ACT incarceration rate was still roughly 70 per 100,000 of population, less than half the national average.<sup>210</sup>

### 5.3.1 Launch, early years and reform

The Official Visitor system had an awkward start. The first Visitor was Geoffrey Potts, the Belconnen Remand Centre civil oversight veteran, who served solely in an advisory role for six months until the prison officially opened without prisoners in September 2008.<sup>211</sup> As we saw in Chapter 4 in the case of the Japanese overseers, the Visitors’ ‘independence’ referred, in reality, to no more than their origins, as ACT Corrective Services itself recruited, paid and supervised them as casual public servants.<sup>212</sup>

The second issue was a combination of mismanagement and poor performance. ACT Corrective Services ceased all prisoner transfers to NSW as soon as the prison officially opened. However, construction delays prevented prisoner admissions until March 2009. This worsened overcrowding at the ACT’s stressed remand centres, where conditions deteriorated.<sup>213</sup> In addition, the second Official Visitor, appointed in September 2008, was a former police officer whose appointment was

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<sup>207</sup> Interview with Sean Costello (24 Jul 2019). Costello held various JACS and ACT Human Rights Commission administrative and policy roles relating to human rights law and regulation in the ACT from 2008 to 2019, many of which saw him involved in implementing, monitoring or reviewing the prison’s Official Visitor system. At time of interview, he was the Executive Manager of the ACT Human Rights Commission. In 2017, he had helped to facilitate this study’s data collection at the prison, which is covered in Chapters 6 and Chapter 10, in his then role as Director, Civil Law, Justice and Community Safety Directorate.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

<sup>210</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2010* (Productivity Commission 2010.) Table 8A.5.

<sup>211</sup> Potts had been an Official Visitor in the ACT since 1998. He was a former probation and parole officer, who was the Vice President of Prisoners Aid (ACT) Inc in 2008. He served from April 2008 to September 2008: Corrections Management (Official Visitor) Appointment 2008 Explanatory Statement (ACT).

<sup>212</sup> CMA 2007 s 57; Interview with Jeremy Boland, Former ACT Official Visitor (Canberra, Australian Capital Territory, 18 June 2015).

<sup>213</sup> Standing Committee on Justice and Community Safety, *Inquiry into the Delay in the Commencement of Operations at the Alexander Maconochie Centre* Report 3, November (ACT Legislative Assembly 2009) vi.



controversial and his visits were rare.<sup>214</sup> Amidst considerable political, media and public tension concerning the prison's ability to deliver on its human rights aims,<sup>215</sup> the third appointee, Jeremy Boland, was conscientious to a fault. Serving for one year from February 2010, he established a frequent, regular pattern of half-day visits, engaging with prison leaders and in frequent, direct dialogue with the ACT Attorney-General, by telephone and in person.<sup>216</sup> At least some aspects of the prison's performance were exceptional at this point; from 2009 to 2011 the prison led Australia in average daily time-out-of-cells.<sup>217</sup>

Indigenous Australians are grossly overrepresented in Australian prisons and the ACT is no exception; the incarceration rate for Indigenous people rose from 830.7 per 100,000 of population to 1302.6 over the four years to 2011, while the rate for other groups rose from 57.9 to 67.7.<sup>218</sup> By Boland's departure, the prison administration issued rare guidance on the Official Visitors system in response to the early overseers' choices and this trend – mandating at least fortnightly visits, broadening the range of authorities to whom overseers could report and adding an Indigenous overseer for Indigenous prisoners.<sup>219</sup> Tracey Whetnall took up her position as the first Indigenous overseer in February 2011.<sup>220</sup> Ivan Potas joined her from mid-year,<sup>221</sup> and the system finally settled into a rhythm. Potas' initial assessment of the prison was strongly positive.<sup>222</sup> Subsequent Visitors emulated the pattern of regular, predictable visits established by Boland,<sup>223</sup> while JACS downgraded the Visitors' ministerial access to the more junior Minister for Corrections, a position created in late 2011.<sup>224</sup>

The CMA 2007 recognised three generic oversight agencies that would also be concerned with conditions at the prison from the outset: the ACT Ombudsman; the ACT Public Advocate; and the ACT

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<sup>214</sup> Craig Sams: Corrections Management (Official Visitor) Appointment 2008 (No 2) Explanatory Statement (ACT); Keith Hamburger and others, *Independent Review of Operations at the Alexander Maconochie Centre ACT Corrective Services* (Knowledge Consulting 12 March 2011) 98; John Hargreaves, Letter to John Ley, Chair, Community Coalition on Corrections, ACT Council of Social Services (Canberra, 5 January 2009).

<sup>215</sup> Boland Interview (2015); Hamburger K and others, *Interim Report as a Basis for a Progress Report to the ACT Legislative Assembly on the Independent Review of Alexander Maconochie Centre ACT Corrective Services* (Knowledge Consulting 29 July 2010) 2-8.

<sup>216</sup> Corrections Management (Official Visitor) Appointment 2010 ACT; Boland Interview (2015).

<sup>217</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2018* (Productivity Commission 2018) Table 8A.12.

<sup>218</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2012* (Productivity Commission 2012) Table 8A. 63

<sup>219</sup> Corrections Management (Official Visitor) Policy 2011 ACT.

<sup>220</sup> Corrections Management (Indigenous Official Visitor) Appointment 2011 Explanatory Statement (ACT).

<sup>221</sup> Corrections Management (Official Visitor) Appointment 2011 (No 2) Explanatory Statement (ACT).

<sup>222</sup> 'Canberra's Holding Cells Harmful and 'Dickensian' *The Canberra Times* (Canberra, 28 November 2011) [www.canberratimes.com.au/story/6174816/canberras-holding-cells-harmful-and-dickensian/](http://www.canberratimes.com.au/story/6174816/canberras-holding-cells-harmful-and-dickensian/) accessed 2 April 2023.

<sup>223</sup> Interview with Tracey Whetnall, ACT Official Visitor (Canberra, 2 November 2015).

<sup>224</sup> Chris Bourke became the initial appointee on 23 November 2011.

Human Rights Commission.<sup>225</sup> After initial uncertainty,<sup>226</sup> the four bodies formed a collaborative arrangement, sharing information and holding regular joint meetings with representatives of the prisons administration and the warden.<sup>227</sup>

However, the prison's Official Visitor system still stood alone. It had neither links to the burgeoning international civil prison oversight landscape, nor ties to the existing prison oversight expertise in other Australian jurisdictions, which may have been a deliberate attempt to make a fresh start.<sup>228</sup> However, there was also no overarching ACT body. While the ACT government had also introduced Official Visitor systems in other closed environments, each operated in a virtual silo under the legislation governing the relevant institutional setting.<sup>229</sup> This meant that all aspects of oversight activity were contingent on human agency. At interview, senior JACS and HRC official Sean Costello explained that this initial isolation of the prison overseers, as well as the vagueness surrounding their duties were deliberate choices; JACS was concerned that it or another oversight agency might be accused of 'capturing' the overseers.<sup>230</sup>

#### *Official Visitors Act 2012 (ACT)*

In June 2012, just over three years after the first AMC prisoners arrived, pressure from public interest groups and political actors interested in human rights, led the ACT government to bring all the administration of all ACT Official Visitors schemes together, under an independent statutory authority within the justice portfolio, by means of the Official Visitor Act 2012 (ACT) (OVA 2012).<sup>231</sup>

In the Legislative Assembly, Attorney-General Simon Corbell took a rosy view of the erratic start to soft civil oversight at the prison. He noted that the Official Visitor system's flexible and informal design was deliberate. In his view, its 'strength' was its ability to 'fix problems ... where and when

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<sup>225</sup> CMA 2007 s 15 (as notified in 2007); Boland Interview (2015); Watchirs and Mackinnon (2010) 165-166; ACT Human Rights Commission, *Annual Report 2011-2012* (ACT Human Rights Commission 2012) 11.

<sup>226</sup> The Public Advocate is now the Public Advocate and Children and Young People Commissioner.

<sup>227</sup> In practice, Sean Costello often represented the JACS Director-General at these meetings over the years covered by this study: Costello Interview (2019).

<sup>228</sup> See Hamburger and others (2011) 94; Anita Mackay 'Operationalising Human Rights Law in Australia: Establishing a Human Rights Culture in the New Canberra Prison and Transforming the Culture of Victorian Police' (2014) 31 *Law in Context* 261, 284-285; Boland Interview (2015).

<sup>229</sup> Before 2012, these were juvenile care and detention facilities, mental health institutions and correctional facilities. The 2012 legislation added Official Visitors for Indigenous juveniles, those in disability care settings and homeless people in emergency shelters: Official Visitor Bill 2012 (No 2) Explanatory Statement (ACT) 1-2.

<sup>230</sup> Costello Interview (2019).

<sup>231</sup> In 2012, the statutory authority was the Office of the Public Advocate: Official Visitor Bill 2012 (No 2) Explanatory Statement (ACT) 1.

they arise', 'informally without ... constricting legislative procedures', while the Visitors' 'personal commitment' and selflessness was its lifeblood.<sup>232</sup>

Under the OVA 2012, the Attorney-General still appoints all Visitors after consulting with the 'operational Minister', in the prison's case the Minister for Corrections (s 10(2)(a)). The Attorney-General can only make an appointment 'if satisfied on reasonable grounds' that the candidate has 'suitable qualifications or experience' (s 10(2)(b)). The OVA 2012 entrenches the prison's dedicated Aboriginal and Torres Strait Islander Official Visitor position (s 10(1)(b), (5)) and allows dismissal if a Visitor has failed to visit as required (ss 12(1)(b), 23). The legislation refers to individuals able to complain to Visitors as 'entitled persons' (s 8) and institutions and sites subject to oversight as 'visitable places' (s 9). The amended CMA 2007 s 57 provides for the meaning of these terms in the prison context.

The statute also expands the prison overseers' duties. In addition to visiting and reporting, they are now to 'receive and consider complaints', as well as 'be available to talk with' not just prisoners, but also anyone else concerned about a prisoner or the prison (s 14(1)). This allows a prisoner's supporters to advocate for them, even where the prisoner has not asked to see an overseer and a complementary provision permits people outside the prison to complain to Visitors about a prisoner's circumstances (s 22). Visitors must interact with prisoners 'with sensitivity', including concerning gender and religion (s 14(2), as well as when accessing their medical records – which now requires the prisoner's consent (ss 14(3), 18(3)).

OVA 2012 ss 16 and 17 streamline and strengthen reporting requirements. These provisions permit the reports that the prison overseers must make to the Minister for Corrections if they believe 'on reasonable grounds' that CMA 2007 standards are not being met, to be made orally (s 16(1), 2(a)) and to additional stakeholders, including the Director-General of Corrective Services and the Public Advocate (ss 16(2)(b), 17). In addition, the prison's duty to help the Visitors received 'teeth'. The warden is now subject to fines if they refuse to help, fail to answer questions, hinder overseers, or fail to keep a record of each visit,<sup>233</sup> and the prison must not only tell prisoners what overseers do, but also how prisoners can contact them (s 20).

Amendments in 2013 demonstrated a growing clarity in the JACS vision for the Official Visitor system by softening some settings and resolving outstanding issues. These amendments established the

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<sup>232</sup> ACT Legislative Assembly, 'Official Visitor Bill 2012 (No. 2)' *Hansard* (6 June 2012) Week 7 [2739]-[2746], [2740].

<sup>233</sup> OVA 2012 s 19. Note that in the ACT, the warden is referred to as the General Manager, Custodial Operations. Section 25 imposes fines for misuse of 'protected information' about a prisoner obtained through the Official Visitor system.

Official Visitors Board, a self-governing administrative support body for all ACT Official Visitors, now hosted by the Public Trustee and Guardian.<sup>234</sup> In an effort to underscore its independence, the Board contains no JACS representative.<sup>235</sup>

The 2013 amendments also removed the word ‘inspect’ from the OVA 2012 as an inaccurately intrusive depiction of oversight visits – and extended the deadline by which the prison must alert overseers to a prisoner’s request to see them. The initial OVA 2012 s 21(2), had given the prison just 12 hours to inform a Visitor after a prisoner’s request and this became a more pragmatic 24 hours. These changes also obliged the Official Visitors Board to give the Minister written annual reports, which the Minister must promptly present to the legislature (s 23DA).

The Attorney-General took the opportunity to articulate a coherent – and glowing – vision of the role and significance of all ACT Official Visitors:

Official Visitors are important safeguards against harm and abuse ... Their work is a manifestation of the human rights principles on which our society is based ... they improve transparency and accountability ... and act as safeguards against systemic dysfunction.

Official Visitors are dedicated individuals ... They have a talent for keen observation. They are problem solvers. They can be relied on to get things done. They ... have an exceptional ability to establish and maintain relationships and they channel these talents to support and protect vulnerable people and ensure [the relevant institution] runs as it was meant to ... [T]hey are the eyes and ears of their ministers ... and reporters of both function and dysfunction.<sup>236</sup>

It seems that by mid-2013, the oversight system had overcome its early operational difficulties and built trust, at least with external stakeholders. However, the prison’s stability was increasingly fragile. The prison’s initial operational capacity had been 270 beds with 300 in total,<sup>237</sup> but in the four years to mid-2013, the average daily prison population rose from 171 to 266,<sup>238</sup> and the ACT incarceration rate rose from 63.4 to 89.8 per 100,000 of population.<sup>239</sup> Real net operating expenditure per prisoner per day consistently far exceeded the national average.<sup>240</sup> By mid-2013, average daily time out of

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<sup>234</sup> OVA 2012 Part 5A; ACT Legislative Assembly, ‘Official Visitor Amendment Bill 2013’ *Hansard* (16 May 2013) Week 7 [2105]-[2110], [2109].

<sup>235</sup> The 2013 amendments added Official Visitors Board to these recipients of both routine and ad hoc reports by Official Visitors under ss 16(2)(b); 17.

<sup>236</sup> ACT Legislative Assembly, ACT Legislative Assembly, ‘Official Visitor Amendment Bill 2013’ *Hansard* (16 May 2013) Week 7 [2105]-[2110], [2106]-[2107].

<sup>237</sup> As of March 2009: Bartels and Boland (2016) 562; Note that all prisons require spare ‘surge’ capacity to cope with spikes in admission, disturbances, and illness. Views differ as to the proper size of this capacity buffer.

<sup>238</sup> Steering Committee for the Review of Government Service Provision (2010) Table 8A.1; Steering Committee for the Review of Government Service Provision, *Report on Government Services* (Productivity Commission 2014) Table 8A.1.

<sup>239</sup> Steering Committee for the Review of Government Service Provision (2014) Table 8A.5.

<sup>240</sup> *ibid* Table 8A.9.

cells was just 8.6 hours, against 10 hours nationally<sup>241</sup> and the rate of serious prisoner-on-prisoner assaults in custody was by far the highest nationally – even if the general assault rate was low.<sup>242</sup>

As the prison exceeded its capacity from mid-2013,<sup>243</sup> the media shone a spotlight on worsening conditions. Veteran criminologist David Biles decried the government response of launching a sentencing inquiry as ‘breathtakingly inept’, amid concern from public interest groups.<sup>244</sup> SCJACS called the Minister for Corrections, the Director-General of ACT Corrective Services and Ivan Potas, who was still a serving Official Visitor, for questioning.<sup>245</sup> Potas noted that overcrowding had increased tension between prisoners and led to chronic boredom due to a lack of purposeful activity, while the frequent ‘lockdowns’ used to manage the prison’s many different prisoner classifications exacerbated these tensions.<sup>246</sup> The Minister admitted that he doubted the prison would ‘ever be perfectly human rights compliant’.<sup>247</sup>

As in Japan and elsewhere, the prison overcrowding that emerged from 2013 posed a serious risk to safety and security yet was largely due to decisions made at earlier times, elsewhere in the penal chain. Three deserve mention. Firstly, the prison’s impractical design, in an ‘open campus’ style with a single activities centre, despite containing over a dozen different categories of prisoner, many of whom could not mix, jeopardised many of its good intentions.<sup>248</sup> Secondly, ACT policing is provided by the Federal Police, who are not bound by ACT government policies.<sup>249</sup> Thirdly, the prison’s

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<sup>241</sup> Steering Committee for the Review of Government Service Provision (2018) Table 8A.12.

<sup>242</sup> Steering Committee for the Review of Government Service Provision (2014) Table 8A.14.

<sup>243</sup> The average prisoner population in September 2013 was 318: ACT Justice and Community Safety Directorate, *ACT Criminal Justice Statistical Profile Spreadsheet* June (ACT Government 2019) Corrective Services Table 2.

<sup>244</sup> See, for example, David Biles, ‘Scales of Justice Off Balance’ *The Canberra Times* (Canberra, 17 May 2013) [www.canberratimes.com.au/story/6156384/scales-of-justice-off-balance/](http://www.canberratimes.com.au/story/6156384/scales-of-justice-off-balance/) accessed 2 April 2023; Christopher Knaus, ‘Concern Inmates’ Rights Breached’ *The Canberra Times* (Canberra, 27 May 2013) [www.canberratimes.com.au/story/6155981/concern-inmates-rights-breached/](http://www.canberratimes.com.au/story/6155981/concern-inmates-rights-breached/) accessed 2 April 2023; Christopher Knaus, ‘Overcrowding At Prison “No Surprise”’ *The Canberra Times* (Canberra, 10 October 2013) [www.canberratimes.com.au/act-news/overcrowding-at-prison-no-surprise-20131009-2v91e.html](http://www.canberratimes.com.au/act-news/overcrowding-at-prison-no-surprise-20131009-2v91e.html) accessed 2 April 2023; Lisa Glenday, ‘Canberra Prison Close to Capacity’ *ABC News* (Canberra, 10 October 2013) [www.abc.net.au/news/2013-10-09/canberra-prison-at-capacity/5012024](http://www.abc.net.au/news/2013-10-09/canberra-prison-at-capacity/5012024) accessed 2 April 2023.

<sup>245</sup> ACT Legislative Assembly, ‘Standing Committee on Justice and Community Safety - Annual and Financial Reports 2012-2013 Transcript of Evidence’ (13 November 2013).

<sup>246</sup> *ibid* 66-73. Potas stated:

‘Of course, with overcrowding, there is nothing you can do ... I am told, “I’m sorry, we have to house people somewhere, and we’ve just got to squeeze more people in... the complaint about lockdowns is so common that I no longer do very much about it. I just report ... that people are complaining’.

<sup>247</sup> *ibid* 52, 62-64; Lisa Glenday, ‘Canberra’s Jail May Never Be Fully Human Rights Compliant’ (*ABC News*, 13 November 2013) [www.abc.net.au/news/2013-11-13/canberras-jail-may-never-be-fully-human-rights-compliant/5089852](http://www.abc.net.au/news/2013-11-13/canberras-jail-may-never-be-fully-human-rights-compliant/5089852) accessed 2 April 2023.

<sup>248</sup> David Biles, ‘First-rate Alexander Maconochie Centre Needs a Little Work’ *The Canberra Times* (Canberra, 12 July 2014) [www.canberratimes.com.au/story/6138711/first-rate-alexander-maconochie-centre-needs-a-little-work/](http://www.canberratimes.com.au/story/6138711/first-rate-alexander-maconochie-centre-needs-a-little-work/) accessed 2 April 2023; Peter Mares, ‘A View of Pale Hills’ (*Inside Story*, 25 February 2014) <https://insidestory.org.au/a-view-of-pale-hills/> accessed 2 April 2023; Costello Interview (2019).

<sup>249</sup> *ibid*.

therapeutic aims may have influenced sentencing decisions.<sup>250</sup> Nonetheless, mixed or critical reviews of the prison's performance became typical. We will pick up this story of deteriorating conditions and critical scrutiny again in Chapter 10.

### **5.3.2 Regulatory design strengths and weaknesses**

We can pause here to assess the ACT's civil prison oversight design on paper in light of regulatory theory. We can see that as in Japan, the ACT legislative vision for civil prison oversight prioritised opening communication channels. In the ACT, this involved channels between those held in the prison, the prison leadership, the relevant Minister and a bevy of oversight bodies.

Prioritising communication and transparency like this seems logical in a climate of keen public, media and political sensitivity to human rights compliance in a closed environment. What is more, the flexible, expansive nature of the oversight system looks impressive. Having easy access to someone whose job is to listen and advocate on their behalf – and who can provide connections to a range of oversight bodies – seems likely to comfort prisoners. It seems as if prison leaders and policymakers will benefit too. They will have minor glitches resolved efficiently on site and receive timely information flows, which should allow them to nip larger problems in the bud, so that the prison runs fairly and smoothly. When prison leaders pass on the overseers' feedback to staff, they will be able to reflect and improve their professional practice. The ACT might achieve a fully human rights compliant prison.

#### *Regulatory insights*

We have seen that there was a broad consensus concerning the need for civil prison oversight from the 1970s onwards. This intensified in the 1990s, the ACT's first decade of self-governance, under the influence of the newer ACT human rights movement. Public and private actors alike believed in the 'powerful idea' that a mechanism of this kind would make the fledgling jurisdiction's new prison exemplary for its human rights compliance;<sup>251</sup> that proceduralisation was a certainty.<sup>252</sup> Here we see echoes of Japan's historical deployment of its criminal justice prowess to augment its 'soft power' in external contexts, which Chapters 3 and 4 explored. Yet unlike in Japan, this 'power of ideas' driver for adopting soft civil prison oversight describes not only the aims of the deliberative body that set the overall policy direction, but also the bureaucracy's internal preferences. Rather than watering

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<sup>250</sup> *ibid.*

<sup>251</sup> Baldwin, Cave and Lodge (2012) 49-53.

<sup>252</sup> Julia Black, 'Proceduralising Regulation: Part I' (2000) 20(4) *Oxford Journal of Legal Studies* 597; Julia Black, 'Proceduralising Regulation: Part II' (2001) 21(1) *Oxford Journal of Legal Studies* 331.

down the human rights rationale for civil prison oversight that had the Prison Community Panel had endorsed in 2000, JACS drafters sought to operationalise it in the CMA 2007.

The ACT style of regulatory state governance is also in striking contrast to Japan's approach, which we saw in Chapter 4 is highly conservative. In the ACT, the initial overseers controlled all aspects of their work, with minimal guidance from JACS. A pattern emerged of overseers 'steering' regulation as well as doing the 'rowing' needed to implement it, with JACS' policy updates and legislative changes following overseers' choices as to how the system should function.

If we consider the ACT mechanism as 'really responsive' regulation, we see that neither the initial or expanded design pays heed to the first two of the six matters Baldwin and Black see as essential.<sup>253</sup> The design process did not contemplate the regulatee corrections officers as stakeholders, let alone measure their 'compliance response' and accommodate their 'attitudinal settings'. While the design does show sensitivity to the third matter 'institutional environment', it contemplates the prison as a closed environment, not as the regulatees' workplace.<sup>254</sup> Far from responding to the intended regulatees, the ACT oversight design process instead responded the perspectives and preferences of the regulatory intermediary overseers and a slew of external parties: the public, public interest groups, the media and political actors.

If we turn to Black and Baldwin's work on the need for regulation to be 'risk-based',<sup>255</sup> and Gunningham and Grabosky's work on 'smart regulation',<sup>256</sup> results are even more mixed. As the ACT prison holds 14 different prisoner categories, each with varying conditions and risks, it would be logical for oversight activity to differentiate between them. However, the overarching question of a prisoner's Indigenous status is the only attribute that the system recognises. That said, the collaborative relationships between the Official Visitors for the prison and the generic ACT prison oversight agencies, do suggest the beginnings of a 'smart' regulatory network, where regulatory actors equipped with different tools and strategies cooperate in regulatory activity, in sequence or in concert. However, as we will see in Chapter 11, there is only a faint link between the efforts of these

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<sup>253</sup> The regulatee's 'compliance response', 'attitudinal settings', the 'institutional environments' around the regulator and regulatee, whether regulatory mechanisms deployed together are compatible, how the regulatory regime performs over time and any changes 'in regulatory priorities, challenges and objectives': Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, 69-76.

<sup>254</sup> The ACT design did accommodate the final three matters to which Black and Baldwin argue it should 'respond': whether the Official Visitor system would be compatible with the other oversight agencies concerned with the prison; how it performed over time; and changes in regulatory priorities, challenges, and objectives.

<sup>255</sup> Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law and Policy* 181.

<sup>256</sup> Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press 1998).

well-networked oversight agencies and escalation to the sole authority with coercive power, the Supreme Court.<sup>257</sup>

As in Japan, the ACT civil prison oversight design seems to be a perplexing mishmash of features from persuasive mechanisms at the regulatory pyramid's base, which involve low relational distance and features from apex, coercive mechanisms, which involve high relational distance.<sup>258</sup> In Etienne's terms, the regulator's relational signals are inconsistent.<sup>259</sup> For example, while the design aims to persuade through dialogue and the OVA 2012 did abolish inspections without notice and remove the word 'inspect' in 2013, an uncooperative warden is still subject to fines under that Act.<sup>260</sup> Moreover, the design process shunned the close collaboration with regulatees that Valerie Braithwaite's Wheel of Social Alignments models.<sup>261</sup> JACS omitted building a trusting relationship with staff, even though this would have increased the likelihood that corrections officers would regard the regulatory intermediary overseers as legitimate experts – and the oversight system as beneficial, fair and morally worthwhile – promoting cooperation.

Focusing on the ACT's regulatory intermediaries, we see the same pattern as in Japan, with both the regulator and the regulatees represented by intermediaries: the prisons administration by the overseers and staff by the warden. While intermediaries are a standard feature of regulatory mechanisms,<sup>262</sup> several design features seem problematic. Firstly, the Japanese strategy of the regulator inviting members of a group traditionally critical of prisons to serve as 'zealous' public interest group intermediaries is also present in the ACT.<sup>263</sup> As the relationship between Indigenous Australians and the penal system has been mutually antagonistic for over 200 years, this feature seems likely to jeopardise cooperation between the intermediary overseers and regulatee staff, fomenting resistance.

Secondly, JACS' strategy of largely excluding the regulatees from the policy and design stages and initially isolating its own intermediaries from both regulatory guidance and administrative support indicates confusion – as to whom a regulatory intermediary serves; how relational distance ought to

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<sup>257</sup> Under Human Rights Act 2004 (ACT) s 36, the ACT Human Rights Commission may apply to intervene in proceedings brought by a prisoner to seek declaratory relief that will enforce their human rights. However, the Commission's role is to assist the court in understanding and applying the human rights legislation, not to assist the plaintiff.

<sup>258</sup> See Figure C.

<sup>259</sup> Julien Etienne, 'Ambiguity and Relational Signals in Regulator - Regulatee Relationships' (2013) 7 *Regulation & Governance* 30, 36-41.

<sup>260</sup> OVA 2012 (ACT) s 19.

<sup>261</sup> See Figure D.

<sup>262</sup> Kenneth W Abbott, David Levi-Faur and Duncan Snidal (2017) 'Theorising Regulatory Intermediaries: The RIT Model' 670 *The Annals of the American Academy* 14.

<sup>263</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 75.



vary in pyramidal regulatory enforcement; and how regulatory networks function. Ironically, JACS's belief that this strategy would 'prevent capture' of the mechanism actually invited the overseers and vocal external actors to capture and control the mechanism. Partly due to these peripheral actors' insistence on greater relational distance between JACS and its own intermediaries, JACS even formally resiled from the regulator's role with the passage of the OVA 2012.<sup>264</sup> However, as Chapter 10 shows, JACS' substantive role as regulator remained unchanged, at least for the duration of this study.<sup>265</sup>

## 5.4 Conclusion

The evolution of civil oversight at the ACT prison is a remarkable story of decades of principled resistance to the prison as a concept, which dissolved through the potent conflation of two phenomena. The first was a belief that an early soft civil prison oversight mechanism's effect on the ACT's problematic remand centres had been genuinely protective. The second was a desire to secure reputational gains by establishing the newly self-governing ACT as a leading jurisdiction in human rights protections. This sentimental conflation of ideas encouraged an idealism that made the celebrated prison project vulnerable to well-meant misdirection. Principles rather than practicalities dominated as the ACT launched into this ambitious project and a series of ungainly missteps followed, including the Official Visitor system's confused design and ignominious launch. While the system settled into a rhythm over time and reforms lessened some friction points, prison conditions worsened regardless, as the prison careened through the consequences of naïve physical design and suboptimal management, gradually exacerbated by relentless overcrowding.

So far, we have seen two jurisdictions struggle with preventing human rights abuses in prisons. Both have explored the possibility that a civil prison oversight mechanism derived from models that have emerged in Europe over recent decades might assist. Interestingly, both found soft versions of civil prison oversight appealing – possibly for two reasons unrelated to human rights. The first is the potential of these designs to provide a steady stream of internal intelligence to the prisons administration. The second is their ability to placate local critics and deliver external reputational gains, cementing perceptions of exceptional prowess in the criminal justice domain.

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<sup>264</sup> The Official Visitors Board, a statutory authority located under the Office of the Public Trustee, a statutory authority within the justice portfolio now selects and pays ACT Official Visitors. See further Chapter 11.

<sup>265</sup> No other body acquired the policy control that JACS continued to exercise. For example, JACS granted permission for this study in 2015; organised and hosted an internal review of the entire Official Visitor scheme in 2017. See further Chapter 11.

The dramatic differences between the designs chosen in each place suggest fertile ground for comparison; Japan's mechanism is rigid and minimalistic, while the ACT's is flexible and expansive. This suggests they will produce different outcomes. However, we have seen evidence in Chapters 4 and 5 that both designs are inconsistent, in similar ways, with what we know from regulatory theory about how to regulate well using persuasive mechanisms. This raises another possibility - that both might fail, for similar reasons.

The following five chapters report on large-scale mixed methods empirical research carried out across 2015-2019 in Japan and the ACT, which sought to shed light on how each soft civil oversight model functions in practice and its impact on each prison system. Chapter 6 reports on the study's methodology, then Chapters 7 through 9 on the findings in Japan and Chapter 10 covers the findings in the ACT, as well as the comparative insights those findings offer.

## Chapter 6 Voices from Inside: Methodology and Research Design<sup>1</sup>

Prisons are ‘closed’ environments in more than one sense:<sup>2</sup> those inside may not leave; and it is hard for those outside to see in.<sup>3</sup> My aim in this study was to step ‘inside’ conceptually and physically, to understand the worldviews of staff, civil overseers and prisoners in Japan and the Australian Capital Territory (ACT).

This chapter outlines my motivations, the research design choices I made to access these prison systems and the research methods I used to gather and analyse rich, valid and reliable data from these insider cohorts. It shows how I used insights gained from preliminary interviews of staff and overseers to design and administer surveys that would capture the experiences of these actors, as well as those of prisoners. Finally, it describes how I combined these data with data collected in final interviews with corrections leaders, to ‘see inside’ from multiple vantage points.

### 6.1 Locating the Project

This section discusses the philosophy behind my research design and methodological choices; the influence of my research background; how my design and methods led to both success and difficulty; and my research questions.

#### 6.1.1 Motivations, biases and research questions

I came to this project as an Australian socio-legal scholar after decades of working on different aspects of the law reform agenda Japan launched at the end of the 20<sup>th</sup> century.<sup>4</sup> I had a long-term interest in how Japanese law, notably criminal justice regulation, quietly influences legal systems across the Global South, particularly in Asia,<sup>5</sup> yet appears as alien and undervalued in European and

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<sup>1</sup> This study was completed with the assistance of an Australian Government Research Training Program (2015-2018) and an Endeavour Research Fellowship grant (No. 5546/2016). Indigenous readers should be aware that this chapter contains the name and description of a person who has recently died.

<sup>2</sup> A ‘closed environment’ refers to ‘places where people are deprived of their liberty’ under art 1 of UNGA, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237. Art 4(2) defines such a place as a ‘public or private custodial setting which that person is not permitted to leave at will, by order of any judicial, administrative or other authority’. Closed environments include criminal justice and immigration detention facilities and some medical and welfare settings.

<sup>3</sup> Open prisons, such as are found in the Philippines, Norway and Finland may be an exception.

<sup>4</sup> See generally, Justice System Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21<sup>st</sup> Century* (12 June 2001) [https://japan.kantei.go.jp/policy/sihou/singikai/990612\\_e.html](https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html) accessed 2 April 2023.

<sup>5</sup> See, for example, Zen Tokoi, ‘Asian Development Through Crime Prevention - Roles and Activities of UNAFEI’ (1974) 2 *Journal of Criminal Justice* 147; Tatsuya Sakuma, ‘Criminal Justice Capacity Building Efforts by UNAFEI’ (2012) 19(3) *Journal of Financial Crime* 274.

Anglo-American research. The paradox of Japan's role as both regional model and global exception seemed worth exploring.

The opportunity came when I met a Japanese civil prison overseer in 2010 during a Nagoya University research visitorship, where I was examining the origins and impact of the Nagoya Prison Scandal, which erupted after 97 years of penological stasis.<sup>6</sup> I found Japan's introduction of civil oversight after these events intriguing, as it challenged the traditional power dynamic by tasking citizens with monitoring an intimidating state institution, potentially reversing the Benthamite vision of the Panopticon.<sup>7</sup>

I wondered how this interaction between individually weak citizens and the most powerfully coercive of all state functions played out in practice and if civil participation made a real difference to prison governance – and if so, in what way. Most importantly, I wanted to know if the answers would differ when the same regulatory technique was applied elsewhere – and if so, why.

We have not had, in either jurisdiction, an empirical inquiry into responsive regulation in these two prison systems.<sup>8</sup> As we have seen in Chapters 1 and 2, 'norm entrepreneurs' have long promoted civil oversight in prisons as a powerful regulatory tool that prevents human rights abuses and promotes prison reform.<sup>9</sup> I wanted to go beyond these normative beliefs, to find out how the actors who design and animate these systems perceive them subjectively, as well as what this might mean in objective terms for the daily reality of civil prison oversight and its influence on prisons.

That said, this was neither an 'action research' project,<sup>10</sup> nor ideologically driven. I do, of course, have normative preferences and articulate these at different points in the study. I am also alert to the negative aspects of incarceration, including the potential for human rights abuses, as occurred in Nagoya Prison. However, I did not have a reform agenda for either Japanese or ACT prisons and did not focus on the extent of their compliance with domestic and international regulatory standards.

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<sup>6</sup> See generally 'Reforming Japanese Corrections: Catalysts and Conundrums' in Leon Wolff, Luke Nottage and Kent Anderson (eds), *Who Rules Japan? Popular Participation in the Japanese Legal Process* (Edward Elgar 2015).

<sup>7</sup> Bentham's Panopticon prison design exposed all prisoners to constant surveillance. See Jeremy Bentham, *Panopticon: or the Inspection House* vols I and II (Thomas Payne 1791); Michel Foucault, *Discipline & Punish: The Birth of the Prison* (Alan Sheridan tr, 2<sup>nd</sup> edn Vintage Books 1995) 200-204.

<sup>8</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992).

<sup>9</sup> Cass R Sunstein, 'Social Norms and Social Roles' (1996) 96(4) *Columbia Law Review* 903, 909. Sunstein's term describes people who strive to change social norms.

<sup>10</sup> 'Action research' is collaborative, applied research in which the researcher participates, with the aim of immediately applying the findings to improve conditions and practices. It does not intend to develop theory. See, for example, Ida Dupont, 'Beyond Doing No Harm: A Call for Participatory Action Research with Marginalised Populations in Criminological Research' (2008) 16 *Critical Criminology* 197; Deborah H Drake, 'Researching Prisoner Experiences with Prison Officers: An Action Research-Inspired Approach' (2014) 12(1) *Action Research* 94.

Instead, I aimed to interpret each cohort's lived experience of civil oversight – particularly prison staff and prisoners – through the lens of regulatory theory and reflect that evidence of regulatory outcomes back to policymakers.

However, I am keenly aware that my own background and experiences affected how I construed participants' words and acts.<sup>11</sup> One way I strove to reduce the impact of my own biases was by 'triangulating' the perspectives of the different participant cohorts in both Japan and the ACT.<sup>12</sup>

My interest in the daily workings of civil prison oversight as experienced by staff, overseers and prisoners suggested the first of two research questions:

*What is the nature of civil prison oversight in Japan and the ACT?*

A normative standpoint of responsive regulation, the idea that effective regulatory mechanisms can and should be likely to 'enhance wellbeing',<sup>13</sup> led to the second:

*What is the impact of civil prison oversight in Japan and the ACT?*

My empirical research philosophy is primarily constructivist, as I believe it is important to 'rely as much as possible on the participants' views of the situation being studied'.<sup>14</sup> This means I am directed by the complex, 'subjective meanings' individual actors give to their situation and how they behave.<sup>15</sup> This constructivist philosophy means that I see the inductive process of listening to participants and 'build[ing] 'up' to patterns, theories and interpretations' as a reliable way of generating knowledge about the world.<sup>16</sup>

My approach is also pragmatic. I see value in considering and contrasting both objective measures of measurable events and subjective voices. To capture both aspects required a mixed methods research design using both qualitative and quantitative tools. I also wanted to grasp the societal, historical, legal and political contexts surrounding civil prison oversight in Japan and the ACT. I believe that gathering multiple kinds of data, which reflect diverse perspectives, sheds maximum light on regulatory mechanisms.

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<sup>11</sup> I have not worked in corrections in either Japan or the ACT. However, in an early career role as a Deputy Registrar of the High Court of Australia, I assisted Australian prisoners who were self-represented litigants to progress their Applications for Special Leave to Appeal. My interest in Japanese prisons dates to 2010.

<sup>12</sup> See Todd D Jick, 'Mixing Qualitative and Quantitative Methods: Triangulation in Action' (1979) 24 *Administrative Science Quarterly* 602.

<sup>13</sup> Valerie Braithwaite, 'Closing the Gap Between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 25.

<sup>14</sup> John W Creswell and J David Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (5<sup>th</sup> edn, Sage Publications 2017) 32.

<sup>15</sup> *ibid.*

<sup>16</sup> John W Creswell and Vicki L Plano Clark, *Designing and Conducting Mixed Methods Research* (3<sup>rd</sup> edn, Sage Publications 2018) 38.

### 6.1.2 Access to data

I am conscious that security and privacy considerations mean prisons' research is a drain on staff who facilitate and implement these projects. Corrections work is complicated and often thankless, with round-the-clock responsibility and daily routines that have scant leeway for external agendas.<sup>17</sup> The disruption, workload and risk involved leads prisons to vet research proposals for factors like relevance, rigour and achievability – and some prisons, including those with an authoritarian bent, can shy away.<sup>18</sup> Typically, access comes with conditions.

In Japan, I received the consent and cooperation of the Ministry of Justice (MoJ) Correction Bureau. In Australia, the same support was provided by ACT Corrective Services, an agency under the Justice and Community Safety Directorate (JACS), which is within the ACT Attorney-General's portfolio. Both prison services extended consistently generous cooperation and practical support over a period of more than five years.

This study is the first empirical study of each civil prison oversight system. It is also the first non-Japanese scholarly research project to have been permitted to survey Japanese prisoners in more than 20 years and the third such project overall.<sup>19</sup> Two factors enabled me to gain this research access. Firstly, I was ready to accommodate the institutional interests of each prison system. Prisons have genuine concerns as to whether researchers might disturb prisoners' equanimity, disclose sensitive or salacious information to the media, or report results in a way that identifies participants.<sup>20</sup> I built trust through active listening in my regular meetings with prison authorities and by dividing the project into a series of manageable phases, with ample time for review, consultation and adjustment between them.

The second factor involved my own attributes, experience and willingness to learn. I had lived, worked and studied in each jurisdiction for 15 or more years, which provided insider-outsider advantages. Moreover, I have a high level of fluency and literacy in Japanese and long experience in

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<sup>17</sup> Yvonne Jewkes and Serena Wright, 'Researching the Prison' in Yvonne Jewkes, Jamie Bennett and Ben Crewe (eds), *Handbook on Prisons* (Routledge 2016).

<sup>18</sup> Marija Lučić-Čatić, 'Challenges in Conducting Prison Research' (2011) XI(5-6) *Criminal Justice Issues: Journal of Criminal Justice and Security* 59.

<sup>19</sup> See Jurg Gerber and Susan L Weeks, 'Some Reflections on Doing Crosscultural Research: Interviewing Japanese Prison Inmates' (1992) 17(6) *The Criminologist* 1; Yoko Hosoi and others, 'Research Abstract' *Empirical Study on the Life World of Elderly Prisoners and Process of their Independence after Release: Grant-in-Aid for Scientific Research (C) 23610008, 2011-2013* (Japan Society for the Promotion of Science, nd) <https://kaken.nii.ac.jp/en/grant/KAKENHI-PROJECT-23610008/> accessed 2 April 2023.

<sup>20</sup> See generally, John J Dilulio, *Governing Prisons: A Comparative Study of Correctional Management* (The Free Press 1990) 267-276; Jewkes and Wright (2016).

negotiating with Japanese stakeholders in various fields and engaging with Japanese legal and sociological texts. Language ability lowers barriers, reduces the burden on cooperating agencies and promotes rigour.

I could grasp both 'emic' and 'etic' perspectives: that of a person inside each jurisdiction and that of an outside observer.<sup>21</sup> This dual status brings privileges and responsibilities. It builds trust with local collaborators, providing insight into their normative postures while allowing a researcher to access and evaluate a wide range of local information. However, the researcher has a duty to be constructive, even when critical. I felt a duty to ensure that the project would offer a useful evidence base for the policymakers who made it possible<sup>22</sup> while doing my best to ensure that the prison systems I studied would remain open for future researchers. I was also alert to stakeholders who represented vested interests interacting with me in ways that could challenge my independence and objectivity. This pull towards co-option is something all empiricists face and can lead to skewed analysis or self-censorship.<sup>23</sup>

I leveraged my insider-outside status to access and participate in epistemic communities concerned with corrections policy and civil prison oversight in both jurisdictions. I also audited three half-year graduate courses on corrections law, policy, and practice<sup>24</sup> as well as attending a wide range of relevant policy, industry and scholarly conferences, symposia and events held by stakeholders in both jurisdictions. This engagement with relevant epistemic communities was invaluable in contextualising and validating my survey questions and analysis.

## **6.2 Research Design**

My constructivist-pragmatic worldview suggested a comparative research design that used mixed methods empirical research, complemented by archival research. This section explains my choice of Japan and the Australian Capital Territory (ACT) as comparators and the types of data I gathered.

### **6.2.1 Research frame and choice of comparators**

I find comparative research appealing because I believe the best way to uncover new knowledge is to step away and view the object of inquiry at a distance, from an unexpected angle. Comparative

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<sup>21</sup> See Kenneth Pike, *Language in Relation to a Unified Theory of the Structure of Human Behaviour* (Summer Institute of Linguistics 1967) 8.

<sup>22</sup> In 2017, I contributed the raw data I collected at the ACT prison to an internal Justice and Community Safety Directorate review of the ACT Official Visitor Scheme as a whole, conducted by Pamela Jenkins. This review led to law reforms in 2019, which are discussed in Chapter 11.

<sup>23</sup> Mark Suchman and Elizabeth Mertz, 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) 6 *Annual Review of Law and Society* 555, 575-6.

<sup>24</sup> Two at the Australian National University in 2015, one at Waseda University in 2016.

studies provide both these advantages. Haley wrote in 1993 that one reason for Western scholars to engage in comparative inquiry involving Japan is to counter the Western tendency to portray the West as global ‘creditors’ and exporters of ideas, our predilection for ‘intellectual smugness’.<sup>25</sup> Comparative research offers the chance to reject this complacency. As Haley also points out, Japan has elaborated the meaning of ‘community’ to a degree inconceivable in Western jurisdictions. This ‘communitarian’<sup>26</sup> orientation is particularly notable in criminal justice, where concern for the community dominates at every stage. I anticipated that a jurisdiction with this striking feature might shed new light on problems that all criminal justice systems face.

In 2018, veteran sociologist Yoshio Sugimoto articulated the flipside of this idea. He argued that Japan is not just a source of fresh ideas for export to the West – it is also an ideal testing ground for Western ideas that have an aura of universal applicability.<sup>27</sup> He posited that the ‘universal’ is sometimes simply a modern Western European or North American construct with limited application elsewhere, making it time to graduate from Eurocentrism to a ‘cosmopolitan’ approach that accepts knowledge produced by multiple civilisation hubs.<sup>28</sup> He calls for a ‘relativistic universalism’, which tests non-Western ideas against those from the West on a competitive basis.<sup>29</sup> In doing so, he echoes the call of legal theorists Halliday and Shaffer for empirical studies on the development and spread of legal ideas that originate outside the Euro-American knowledge production hegemony.<sup>30</sup>

A study involving Japan and a Western jurisdiction that takes advantage of the opportunities Haley and Sugimoto identify also has the advantage of fitting within the ‘Most-Different-Systems’ Design (MDSD) category for comparative research. As van der Heijden explains, a comparative set made up of Most-Different-Systems cases sharpens contrasts and reveals the ‘robustness’ of associations between dependent and explanatory variables that ‘hold’ constant, no matter what else changes.<sup>31</sup>

Japan and Australia also have some broad similarities.<sup>32</sup> Both are post-industrial constitutional democracies, in the Asia-Pacific region, with sophisticated, established legal systems, which have

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<sup>25</sup> John Haley, ‘Lessons from a Changing Japan’ (1993) 2 *Pacific Rim Law and Policy Journal* 1.

<sup>26</sup> *ibid.*

<sup>27</sup> Yoshio Sugimoto, ‘Turning Towards a Cosmopolitan Japanese Studies’ in Kaori Okano and Yoshio Sugimoto (eds), *Rethinking Japanese Studies: Eurocentrism and the Asia-Pacific Region* (Routledge 2018).

<sup>28</sup> *ibid* 292-293.

<sup>29</sup> *ibid* 286.

<sup>30</sup> Terence C Halliday and Gregory Shaffer, ‘Transnational Legal Orders’ in Terence C Halliday and Greg Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015)

<sup>31</sup> Jeroen van der Heijden, ‘Selecting Cases and Inferential Types in Comparative Public Policy Research’ in Isabelle Engeli and Christine Rothmayr Allison (eds), *Comparative Policy Studies: Conceptual and Methodological Challenges* (Palgrave Macmillan, 2014); Jay Steinmetz, *Politics, Power and Purpose: An Orientation to Political Science* (Fort Hays State University 2021) 178-179.

<sup>32</sup> Note however, that Japan is a unitary jurisdiction with a single prison system, Australia is a federation of eight states and territories, and has eight separate prison systems including the ACT prison system. Australia has no federal prisons.



European roots. When this study began in 2015, both had ratified the International Convention on Civil and Political Rights 1966 (ICCPR)<sup>33</sup> and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984 (CAT),<sup>34</sup> while neither had ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 2002 (OPCAT).<sup>35</sup>

However, as we have seen in Chapters 4 and 5, the Japanese and ACT prison systems are strikingly different. The ACT built its single mainstream adult male prison recently as an exemplar of human rights compliance. In contrast, Japan built many of its 49 prisons in this category over a century ago, emulating features of the Victorian industrial prison model. We also noted that the ACT civil prison oversight system closely reflects European-origin prison oversight human rights norms, while the Japanese system sidesteps those norms. Instead, it adapts a German prison governance mechanism established in the 19th century. The differences between the two oversight mechanisms are stark, irrespective of the attribute compared.

Further, this comparative pairing provided a workable scope for the study. Both Japan and the ACT had introduced civil oversight systems for the first time a decade before this study commenced, under entirely new prisons legislation. In Japan, the legislative scheme began with legislation covering only sentenced prisoners passed in May 2005. A June 2006 amendment extended coverage to unsentenced prisoners and those on ‘death row’, with the completed scheme known as the Act on *Keiji shūyo shisetsu oyobi shūyōsha to no shogū ni kansuru hōritsu* (Act on Penal Detention Facilities and the Treatment of Inmates and Detainees) 2005 (Penal Detention Act).<sup>36</sup> Japan’s completed scheme became fully operational in May 2007, just a few months before the Corrections Management Act 2007 (ACT) became effective in the ACT.<sup>37</sup> The serendipity of Japan and the ACT taking nearly simultaneous legislative action to introduce new civil prison oversight systems narrowed the scope of my inquiry in terms of period, geography and institutional focus. What is

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<sup>33</sup> UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Japan ratified the ICCPR in 1979, Australia following in 1980.

<sup>34</sup> UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Australia ratified the CAT in 1989, followed by Japan in 1999.

<sup>35</sup> UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT); Australia signed OPCAT on 19 May 2009, ratifying on 21 December 2017. Japan has taken no action.

<sup>36</sup> A provisional English translation is available at [www.japaneselawtranslation.go.jp/en/laws/view/2796](http://www.japaneselawtranslation.go.jp/en/laws/view/2796) accessed 2 April 2023. The civil oversight system became fully operational as of May 2007.

<sup>37</sup> On 1 August 2007.

more, both are soft civil oversight systems, in which overseers lack corrections industry expertise or experience and may not publish their findings at will.<sup>38</sup>

Finally, pairing Japan and the ACT in a MDSD study of civil prison oversight also made sense based on accessibility, as I had established connections in and good knowledge of both locations.

### 6.2.2 Mixed methods research

Complicated research problems ‘call for answers beyond simple numbers in a quantitative sense or words in a qualitative sense’.<sup>39</sup> Combining these complementary data collection modes in a mixed methods research design ‘triangulates’ the data gathered to obtain the clearest available picture, while this hybridity also tends to ‘neutralise’ the inherent ‘biases and weaknesses’ of each type of data source on its own.<sup>40</sup> As Bazeley and Woolley have each noted, gathering qualitative data makes it possible to discern the rich complexity and internal contradictions in participants’ views that quantitative questions alone do not capture.<sup>41</sup> The lack of established performance indicators for civil prison oversight mechanisms that could assist in answering my research questions made seeking this nuanced understanding vital.

I used a three-phase sequential design incorporating both exploratory and explanatory elements, implementing all three phases in both jurisdictions.<sup>42</sup> After archival research in both jurisdictions, I firstly gathered exploratory qualitative data in 2015, through observation and semi-structured interviews, which provided preliminary insights.<sup>43</sup> I used these insights to design survey instruments that would collect both quantitative and qualitative data, then administered them in the second and main research phase across 2016 and 2017.<sup>44</sup> In the third and final phase in 2019, I gathered explanatory qualitative data through semi-structured interviews.<sup>45</sup> The project’s extended duration was an asset. It firstly allowed me to aggregate the data in this interwoven sequence of qualitative and quantitative tranches. Secondly, it allowed me to acquire the skills needed to interrogate the

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<sup>38</sup> This study divides civil oversight systems into ‘hard’ designs, which are marked by higher levels of intrusiveness, expertise and authority and ‘soft’ designs, which tend to be less intrusive, with overseers having less expertise and authority.

<sup>39</sup> Creswell and Plano-Clark (2018) 22.

<sup>40</sup> Creswell and Creswell (2017) 35.

<sup>41</sup> Patricia Bazeley, *Integrating Analyses in Mixed Methods Research* (SAGE Publications 2018) 263-276; Claire M Woolley, 'Meeting the Mixed Methods Challenge of Integration in a Sociological Study of Structure and Agency' (2009) 3 *Journal of Mixed Methods Research* 7.

<sup>42</sup> I received ethics approval from the Australian National University Human Research Ethics Committee under Expedited Protocol 2015/160 applying to civil overseers, and managerial corrections officers and Full Protocol 2016/288 applying to custodial corrections officers and prisoners.

<sup>43</sup> See Appendix A Phase 1: Exploratory Data Collection.

<sup>44</sup> See Appendix B Phase 2: Main Data Collection; Appendix C Phase 2: Open-Ended Survey Question.

<sup>45</sup> See Appendix D Phase 3: Explanatory Data Collection.

data using thematic, descriptive and inferential techniques, then integrate all three kinds of analysis to form a rich, nuanced picture of the nature and impact of each system.

I included all three cohorts involved in civil prison oversight as participants: corrections officers, overseers and prisoners. As I explain in the next section, this design feature reduced the risk of error.

### **6.2.3 Participants: ‘voices from inside’**

The historical lack of recognised performance indicators for civil prison oversight mechanisms may be one reason for the dearth of empirical studies noted in Chapter 1. However, Chapter 2 highlights the 2002 work of Boyne, Day and Walker, as being among the first to investigate how to evaluate these mechanisms.<sup>46</sup> I agree with these authors that the best data source is likely to be the perceptions of people with lived experience of civil prison oversight.

As the voices of civil overseers have dominated the discourse on these mechanisms to date, adding the voices of those with lived experience of them addresses a gap in the voluminous literature promoting civil prison oversight. The lived experience of staff and prisoners in any civil prison oversight system dwarfs that of civil overseers. As actors external to the prison, overseers are the least likely of all actors to know how the oversight system functions as part of the prison’s daily operations and its effects inside the prison. Accordingly, I focused on the views of staff and prisoners, without overlooking overseers’ perspectives.

#### *Qualitative data*

Qualitative data takes the form of words, images, and objects<sup>47</sup> that uncover participants’ ‘attitudes, motives and behaviours’.<sup>48</sup> This data allowed me to look behind the formal positions that participants expressed in responses to quantitative questions, which required them to agree or disagree with positions that I determined. Using a qualitative approach allowed participants to determine the lens through which they would respond and to offer rich, intersecting landscapes of perception and sentiment. In a closed environment like a prison, this kind of data provides insights into questions that even a well-informed researcher might not know to ask.

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<sup>46</sup> George Boyne, Patricia Day and Richard Walker, ‘The Evaluation of Public Service Inspection: A Theoretical Framework’ (2002) 39(7) *Urban Studies* 1197, 1209:

A more appropriate methodology ... may be to rely on the perceptions of key actors in the inspection process. These include central government ... the inspectorate ... and inspectees.... Surveys and interviews with these actors would provide measures of the benefits and costs of inspection, and the extent of the problems in the inspection cycle.

<sup>47</sup> Creswell and Creswell (2017) 4, 190-8.

<sup>48</sup> Peter Francis, ‘Planning Criminological Research’ in Pamela Davies, Peter Francis and Victor Jupp (eds), *Doing Criminological Research* (2<sup>nd</sup> edn, Sage Publications 2010) 15, 23.

I collected qualitative data in all three phases of this mixed methods study. In the first phase in 2015, I took notes during observational prison visits and conducted semi-structured interviews of overseers and senior corrections officers: 30 in Japan; and six in the ACT.<sup>49</sup> In the second phase in 2016 and 2017, I collected responses to a single open-ended question positioned at the end of surveys administered to all three types of actor in both jurisdictions.<sup>50</sup> In the third phase in 2019, I interviewed senior corrections leaders with detailed knowledge of the establishment and operations of their system's civil oversight mechanism: two in Japan and one in the ACT.<sup>51</sup>

I used ethnographic methods in the first phase. In an ethnographic study, the researcher 'studies the shared patterns of behaviours, language and actions of an intact cultural group in a natural setting over a ... period of time',<sup>52</sup> entering the participants' social space and experiencing what they experience.<sup>53</sup> Naturally, I could not share the lived experience of being a corrections officer or prisoner. However, I was able to accompany and observe Japanese civil oversight committees on ten half-day visits to prisons and spent a half day at an 11th Japanese prison between mid-July and mid-September 2015.<sup>54</sup> I also made three site visits to the ACT prison: two in 2015 and one in 2017. While these visits included secure custodial areas, it was not feasible to accompany the ACT overseers while they interacted with prisoners and the warden.<sup>55</sup> I made contemporaneous notes and was particularly attentive to the physical design of the facilities, the interactions between staff and prisoners, the language used in those encounters and the rituals that accompanied my visits.

I used the qualitative data gathered in this first phase to enhance my understanding of each prison system and the design and operations of its civil oversight system.<sup>56</sup> This in turn informed the design

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<sup>49</sup> In Japan, I recorded interviews of eight wardens, eight corrections officers and 14 overseers. In the ACT, I recorded interviews of the warden, two senior corrections officers and three current and former overseers. See Appendix A Phase 1: Exploratory Data Collection.

<sup>50</sup> The open-ended questions in the staff and overseer surveys both asked: 'Please write any additional thoughts or views you may have about the [oversight system in your jurisdiction or its] activities – especially how to improve [it]. The open-ended question in the prisoner surveys asked: 'Please write any thoughts you have about the [oversight system where you are] – especially how [it] could be made better'. See Appendix B Phase 2: Main Data Collection.

<sup>51</sup> In Japan, I recorded interviews with the Director-General elect of the Correction Bureau and a former Director-General of the Correction Bureau. In the ACT, I recorded an interview with a senior bureaucrat who had held various roles related to the civil prison oversight system from prior to its inception. See Appendix D Phase 3: Explanatory Data Collection.

<sup>52</sup> Creswell and Creswell (2017) 35.

<sup>53</sup> Raymond Madden, *Being Ethnographic: A Guide to the Theory and Practice of Ethnography* (Sage Publications, 2010) 24.

<sup>54</sup> See Appendix A1.

<sup>55</sup> The confidentiality and security obstacles were insurmountable as each ACT overseer spends their twice-weekly half-day visits to the prison walking freely, unaccompanied, around the secure custodial areas of the prison and speaking informally with prisoners. The warden of the Alexander Maconochie Centre, the ACT prison, is known as the 'General Manager Custodial Operations'.

<sup>56</sup> See Appendices A2 through A7.

and content of my second phase research surveys.<sup>57</sup> The qualitative data gathered in the second phase surveys helped me to understand the perceptions of staff, overseers and prisoners concerning each system, while the qualitative data I collected from senior corrections leaders in the third phase provided insights into each prison administration's perspectives.<sup>58</sup>

### *Quantitative data*

Quantitative data offers a 'broad lens' through which to gain a comprehensive overview of sentiment across a large number of participants.<sup>59</sup> As it takes the form of numerical values, quantitative data allows the use of descriptive summaries and statistical analysis to compare groups empirically.

I collected quantitative data during the second phase of my study. These data comprised numerical rating scale and multiple-choice responses to closed questions, which formed the bulk of the questions in the surveys administered in prisons in Japan and in the ACT.<sup>60</sup> I developed four separate surveys and used them in both jurisdictions, keeping the questions for each participant cohort identical as between the two jurisdictions, so far as possible.<sup>61</sup>

Three of the survey instruments measured staff, overseer and prisoner opinions on the nature and impact of the oversight systems. The fourth survey collected data from oversight committee chairs in Japan and both the overseers in the ACT, which concerned the oversight activities at each prison during the previous fiscal year in that jurisdiction. It used multiple-choice categorical questions concerning type, frequency, and duration of activities.<sup>62</sup>

The final page of each survey also collected participants' demographic data. For staff and overseers, this included their gender; age group; years of service; and rank or position – and for Japanese overseers, their sending organisation. For prisoners, it included: their age group; whether their release was on parole or on completing their full sentence; and whether they had experienced prison life before the advent of civil prison oversight.

### *Archival data*

I collected valuable contextual data through archival research involving primary and secondary resources in Japanese and English. These resources extended from the late 1700s to contemporary times and included media reports; personal memoirs published by corrections officers, overseers,

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<sup>57</sup> See Appendices B2 through BB.

<sup>58</sup> See Appendices D1 and D2.

<sup>59</sup> Creswell and Plano Clark (2018) 8.

<sup>60</sup> See Appendices B2 through B8.

<sup>61</sup> Differences in prison systems meant some localisation was necessary when administering the Japanese surveys in the ACT.

<sup>62</sup> I combined the overseer and oversight committee chair surveys administered in Japan (Appendices B3 and B5) into a single survey in the ACT (Appendix B6).

and prisoners; policy papers; official statistics and annual reports; parliamentary debates; legislative instruments and administrative guidelines; as well as non-government organisation (NGO) and scholarly publications.

Collecting mixed methods data from a variety of sources provided a rich, complex picture of the nature and impact of each civil prison oversight systems from multiple angles – some echoing, some contrasting, and some conflicting. Purposefully interrogating each data set in light of insights gained from others, as if orchestrating a conversation that would integrate the ‘kaleidoscopic’ perspectives represented, made it possible to see civil prison oversight in a new light, to ‘see things that have not yet been seen’.<sup>63</sup>

### **6.3 Research Methods**

This section reports on the sampling choices I made, how I designed my surveys and their implementation and how I analysed and interpreted my data.

#### **6.3.1 Sampling and response rates**

Sampling was necessary when I was determining which Japanese prisons to visit during the first exploratory phase and when conducting interviews at these prisons, I sometimes used the snowball method to recruit alternate or additional interview participants. In the second phase, I invited entire populations from each participant cohort to participate. In the third phase, I collected data from specific individuals in leadership positions.

##### *Observational and interview data, Phases 1 and 3*

I collected observational and interview data during the exploratory first phase in 2015. I travelled to Japan for nearly three months and sought Ministry of Justice Correction Bureau permission to observe Penal Institutional Visiting Committee visits at penal institutions. Of the nine types of penal institution, then numbering 77 in all, I selected a sample of 11 penal institutions across all types according to a mix of deliberate, random and convenience factors.<sup>64</sup> The candidate institutions were those with oversight committees that happened to be meeting during my time in Japan. Each institution consulted with its oversight committee to confirm their availability on a mutually convenient date. Although I was aware that the frequent rotation of senior corrections officers

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<sup>63</sup> Donna M Mertens and others, ‘Expanding Thinking through a Kaleidoscopic Look into the Future: Implications of the Mixed Methods International Research Association’s Task Force Report on the Future of Mixed Methods’ (2016) 10(3) *Journal of Mixed Methods Research* 221, 221-222.

<sup>64</sup> See Appendix A1. It was not possible to align my visit to Okinawa Prison with an oversight committee visit. After my visits were planned, a committee chair at a mainland prison wrote to the Correction Bureau objecting to my planned visit on the basis that I was likely to reveal confidential information about the committee in that prison to the Ministry. I selected an alternate prison.

between Japanese penal institutions produces a high degree of consistency in culture and practices nationwide, I included urban, regional and remote institutions. The Correction Bureau granted permission to conduct a brief semi-structured interview of the warden at each institution; quietly observe each committee meeting; then conduct further brief semi-structured interviews with the mid-ranked officer who served as the institution's Visiting Committee liaison and at least one Visiting Committee member.<sup>65</sup>

Sampling was not necessary in the ACT, as it has just one prison and a small number of overseers and staff in leadership roles.<sup>66</sup> I sought permission from JACS to visit the prison and interview the warden and two other senior correction officers. ACT Corrective Services put me in direct contact with the serving Official Visitors, who both agreed to interviews and I used the snowball method to also recruit a former Official Visitor.<sup>67</sup> In 2015, I conducted six Phase 1 ACT interviews in all and visited the prison twice.<sup>68</sup>

I also collected interview data during the final, explanatory phase in 2019. I conducted semi-structured interviews with three elite policy makers who had been influential in the introduction and operation of the respective civil oversight systems: two in Japan and one the ACT.<sup>69</sup>

### *Survey data, Phase 2*

#### Survey populations

I offered my surveys to the entire population of each type of actor eligible to answer in each jurisdiction. I adopted this strategy in view of the significant additional workload required for the cooperating agencies, especially in Japan, to facilitate anonymised random sampling of staff and prisoners.<sup>70</sup>

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<sup>65</sup> I provided my questions in writing in advance to the Correction Bureau, who provided them to each prison and each committee ahead of my visit. The committee members' willingness and availability on the day, immediately after the meeting, determined the identity of the 14 committee members whom I interviewed. All wardens and prison liaison officers agreed to interviews, however as some declined electronic recording, I recorded interviews with eight wardens and eight liaison officers in all. The preliminary interviews took an average of 30 minutes.

<sup>66</sup> The prison is known as the Alexander Maconochie Centre.

<sup>67</sup> Judy Putt, Tracey Whetnall and Jeremy Boland.

<sup>68</sup> All Phase 1 ACT interviewees agreed to their identification in this study.

<sup>69</sup> Satoru Ōhashi (2020-2021 Director-General of the Correction Bureau); Satoshi Tomiyama (2016-2018 Director-General of the Correction Bureau); Sean Costello (as of 2019 Executive Manager of the ACT Human Rights Commission). All Phase 3 interviewees agreed to their identification in this study.

<sup>70</sup> The Correction Bureau advised that random sampling across the large corrections officer and prisoner populations at Japan's 49 mainstream adult prisons would have been prohibitively onerous. This was due to the multi-dimensional stratification of mainstream adult male prisons in Japan by security classification; length of sentence; and correctional region.

I focussed the study on Japan's 49 mainstream adult male prisons.<sup>71</sup> There were 924 corrections officers in managerial roles at those prisons<sup>72</sup> and 243 individuals serving as Visiting Committee members, with 49 of them in the role of chair.<sup>73</sup> In light of prisoners' vulnerable status and the risk of staff retaliation that is endemic to all prisons research,<sup>74</sup> I limited the prisoner survey population to prisoners who would be in Japan's brief pre-release programs during the survey period.<sup>75</sup> This number was somewhat fluid. Ultimately, some 1700 prisoners passed through the pre-release programs at the 49 prisons during the survey period.

I offered the survey to the entire population of roughly 120 corrections officers employed at the ACT prison. There were two civil overseers, one of whom was the Indigenous Official Visitor and roughly 70 mainstream adult male prisoners in the pre-release program during the survey period.<sup>76</sup>

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<sup>71</sup> I excluded Japan's penal institutions for specific prisoner populations from the study: juvenile prisons; women's prisons; medical prisons; and Detention Houses. This was in order to provide the best equivalency to the ACT prison population. Convenience and resources were also factors. The 49 prisons consisted of Category A, LA, B and LB prisons. Category A prisons are for those who have committed a first or minor offence. Category B prisons for those who have committed a subsequent or serious offence. Category L prisons are for those serving sentences of ten years or longer. See Appendix B1. The small number of female prisoners in the ACT ruled out including women's prisons in Japan. As of the end of 2016, there were 31 adult female prisoners in the ACT of a total of 441 adult prisoners: Australian Bureau of Statistics, 'Table 14 PRISONERS, Selected Characteristics by State/Territory' 4517.0 - Prisoners in Australia, 2017

[www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02016?OpenDocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02016?OpenDocument) accessed 2 April.

<sup>72</sup> Lower-ranked officers including custodial officers were not included in Japan. The surveys were offered to the middle-management *kanshūchō* rank and above. The minimalist design of the Japanese civil prison oversight system meant that lower-ranked officers were unlikely to have any knowledge of the oversight system or to have interacted with overseers. Convenience and resourcing were also factors as the entire staff population at the 49 Japanese prisons came to several thousand individuals.

Japan's corrections service remains hypermasculinised. The prison liaison officer was male at all eleven penal institutions visited in Japan in 2015, including the women's prison. I did not observe any female officers on duty when inside the ten male prisons among these 11 institutions. There were 17,466 corrections officers in Japan in 2015, of whom 8% were female. In the ten women's prisons at that time, around 90% of staff were female and 75% of all female staff were aged under 40 years of age. This suggests that Japan's female corrections officers overwhelmingly worked at women's prisons, in relatively junior positions. See Masako Natori, Director, Facilities Department, MoJ, Japan, 'Capacity Building of Female Correctional Officers: From the Perspective of Administration of Women's Prisons in Japan' in Report of the Workshop: Role of the United Nations Standards and Norms in Crime Prevention and Criminal Justice in Support of Effective, Fair, Humane and Accountable Criminal Justice Systems: Experiences and Lessons Learned in Meeting the Unique Needs of Women and Children, in Particular the Treatment and Social Reintegration of Offenders - Thirteenth United Nations Congress on Crime Prevention and Criminal Justice (UNAFEI March 2016) 87, 88-89.

<sup>73</sup> Each committee has between four and ten members.

<sup>74</sup> Lynne Roberts and David Indermaur, 'The Ethics of Research with Prisoners' (2008) 19(3) *Current Issues in Criminal Justice* 309. This can arise due to prisoners having participated in a study, or due to awareness of unfavourable prisoner responses to a survey or interview questions in the prison. In Japan, staff retaliation against prisoners who had sought to complain of ill-treatment had been a factor in the Nagoya Prison Scandal: Lawson (2015).

<sup>75</sup> This period is two weeks for prisoners released on parole, and three days for those released after serving their full sentence.

<sup>76</sup> The ACT prison's pre-release program is flexible, usually lasting several months.



### Survey response rates: survey as whole

The survey response rates, shown in Table A, were high in Japan, although somewhat lower for the overseers who chaired the oversight committees.<sup>77</sup> Response rates were also high in the ACT.

**Table A** Japan and ACT response rates: Phase 2 surveys - survey as a whole

| Actor                               | Survey population | Valid responses | Response rate |
|-------------------------------------|-------------------|-----------------|---------------|
| <i>Japanese survey participants</i> |                   |                 |               |
| Corrections officers                | 924               | 862             | 95.4%         |
| Overseers                           | 243               | 200             | 82.3%         |
| - committee chairs                  | 49                | 34              | 69.4%         |
| Prisoners                           | 1700              | 1451            | 85.6%         |
| <i>ACT survey participants</i>      |                   |                 |               |
| Corrections officers                | 94                | 81              | 86.2%         |
| Overseers                           | 2                 | 2               | 100.0%        |
| Prisoners                           | 69                | 59              | 85.5%         |

Very high response rates in a closed environment can raise the question of coercion, particularly for prisoners in Japanese prisons, which have a heavily disciplinarian ethos. However, it was clear from the data that Japanese prisoners, felt able to express critical views freely – more so than staff.<sup>78</sup> They had all been transferred from their cellblock and factory groups into a pre-release wing, which was managed by different staff, as they were due for release within 3 to 14 days. As is explained below, the format in which they received the surveys reduced the opportunity for interference by corrections officers and their data suggest that they did not feel intimidated when responding or coerced to respond in particular ways. Further, the professionalism and integrity of Japanese prison personnel are not generally in doubt.<sup>79</sup>

<sup>77</sup> This lower response rate from chairs meant that oversight activity data was missing for more than a dozen prisons. However, it was possible to obtain some basic items among these missing data from the Correction Bureau.

<sup>78</sup> Responses to the questions on 5-point scales with neutral mid-points have shown a broader spread around the mid-point among prisoners than correction officers, whose response typically showed a strong Middle Response Style (MRS) response bias, in the form of a narrow spike at the neutral mid-point, with modest spread on either side. This is a known pattern in Japanese participants' responses to Likert scale survey questions: Anne-Wil Harzing, 'Response Styles in Cross-National Survey Research: A 26-Country Study' (2006) 6(2) *International Journal of Cross Cultural Management* 243; Noriko Onodera, 'Research on Middle Options in Mail Surveys: Analyses Based on an Experimental Mail Survey' (*NHK Broadcasting Culture Research Institute Public Opinion Research*, April 2014) [www.nhk.or.jp/bunken/english/reports/pdf/report\\_14040101.pdf](http://www.nhk.or.jp/bunken/english/reports/pdf/report_14040101.pdf) accessed 2 April 2023. The MRS response bias seen in staff responses in Japan may have been exacerbated by the disciplinarian, militaristic ethos of the Japanese corrections system.

<sup>79</sup> The Correction Bureau publishes a descriptive summary of the results of its (*Jukeisha ni taisuru shakuhōji anke-to*) (Prisoner Release Survey) each year. The summaries for surveys conducted around the time when this study collected data from prisoners show that Japanese prisoners did not typically report ill-treatment, coercion or human rights abuses at the point of release. The summaries for the most recent five years of these

In addition, some features of the participant recruitment protocol may have helped achieve the high Japanese response rates. I carried out pilot survey testing and revision for a month before implementation, the Correction Bureau made helpful suggestions for making the surveys accessible for prisoners with low literacy and prisons distributed the survey together with the Correction Bureau's own *Prisoner Release Survey*.<sup>80</sup> Psychocultural factors, such as social desirability,<sup>81</sup> and the general tendency in Japan to comply with the implicit wishes of authority figures<sup>82</sup> may also have contributed to the high response rates.<sup>83</sup> The response rates in the only other scholarly research surveys of prisoners permitted in Japan in recent decades were also high.<sup>84</sup>

Prisoners in the ACT had advance notice of the ACT survey's implementation.<sup>85</sup> In addition, the ACT prisons administration contacted the prison community at around the same time to encourage participation in an internal review of the civil oversight system being conducted by Pamela Jenkins. Some participants may have conflated these simultaneous data collection efforts. The invitation to participate I sent to prisoners also made it clear that the Jenkins review would receive a copy of the data collected for inclusion in her deliberations on future law reforms. Finally, some minor incentives are likely to have influenced the prisoner and staff response rates in the ACT. Payment of minor

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surveys are available at Ministry of Justice Correction Bureau, 'Jukeisha ni taisuru shakuhōji anke-to shūkei kekka' (Aggregated Results of Prisoner Pre-Release Surveys) (Ministry of Justice Correction Bureau nd) [www.moj.go.jp/kyousei1/kyousei\\_kyousei26.html](http://www.moj.go.jp/kyousei1/kyousei_kyousei26.html) accessed 2 April 2023.

<sup>80</sup> These suggestions included adding *furigana* superscript to all Chinese characters and using terminology with which prisoners would be familiar.

<sup>81</sup> It is a rational choice for prisoners to seek to fit in smoothly with the business of the day in a prison. See generally Hans Toch, *Living in Prison: The Ecology of Survival* (Revised edn, American Psychological Association 1992); Jason Warr, 'The Prisoner: Inside and Out' in Yvonne Jewkes, Jamie Bennett and Ben Crewe (eds), *Handbook on Prisons* (2<sup>nd</sup> edn, Routledge 2016).

<sup>82</sup> The Japanese term for this behaviour is *sontaku*. A direct order or request from the authority figure is not necessary. Acting in a manner that is likely to please the authority figure is a conditioned response: Jun Monoe, *Kūki ga shihaisuru kuni* (The Country where 'Sensing the Atmosphere' Rules) (Shinchōsha 2020)

<sup>83</sup> See Table A. Culture alone is unlikely to be a sufficient explanation. Sugimoto (2018) 285 notes:

It is one thing to promote non-Western concepts as yardsticks for comparative analysis. It is another to suggest that the attributes that they depict are uniquely extant only in the society from which the ideas have originated. One is a conceptual issue, and the other is an empirical question. Confusing the two often leads to erroneous stereotyping.

<sup>84</sup> The Tatsuno-Hosoi group research project surveyed male prisoners aged 65 years or more in Japan and New Zealand across 2012-13. This survey attracted a 35% response rate in New Zealand, compared to a 93% response rate in Japan: Yoko Hosoi and others (2011-2013). In 2016, an overlapping group of researchers collected data from mature-age women prisoners, attracting an 80.8% response rate: Yoko Hosoi and others, 'Outline of Final Research Achievements' *A Research on the Recognition of "Self-Image" of the Elderly Criminals, and on their Challenge to Re-Socialization to the Society: Grant-in-Aid for Scientific Research (B) 26310108, 2017-2020* (Japan Society for the Promotion of Science, nd) <https://kaken.nii.ac.jp/en/grant/KAKENHI-PROJECT-26310108> accessed 2 April 2023. Finally, the official *Prisoner Release Survey* statistical summaries released annually in Japanese by the Correction Bureau quoted 'valid response rates' over the five years between 2013 and 2017 ranged from 93% to 97%: Ministry of Justice Correction Bureau, 'Jukeisha ni taisuru shakuhōji anke-to shūkei kekka' (Aggregated Results of Prisoner Pre-Release Surveys) (Ministry of Justice Correction Bureau nd) [www.moj.go.jp/kyousei1/kyousei\\_kyousei26.html](http://www.moj.go.jp/kyousei1/kyousei_kyousei26.html) accessed 2 April 2023.

<sup>85</sup> The prison notified prisoner Delegates by email and provided an oral briefing at a regular Delegates Meeting in mid-2017.

incentives is normative in Australian prisons research, but inconceivable in Japan.<sup>86</sup> The incentives to ACT prisoners consisted of an AUD 20 credit to the participant's internal grocery and miscellaneous goods 'buy-up' account at the prison on the return of their survey form.<sup>87</sup> I also offered a low-value consumable goods incentive to each staff member who participated. This was a small chocolate bar from a self-serve box. These incentives and their administration were consistent with the Australian National University Human Research Ethics Committee protocols approved for this study.<sup>88</sup>

Overall, we see that there were a number of factors encouraging participation in both jurisdictions. While prisons are inherently coercive spaces, there is no evidence to suggest that anything more than the usual forces at play in the prison environment affected the participation rates in this study.<sup>89</sup>

#### Survey response rates: open-ended question

Table B lists the response rates to the single open-ended survey question at the end of each survey. Participation across cohorts was even, at nearly a quarter of the Japanese survey participants in each cohort.<sup>90</sup> In the ACT, this one-quarter ratio held for the staff cohort and both overseers answered the qualitative question as well as the quantitative questions.<sup>91</sup> The prisoner response rate for the qualitative question was much higher in the ACT. This may have been due to the minor incentives mentioned above.<sup>92</sup>

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<sup>86</sup> The authoritarian, Spartan ethos of the Japanese corrections system makes any question of incentives moot.

<sup>87</sup> The prison notified me of the buy up account numbers for each prisoner who returned a sealed survey envelope, without disclosing the prisoners' names, and I made the transfers from a prepaid Australia Post card. I took a crate to the prison filled with small chocolate bars, and invited each staff member who returned their survey form to take two.

<sup>88</sup> See Research Design above.

<sup>89</sup> One focus of ANU Human Research Ethics Protocol No. 2016/288, which was approved by the Human Ethics Research Committee (HREC) before I undertook Phase 2, was mitigating against the risk of coercion in each jurisdiction. I made a number of granular variations to this Protocol during the survey administration in each prison system, receiving detailed HREC advice and receiving HREC approval in relation to each.

<sup>90</sup> I used the chi-squared test of independence to show that these sub-cohorts did not differ significantly in demographic characteristics from the sub-cohorts who answered only the quantitative questions, with three exceptions. These were, firstly, that prisoners who answered the open-ended question were more likely to have served their full sentence,  $\chi^2 (1, N = 1382) = 6.6, p < .05$ . Secondly, correction officers who answered open-ended question were more likely to have been a corrections officer for nine or fewer years,  $\chi^2 (3, N = 845) = 14.9, p < .05$ . Finally, overseers who answered the open-ended question were more likely to be serving at a larger prison,  $\chi^2 (3, N = 198) = 10.1, p < .05$ .

<sup>91</sup> The chi-squared test of independence demonstrated that staff sub-cohort in the ACT who also answered the open-ended question did not differ significantly in demographic characteristics from the sub-cohorts who answered only the quantitative questions, with one exception. Staff who answered the open-ended question were more likely to be aged 45 or more,  $\chi^2 (1, N = 77) = 5.6, p < .05$ .

<sup>92</sup> The chi-squared test of independence found that the prisoner sub-cohort in the ACT who also answered the open-ended question did not differ significantly in demographic characteristics from the sub-cohorts who answered only the quantitative questions.

**Table B** Japan and ACT response rates: Phase 2 surveys - open-ended question

|                                     | Total survey responses | Valid responses to open-ended question | Open-ended question valid response rate |
|-------------------------------------|------------------------|----------------------------------------|-----------------------------------------|
| <i>Japanese survey participants</i> |                        |                                        |                                         |
| Prisoners                           | 1451                   | 344                                    | 23.7%                                   |
| Corrections officers (staff)        | 862                    | 193                                    | 22.4%                                   |
| Overseers                           | 200                    | 47                                     | 23.5%                                   |
| Total                               | 2513                   | 584                                    |                                         |
| <i>ACT survey participants</i>      |                        |                                        |                                         |
| Prisoners                           | 59                     | 45                                     | 76.3%                                   |
| Corrections officers (staff)        | 81                     | 21                                     | 25.9%                                   |
| Overseers                           | 2                      | 2                                      | 100%                                    |
| Total                               | 160                    | 68                                     |                                         |

### 6.3.2 Survey design and implementation

#### *Japan*

I designed the survey questions, layout and implementation protocol in Japan, in Japanese, with input from the Correction Bureau. The prisoner survey was a short, simple survey of roughly 25 individual questions.<sup>93</sup> Just over half the questions for prisoners used a five-point Likert Scale to collect opinion data. The corrections officer and overseer surveys mirrored each other closely, sharing around 90% of their content.<sup>94</sup> These surveys each contained roughly 120 questions, laid out in tables, most of which used a five-point Likert Scale to collect opinion data. The final question in the three opinion surveys, one for each participant cohort, was an open-ended question asking how the participant would improve the civil oversight system. The fourth survey was a short supplemental survey for committee chairs that contained 19 questions relating to the frequency and duration of oversight activities.<sup>95</sup> All questions related to the previous fiscal year, which ran from 1 April 2015 to 31 March 2016 in Japan. All surveys were in paper format due to Correction Bureau requirements and took roughly 30 minutes of participants' time, including the demographic questions.

I conducted a pilot test of the prisoner survey form with more than 30 test participants at a mainstream adult male prison in the Kantō region, all of whom were due for release before the survey period began. I also tested the overseer and staff survey forms. The three overseer test

<sup>93</sup> See Appendices B4 and B8. As noted above the prisoner survey was made accessible for prisoners with low literacy levels. The five-point Likert scale used in the 15 opinion questions in this survey was reversed for analysis and reporting. The relevant questions were Q3-4, Q3-5, Q3-7, Q4-2 and Q5-1 to Q5-11.

<sup>94</sup> See Appendices B2 and B6, B3 and B7.

<sup>95</sup> See Appendix B25. This survey elicited data on how overseers spent their time, with whom and where in the prison. It did not contain any open-ended questions.

participants were either former overseers, or current overseers at prisons outside the study. I tested the staff survey form with three retired senior corrections officers. In each case, I clarified the wording of questions in light of the test participants' feedback.<sup>96</sup> I asked the ANU Statistical Consulting Unit to carry out descriptive analysis of the test survey data from prisoners using SPSS and – on their advice – revised the question order to reduce the number of prisoners answering questions not applicable in their case.

I distributed the survey forms by registered mail to prisons in mid-August 2016, with instructions for prisons to implement the survey from 1 September 2016. The survey period was to end when either the allocated forms ran out, or the survey period ended on 31 October. I asked prisons to post all survey forms back to my address in Tokyo during the month of November using stamped self-addressed parcel bags that I provided.

I offered the overseer and staff surveys in numbered opaque self-sealing envelopes in which participants could seal their correspondingly numbered answered survey form for return, to ensure the confidentiality of their answers. In Japan, all 49 wardens participated. This made it possible to record their rank in the Japanese data set without risking re-identifying them. I have refrained from reporting their views as a discrete cohort. The Correction Bureau denied permission to use envelopes in the case of prisoners, on the basis that it would mean staff had to open and search each envelope for irregular items or messages that prisoners might attempt to smuggle out. Accordingly, I stapled a blank sheet of paper to the front of each prisoner survey and another to the back. This was to make it difficult for staff collecting completed survey forms to glance at a prisoner's responses.

I asked participants to return their survey form even if they had not answered it. This helped to protect the anonymity of participants within the prison environment and saved staff having to decide what to do with unused surveys. After receiving the returned forms, I carefully noted any missing forms or envelopes and the condition of returned envelopes and forms. This allowed me to identify a small subset of survey responses where irregularities may have occurred during the proxy implementation process. I excluded these survey responses from analysis. I stored all returned envelopes and completed survey forms securely after I had the completed forms scanned.

I provided a report in Japanese to the Correction Bureau showing basic aggregations of survey results by late 2017 and made this available to survey participants by uploading to a shared Dropbox folder. I had notified participants of the URL for this folder when the surveys were distributed.

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<sup>96</sup> In the Japanese language, clarity is achieved by listing several examples of a single concept, joined by the particle 'ya'. This particle is used to signal that the examples given are part of an incomplete list. The single concept that is the subject of a sentence may be left unstated. This 'silent subject' syntax is seen in some survey questions.

### *Australian Capital Territory*

I translated the survey forms used in Japan into English as a single set and localised the prisons terminology, paying particular attention to consistent usage across the set.<sup>97</sup> As the ACT civil oversight system is straightforward, I removed questions tailored for the more complex Japanese system. As just seven of the oversight activity questions applied in the ACT's case, rather than having a fourth survey, I appended them to the end of the overseers' opinion survey. In the ACT, all questions related to the previous calendar year, from 1 January to 31 December 2016. All surveys took roughly 30 minutes of participants' time and were in paper format as in Japan. Both overseers consented to the identification of their individual answers in the Phase 2 data set.<sup>98</sup> However, I removed the demographic question identifying the warden from the ACT staff survey to protect the confidentiality of that participant's responses.

I conducted pilot testing of the ACT prisoner survey with assistance from two former prisoners and several undergraduate students from the Australian National University community. Senior ACT prison staff also advised on simplifying language choices to ensure the prisoner survey would be accessible for those with low literacy levels.<sup>99</sup> I asked a former ACT civil overseer and a retired senior corrections officer to test the overseer and staff surveys and clarified the wording on their advice.

I delivered the survey forms to the ACT prison by hand in August 2017.<sup>100</sup> The prison agreed to administer the surveys until either the allocated forms ran out, or the two-month survey period ended and to store all returned forms in a locked cabinet until I collected them by hand. I emailed the overseers' survey directly to the overseers and received them back the same way. All participants at the prison received numbered survey forms in correspondingly numbered opaque self-sealing envelopes and I asked all those who received forms to return them whether completed or blank. Both these measures protected participant anonymity. I collected the survey forms by hand in October and followed the same checking, scanning and storage protocol as in Japan, again excluding a small subset of returned forms from analysis. I reported the aggregated survey results to JACS and the ACT participants in late 2017, in the same way as in Japan.

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<sup>97</sup> In some cases, I altered the wording of a question slightly to reflect local ACT prison conditions and norms, including linguistic norms. In all cases, the underlying concepts remained the same.

<sup>98</sup> The overseers' public profile and routine inclusion in ACT corrections policy and advocacy circles meant that their views on various matters were already public knowledge.

<sup>99</sup> Senior prison staff advised that some among the prisoner population were functionally illiterate. I prepared a script and protocol for an oral version of the prisoner survey and offered the prisoner survey population the opportunity to complete the survey orally. No prisoner took up this option.

<sup>100</sup> I delivered the prisoner survey forms first, and the corrections officer forms later. This staggered launch was in response to an ACT Justice and Community Safety (JACS) Directorate request, so that as much data as possible could be gathered from all three types of actors ahead of the data collection deadline for the contemporaneous internal JACS review of the civil oversight system conducted by Pamela Jenkins.

### 6.3.3 Data analysis and reporting

I outsourced the transcription of the Phase 1 and Phase 3 interviews,<sup>101</sup> then organised my qualitative data by jurisdiction and participant cohort, analysing it by close, repeated reading of these transcripts and my field notes from each prison visit. I drew on participants' and my own descriptions in the Phase 1 data of the daily operations of each oversight system, including its potential benefits and unintended consequences, when drafting my Phase 2 survey questions. I drew on insights gained from the Phase 3 interviews when writing my comparative analysis and conclusions.

I outsourced the Phase 2 survey scanning and data entry and received expert quantitative data analysis assistance.<sup>102</sup> The quantitative data analysis was conducted using SPSS v.26. I analysed patterns in this data deductively, using descriptive and multivariate inferential analysis techniques to test theories that had emerged from the analysis of the observational and qualitative data collected in Phase 1.<sup>103</sup>

I analysed the qualitative survey responses in Dedoose, using thematic interpretative analysis to identify patterns via an inductive process. Participants who answered the open-ended question common to all the opinion surveys wrote their responses at the end of their survey form. I assigned codes to recurring themes in participants' responses, then assessed the connections between the themes.<sup>104</sup> I used value-neutral or positive terms such as 'transparency', 'advocacy', 'comfort' and 'deference' to denote codes. As participant responses often addressed multiple topics, each response could be coded with multiple child codes under a given parent code. Accordingly, percentages did not add up to 100.<sup>105</sup>

To help identify trends in the large number of qualitative responses,<sup>106</sup> I rated responses on a 1 to 5 rating weighting scale, with the value '1' applied where a participant strongly disagreed with a code, the value '3' where a participant took a neutral position and the value '5' where a participant

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<sup>101</sup> I outsourced the initial transcript preparation then checked the transcripts myself and provided copies of the checked versions to each participant for their approval.

<sup>102</sup> The large data sets from Japan made this assistance particularly necessary.

<sup>103</sup> Creswell and Creswell (2017) 3-4, 156-158. In this study, *N* denotes the entire-sample size, while *n* indicates a within-cell size.

<sup>104</sup> Creswell and Creswell (2017) 4, 190-8. See Appendix C Phase 2: Open-Ended Survey Question for the code trees and weighting metrics for each survey.

<sup>105</sup> *ibid.*

<sup>106</sup> There were 652 responses to the open-ended question in total. See Table B.

strongly agreed with a code.<sup>107</sup> This has allowed me to report mean participant sentiment and to compare values between cohorts in some cases.<sup>108</sup>

## 6.4 Limitations

This study collected, analysed and interpreted large amounts of data. As we will see in Chapters 7 through 10, this allowed the identification of hidden factors common to the civil prison oversight systems in both jurisdictions. However, I acknowledge some limitations relating to access and sampling.

### 6.4.1 Factors affecting access

While I experienced generous cooperation and access from the prisons administrations in both jurisdictions, there were also considerable restrictions.

Prison research saw a resurgence when global attention turned to the conditions and effectiveness of imprisonment in the aftermath of World War II and now has its own methodological literature.<sup>109</sup> This literature emphasises the difficulty and complexity of undertaking empirical work in highly regulated secure environments, where researchers have less discretion and access than in other social contexts. Additionally, universities enforce stringent human research ethics controls on prison research due to the vulnerability of prisoners, as well as that of junior staff.<sup>110</sup>

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<sup>107</sup> I performed the qualitative coding myself. The value of using a rater to independently code and weight qualitative data to allow for inter-rater reliability testing is contested. As Bazeley notes (2018) 166-167, coding that is justifiable in light of the project's 'purpose framework and [research] questions' is more important. Moreover, her test for whether the codes used in this study were useful and consistent is met. The coding system adopted has facilitated clear answers to the research questions, 'supported with evidence from across the data set'. Further, even if inter-rater reliability testing had been seen as vital, feasibility would have been problematic. A rater would have needed advanced Japanese language skills, qualitative data coding skills, familiarity with Dedoose, detailed knowledge of Japanese prison practices, and a sound grasp of the distinctive linguistic sub-cultures seen in the staff and prisoner participant cohorts, particularly in Japan.

<sup>108</sup> See Appendix D Phase 3: Explanatory Data Collection. This study uses Mean to report the measure of centre, unless the distribution shows skewing or contains serious outliers: Kenneth Bordens and Bruce Barrington Abbott, *Research Design and Methods: A Process Approach* (10<sup>th</sup> edn, McGraw-Hill 2018) 417. Due to the large number of qualitative responses and space limitations, quotations from participant responses typically illustrate mean participant sentiment on a given code.

<sup>109</sup> Recent elaborations of the development and challenges of prison research include: Marija Lučić-Čatić, (2011); Deborah H Drake, 'Researching Prisoner Experiences with Prison Officers: An Action Research-Inspired Approach' (2014) 12 *Action Research* 1, 94; Francis Pakes, 'Howard Pratt and Beyond: Assessing the Value of Carceral Tours as a Comparative Method' (2015) 54 *The Howard Journal* 3, 265; Yvonne Jewkes and Serena Wright, 'Researching the Prison' in Yvonne Jewkes, Jamie Bennett, and Ben Crewe (eds), *Handbook on Prisons* (2<sup>nd</sup> ed, Routledge 2016).

<sup>110</sup> This study required both expedited and full ethics approvals. See Research Design above.



## *Japan*

External research access to Japanese prisons is rare and the Japanese Correction Bureau exercises painstaking institutional gatekeeping. As there was no recent precedent for direct access to prisoners to conduct research interviews, I did not request this, but focussed on gaining approval for my survey design and wording. This approval took months of exhaustive negotiations with senior corrections managers, who were understandably concerned with institutional agendas and did not themselves have empirical research training. Navigating this reality was challenging, as this study was the first of its kind, with no validated survey instruments to use as reference points.

This stringent institutional vetting may have limited the depth of my survey data collection, although it did incorporate useful linguistic advice, which helped to build trust with the survey populations.<sup>111</sup> Overall, projects that build on this study in Japan should expect lengthy, granular negotiations concerning survey content and design.

## *Australian Capital Territory*

While security considerations related to the expansive nature of the ACT's civil prison oversight system prevented me from observing oversight visits to the ACT prison in person during Phase 1, the prisons administration delegated scrutiny of my survey instruments to the prison and this scrutiny was brief. Senior staff vetted the surveys just once for length and questions that might inflame tensions, making no comment on the content. As in Japan, this vetting included useful advice on linguistic matters, in this case localising the English translations for the ACT prison population.

### **6.4.2 Factors affecting sampling**

The sampling, resourcing and convenience issues discussed above made it necessary to offer the corrections officer survey to different survey populations in the two jurisdictions. The two staff populations were not the same in terms of rank and this led to other demographic differences.

In Japan, I excluded a large population of junior officers from Phase 2. These staff were unlikely to have any knowledge or experience of Japan's minimalist oversight system. However, I included junior officers in the ACT where they were likely to have some knowledge and experience of the expansive ACT oversight system.<sup>112</sup>

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<sup>111</sup> I received no complaints from participants or from prison authorities about the nature of the surveys or the questions used.

<sup>112</sup> The ACT prison only employed around 120 corrections officers in total when I collected the Phase 2 data there in 2017, with roughly a third in managerial roles. This raised the risk of small cell sizes in the ACT staff data if I only offered the survey to managerial staff, so I offered the survey, in principle, to all corrections officers employed at the prison. The number actually distributed was 94, somewhat lower than the 120 officers employed at that time. Some may have been on extended leave during the two-month survey period.

As a result, 862 Japanese staff answered the survey. They were overwhelmingly male, with two-thirds aged 46 or more; four fifths were in middle management.<sup>113</sup> In contrast, 81 ACT prison staff responded. Over a quarter were female, with a majority aged 45 or younger, over three quarters junior in rank and the vast majority having no more than 14 years of service.<sup>114</sup> Nonetheless, 'between group' analysis of the quantitative questions used for the comparative analysis between Japan and the ACT found no significant differences between different age, ranks and service length cohorts. Accordingly, the younger, more gender diverse, less experienced and more junior demographic profile of the ACT staff participants did not have a skewing effect on the comparative analyses reported in Chapter 10.

## 6.5 Conclusion

Collecting data in prisons is challenging in any circumstances, but this study was more challenging than most due to its complex design and the distinctive qualities of the Japanese prison system.

However, the study's hybrid constructivist-pragmatist framework helped to resolve a variety of research design, survey design, data collection and data management issues. Further, the iterative nature of the design meant that when limitations or challenges encroached, I could often find ways to ameliorate or compensate for the difficulty in the next data collection phase – and if this was not possible, to accommodate it at the data analysis stage.

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<sup>113</sup> At least 845 of these Japanese staff participants answered each demographic question. Some 97% were male, and 66% were aged 46 years or more, and had been corrections officers for 20 or more years, with 42% having served for at least 30 years. Some 22% were in *shochō* or *buchō* (senior management) roles, with 78% in *kachō* (middle management) ranks.

<sup>114</sup> At least 74 of these ACT staff participants answered the demographic questions. Some 28% were female, and 61% were aged 45 years or less, while 84% had served for 14 years or less and 78% were in Corrections Officer Level 1 roles.

## Chapter 7 Soft Civil Prison Oversight in Japan: Nature

In Chapter 4, we saw that Japan's adoption of civil prison oversight was groundbreaking. It meant that the penal administration would open itself to external scrutiny for the first time, permitting unprecedented dialogue between those in prisons and the outside world. This chapter draws on the empirical evidence gathered in Japan across 2015-2019 to assess how this oversight system translated into practice: its *nature* as a regulatory mechanism. The next two chapters then assess its *impact* on Japanese prisons.

We know that a mechanism like soft civil oversight has a greater chance of succeeding when the relational distance between the regulator-side intermediaries and the regulatees is low.<sup>1</sup> When the regulatory interaction is close and collaborative, trust grows. In such an interaction, the 'values, norms, beliefs and processes' of the regulator-side intermediaries and the regulatees are aligned.<sup>2</sup> This promotes a situation where the regulatees, in this case staff, are likely to recognise the legitimacy of the regulator-side intermediaries, in this case overseers.<sup>3</sup> This recognition is essential for establishing the elements of the Wheel of Social Alignments, which are a focus of later chapters that address the impact of the mechanism in Japan and the ACT. These elements are whether regulatees also see the oversight processes as beneficial; fair; and the regulatory agenda as worthy.<sup>4</sup> When all of these elements are in place, the cooperative 'motivational postures' – commitment and capitulation – are more likely, while defiant postures are less so.<sup>5</sup>

Under the formal blueprint for Japan's design, the Ministry of Justice (MoJ) Correction Bureau acts as the regulator. Penal Institution Visiting Committees serve as the regulator-side intermediaries, making regular visits to prisons to persuade the regulatee prison staff to comply with certain standards. Inside prisons, it seems that the warden is to serve as the regulatee-side intermediary, that is, the officer who will receive the overseers' advice and channel it to the staff as a whole.

However, our preliminary evaluation of this design on paper in Chapter 4 suggests that it may not function this way in prisons – and the empirical evidence reported below is sobering. The relationship between overseers and staff is neither close nor collaborative. Instead, staff question

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<sup>1</sup> See Figure C.

<sup>2</sup> Valerie Braithwaite 'Closing the Gap between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 29.

<sup>3</sup> See Figure B.

<sup>4</sup> See Figure B.

<sup>5</sup> Valerie Braithwaite, 'Defiance and Motivational Postures' in David Weisburd and Gerben Bruinsma (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer Science & Business Media 2014) 919-922.

the overseers' legitimacy as regulator-side intermediaries and contest the standards that overseers seek to apply, as well as their priorities and neutrality.

What is more, the mechanism is neither 'risk-based' nor 'responsive' in practice.<sup>6</sup> It is applied uniformly, irrespective of the risk profile of each prison and prisoner population. There are no performance benchmarks for either the intermediary overseers or the regulatee staff. In addition, if prison staff sidestep overseers' advice, there is no way to escalate directly up the regulatory pyramid to more intrusive measures<sup>7</sup> or activate additional regulatory mechanisms via a 'smart' regulatory network.<sup>8</sup>

In this way, the nature of Japan's mechanism in practice in prisons seems to lack many of the building blocks for persuasive regulatory success. The data below highlight staff and prisoner comments to this effect.<sup>9</sup> Their dissatisfaction is mutual, each cohort inside the prison regarding overseers as inappropriately aligned with the interests of the other, while overseers seem unaware of this dynamic.

The first section of this chapter reports on the attributes of Japan's prison oversight personnel, as well as their workflows and conditions, before considering how each participant cohort views these matters. The second section explores overseers' presence in prisons by evaluating the length of their visits, how they spend their time and how each participant cohort views their activities. The third section considers how each participant cohort views overseers' performance. The chapter concludes by considering these findings regarding the nature of the mechanism in action in Japan in light of the regulatory theory introduced in Chapter 2.

## 7.1 Views on Oversight Personnel

Globally, civil prison oversight proponents regard the mechanism as a means of prying open closed systems by constructively disrupting the status quo. As we saw in Chapter 1, they believe that

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<sup>6</sup> Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law and Policy* 181.

<sup>7</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992).

<sup>8</sup> Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press 1998).

<sup>9</sup> Quantitative results are reported using descriptive and inferential analysis performed using SPSS 26, employing multi-question scales wherever possible. Each scale was developed from between three and eight individual questions on the basis of face validity, theoretical salience and the absence of theoretical or empirical overlap with other measures. Reliability was measured using Cronbach's alpha, which was satisfactory or good in all cases. Qualitative data were analysed thematically using Dedoose. See Appendix C Phase 2: Open-Ended Survey Question.

overseers serve as a benign challenge to the pervasive authority of prison staff; a circuit breaker that enhances officers' ability to self-regulate.

Yet this raises questions about the attributes of the people asked to perform the oversight role. This section reports on the demographic characteristics of Japan's overseers as well as the characteristics of the cohorts inside prisons whose needs overseers serve. It then turns to how overseers are selected – and their skills, before examining their work processes, conditions and resources.

### 7.1.1 Participant cohort characteristics

We saw in Chapter 4 that the *Keiji shūyo shisetsu oyobi shūyōsha to no shogū ni kansuru hōritsu* (Act on Penal Detention Facilities and the Treatment of Inmates and Detainees) 2005 (Penal Detention Act)<sup>10</sup> stipulates a maximum committee size of 10 members. In practice, the minimum size was four members, with the size of each committee set by the Correction Bureau in line with the prisoner population at each prison.

We also saw that one of the *gyōsei shidō* (administrative guidance) documents introduced in Chapter 4, the *Heisei 18-nen 5-gatsu 23-nichi Homushō kyōsō tsūtatsu dai 3255 gō* (MoJ Correction Bureau General Affairs Division Directive No. 3255 of 23 May 2006; Directive to Wardens)<sup>11</sup> assigns control over overseer appointments to the warden of each prison and instructs them to ensure that their prison's committee is not skewed in characteristics like gender, age and occupation. However, the data collected in 2016 show that this balance is elusive in practice.

Almost all the 200 overseer participants answered the demographic questions (lowest  $n = 194$ ).<sup>12</sup> Of the 198 who answered the age question, 90% were male and over two thirds (70%) were aged 56 years or more. Thirty nine percent were past the Japanese retirement age of 65 years and 10% were aged 76 years or above. While older males still heavily dominate many Japanese leadership roles,<sup>13</sup> this age and gender profile was inconsistent with the instruction given to wardens to ensure that the demographic profile of their committee was not skewed.

Most members were relatively inexperienced, with 67% of the 196 responding having served for less than three years. Over three quarters (77%) were recruits from the three stipulated local bodies: the

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<sup>10</sup> A provisional English translation is available at [www.japaneselawtranslation.go.jp/en/laws/view/2796](http://www.japaneselawtranslation.go.jp/en/laws/view/2796) accessed 2 April 2023.

<sup>11</sup> Available at [www.moj.go.jp/content/000074535.pdf](http://www.moj.go.jp/content/000074535.pdf) accessed 2 April 2023.

<sup>12</sup> In this study,  $N$  refers to the entire sample size and  $n$  to a cell size.

<sup>13</sup> For example, in 2020 Japanese women occupied 14.5% of Diet seats, while males aged over 60 occupied 29.3%: Inter-Parliamentary Union, 'Japan - House of Representatives' (*IPU Parline*, 2023) [https://data.ipu.org/content/japan?chamber\\_id=13432](https://data.ipu.org/content/japan?chamber_id=13432) accessed 2 April 2023; Inter-Parliamentary Union, 'Japan - House of Councillors' (*IPU Parline*, 2023) [https://data.ipu.org/node/85/basic-information?chamber\\_id=13433](https://data.ipu.org/node/85/basic-information?chamber_id=13433) accessed 2 April 2023.

Bar Association, Medical Association and a public body – in roughly equal numbers. The remaining quarter (23%) belonged to other local bodies, including local neighbourhood, welfare and educational institutions. Just over a third (36%) of the 195 who indicated their position on the committee were serving as chair or deputy chair, with half of these serving as chair. Among this group of 35 chairs, 80% were attorneys<sup>14</sup> and 94% were males. Just over half (54%) of these 35 chairs were aged 36 to 55 years, with 20% aged 56 to 65 years. A large majority (69%) had been overseers for less than three years. Overall, these data show that committee chairs tend to be mid-career to senior male attorneys with less than three years' experience in the oversight role.

No Japanese overseer commences their role with corrections' expertise and there is no official training. Appointing corrections' novices from local elites is consistent with other Japanese examples of populating 'narrow' participatory bodies with 'people of high standing in the community' who are asked to 'provide common sense advice' but are not given 'exclusive decision-making power'.<sup>15</sup> This approach recognises general community leadership experience. Yet as others have pointed out in the Japanese context, when elites who have benefitted from existing societal hierarchies fill oversight roles, they are likely to be predisposed to maintaining those hierarchies.<sup>16</sup>

Turning to the demographic profiles of the other actor cohorts, at least 98% of the 862 staff survey participants answered the demographic questions and this cohort was made up of mid to senior ranked males, most of whom had extensive corrections experience.<sup>17</sup> At least 95% of the 1451 Japanese prisoner participants answered the demographic questions. While we might expect that the prisoner cohort would be considerably younger,<sup>18</sup> mainstream adult male prisons in Japan do not

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<sup>14</sup> Interviews with attorneys serving as chairs during Phase 1 in 2015 showed that they typically specialized in criminal defence and were members of the local chapter of the Japan Federation of Bar Associations *Jinken yōgō i'inkai* (Human Rights Protection Committee). There are rare cases of two legally trained members serving on a single committee when an educational institution provides a member who is a legal academic.

<sup>15</sup> See Kent Anderson and Mark Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspective' (2004) 37 *Vanderbilt Journal of Transnational Law* 935, 966-970. In this work, 'narrow' means participatory bodies with members selected from a narrow class of citizens according to certain criteria, not at random from the electoral roll. Other examples given include the Judicial Commissioners (*Shihō i'in*) who assist in Family Court disputes, and Psychiatric Review Board members (*Seishin iryō shinsakai i'in*).

<sup>16</sup> See for example, Gregory Noble, 'Freer Discussion of Predetermined Agendas: Reform and Continuity in Japan's *Shingikai* Deliberation Councils' in JAA Stockwin, Jennifer Amyx and Gregory Noble (eds), *Toward Reform and Transparency in Policymaking Processes* (Australia Japan Research Centre 2000) 3.6-3.7; Anderson and Nolan (2004); Shinji Kojima, Scott North and Charles Weathers, 'Abe Shinzō's Campaign to Reform the Japanese Way of Work' (2017) 15(23) 3 *The Asia-Pacific Journal: Japan Focus* 1.

<sup>17</sup> The lowest *n* was 845. Some 97% were male, and 66% were aged 46 years or more. The same proportion had been prison staff for 20 or more years (66%), and over 40% had served for at least 30 years (42%). A fifth were in *shochō* or *buchō* (senior management) roles (22%), with the rest in *kachō* (middle management) ranks (78%). Junior staff ranks were not included in the study in Japan.

<sup>18</sup> Adolph Quetelet, *Recherches sur le penchant au crime aux différents âges* (1831) (Research on the Propensity for Crime at Different Ages) (S Sylvester tr, Anderson 1984)

hold males aged 18-26 years<sup>19</sup> and Japan's prisons have been greying for decades.<sup>20</sup> Mid-life and mature-aged offenders dominated – typically those who had been sentenced for repeat or more serious offences, yet qualified for parole.<sup>21</sup> Nearly half (48%) indicated that they had also experienced prison before the oversight system began in May 2006, suggesting that the prisoner participants included many who were well-qualified to evaluate the mechanism.

### **7.1.2 Overseer selection and skills**

The representative samples of each participant cohort who also answered the open-ended survey question<sup>22</sup> commented on overseer selection and skills.

#### *Overseer perceptions*

Nearly half of the representative sample of 47 overseers (45%) who also answered the open-ended question raised overseer selection or skills. Sentiment was strongly negative ( $M = 1.33$ ,  $SD = 0.48$ ).<sup>23</sup> Some overseers commented that the selection process was 'slapdash', 'careless' or inappropriately 'influenced' by the prison due to sending bodies checking that the prison was happy before renewing a serving overseer's nomination.<sup>24</sup> Others noted the need for 'induction training' for overseers:<sup>25</sup>

Your position changes depending on whether you see prison as a place for rehabilitation or a place for punishment. I think they're both, but which should we emphasise? It'd be easier... if we had clearer guidelines (Overseer Survey 74PV92)

#### *Staff perceptions*

Nearly a quarter (24%) of the representative sample of 193 staff who also answered the open-ended question commented on overseer selection or skills. Sentiment was strongly negative ( $M = 1.67$ ,  $SD = 0.63$ ) and clustered around two subthemes. The first was that the composition of the oversight

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<sup>19</sup> As males aged 18 through 26 years are typically held in juvenile prisons, those aged 26-35 years are usually the youngest cohort in a mainstream adult male Japanese prison.

<sup>20</sup> Over 82% were aged 36 years or more, 51% were 46 years or more and 25% were 56 years or more. See generally Carol Lawson, 'Subverting the Prison: The Incarceration of Stigmatised Older Japanese (2021) 17 *International Journal of Law in Context* 336.

<sup>21</sup> Parolees took up 60% of the prisoner participants. Near three quarters (73%) came from Category B prisons which primarily hold those who have committed repeat or serious offences.

<sup>22</sup> Emphasis in the comments by Japanese participants who also answered the open-ended question is reproduced in the translated excerpts using italics and punctuation as appropriate. The open-ended questions in the staff and overseer surveys both asked: 'Please write any additional thoughts or views you may have about the [oversight system in your jurisdiction or its] activities – especially how to improve [it]. The open-ended question in the prisoner surveys asked: 'Please write any thoughts you have about the [oversight system where you are] – especially how [it] could be made better'. See Appendix B Phase 2: Main Data Collection.

<sup>23</sup> Code weighting was applied using a five-point scale. I applied the value '5' where a participant strongly agreed with a code, '3' where a participant took a neutral position, and '1' where a participant strongly disagreed.

<sup>24</sup> Overseer Surveys 74V98, 99V99 and 90V95.

<sup>25</sup> Overseer Surveys 88V94 and 88V98.

committee was unbalanced or inappropriately limited. The strongest objections were to having attorneys and medical professionals as overseers. Staff felt these appointees elevated prisoners' interests in ways that were wrong or unrealistic:

...[O]verseer selection is more important than the civil oversight system itself. For instance, the [attorney] overseer typically finds fault with corrections officers because of what prisoners say, or critiques *our* behaviour instead of the *prisoners'*, so the committee turns on us... (Staff Survey 52C93)

While the physician overseers give useful opinions, they also tend to fail to grasp the actual state of the struggling prison medical system, because they stick too closely to their own expertise (Staff Survey 63C96)

The second subtheme in staff comments was the perception that overseers were naïve. Many commented that the overseers' lack of corrections knowledge allowed prisoners and attorney chairs to manipulate them:

Overseers don't understand that how we *treat* prisoners reflects prisoners' *attitudes* in prison. Criminals don't become model citizens just because they come to prison (Staff Survey 90C95)

It's not every prisoner, but I feel as if in many cases the prisoner had no qualms making a false claim... If the overseers don't have a certain level of corrections expertise, the reality is that they ask us to inquire into these cases, increasing our workload (Staff Survey 93C94)

Staff suggested that the missing corrections knowledge included: 'the prison's limited budget'; the 'behaviour corrections officers put up with'; and the 'increased workload' that overseers generated.<sup>26</sup> Some wanted to select overseers 'freely, on merit' from outside the legal and medical professions, so they would not only see prisoners as having rights, but as perpetrators and represent victims' perspectives, while others wished to 'evaluate' and 'exclude' condescending or obtuse overseers.<sup>27</sup> Some wrote that the prison should 'appoint former staff' or 'train' overseers,<sup>28</sup> including by having them 'experience corrections work themselves' in uniform, which would mean that they shadowed staff for periods from 'a shift' to 'a year'.<sup>29</sup>

### *Prisoner perceptions*

Prisoners would not normally know how overseers were chosen or their background. Only four of the representative sample of 344 prisoners who also answered the open-ended question commented on their selection or skills. Views were critical. Several felt that overseers would only comprehend prison life if they 'experienced it themselves', or 'ex-prisoners were appointed'.<sup>30</sup> Two commented on

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<sup>26</sup> Staff Surveys 68C82, 63C99 and 91C97

<sup>27</sup> Staff Surveys 79C97, 57C98 and 66C99.

<sup>28</sup> Staff Surveys 65C90 and 66C93.

<sup>29</sup> Staff Surveys 73C97, 78C89 and 98C90.

<sup>30</sup> Prisoner Surveys 70P42, 57P98 and 78P94.



overseers' backgrounds. One felt their occupations were 'opaque', the other that they should be recruited from a 'wide range of occupations', with their skills 'certified through a national examination'.<sup>31</sup>

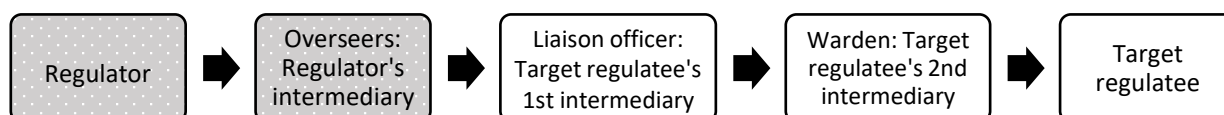
### 7.1.3 Oversight workflows

All participant cohorts raised overseers' working conditions in their written responses, including their independence; authority; pay and tenure; and resources. However, views differed as to the adequacy of these conditions.

Understanding overseers' annual workflow sheds light on each cohort's stance. The oversight workflow can be described from the observational data gathered at nine civil prison oversight committee meetings in Phase 1 in 2015, at penal institutions spanning all categories.<sup>32</sup> These meetings took place on weekday afternoons and were the first or second of the Japanese fiscal year, which starts on 1 April.<sup>33</sup>

At each prison, almost all the overseers' time was spent in a meeting room in the main administrative building, which is close to the main gate. This meeting room is in the part of this building that is outside the secure custodial area. If the meeting was the first of the fiscal year, ideally held by the end of May, it started with a formal briefing. Two long tables were arranged in parallel. The warden and senior staff entered briskly, in full uniform. They sat along one table, opposite the overseers, so that the two sides faced each other, as in a bilateral negotiation. After formal introductions, the warden read a report on the operational matters stipulated for annual disclosure. After any questions, the senior delegation withdrew. For the rest of the year, the overseers would mostly interact with a single mid-ranked officer (*shomu kachō*) – the prison's liaison officer, as shown in Figure G. This officer, who is barely mentioned in the Directive to Wardens 2006, singlehandedly absorbs almost all the overseers' interactions with the prison. They are an additional regulatee-side intermediary between the overseers and the warden.

**Figure G** [Regulator→ Intermediary→ Target] model in Japan: Triple intermediary variation



<sup>31</sup> Prisoner Surveys 58P42 and 93P95.

<sup>32</sup> The exact dates and locations of these visits are not given in order to protect participant anonymity. See Appendix A1.

<sup>33</sup> Prisons are typically in inaccessible locations with infrequent bus services. Staff typically shuttled overseers between the prison and the nearest train station.

The housekeeping agenda suggested in the *Hōmushō kyōseikyoku keiji shisetsu shisatsu i'inkai katsudō no tebiki* (Guide for Penal Institution Visiting Committee Activities; Ministry Guide for Overseers) 2015 occupied the rest of the first meeting. The committee selected a chair and a deputy, then scheduled the meetings for the rest of the year. It decided its priorities and activities, allocating the associated workload at the same time, with opinion-writing assigned to the attorney member. Committees did these annual chores in close consultation with the prison liaison, although a few committees set only the next meeting date, then asked him to step out.<sup>34</sup> If a committee was larger or had several members who were busy professionals, finding dates when the prison could host the next five meetings and most members could attend was time-consuming.

The first meeting also included an inspection of the secure custodial areas, in a formal procession-like tour. The prison liaison accompanied the overseers closely and narrated, while other more senior officers also joined the tour. Overseers received generic 'Overseer' badges to wear.<sup>35</sup> Visitors to prison factories must stay within painted lines for safety, but the overseers followed their guides closely in all areas. As with all Japanese prison tours, custodial officers ordered prisoners whom the visitors passed to remain silent and to bow their heads and avert their eyes or turn their backs. Overseers typically did not interact with the prisoners and staff they encountered. Some asked for the route to include specific areas,<sup>36</sup> but most stayed silent. There was little or no time during this meeting to collect and empty the suggestion boxes, which are positioned along the corridors and covered walkways along which prisoners are marched, for example between cell blocks and factories. There were no boxes in work or recreation areas where prisoners might have had freer access.

The suggested schedule in the Ministry Guide for Overseers anticipated input from prisoners during the second to fourth meetings of the fiscal year via letters and interviews. A cyclical process began – ideally by the end of July – when the overseers either sent some members to walk quickly around the prison collecting the suggestion boxes or had the General Affairs Section (*shomuka*) do this. This was often the first collection since February or March. While the Directive to Wardens 2006 specifies that the liaison officer is to hold the keys to the boxes, some liaisons entrusted them to the committee chair. The liaison stepped out while the overseers emptied the boxes and divided the letters for

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<sup>34</sup> In all eleven penal institutions visited in 2015, the liaison officer was male. It is possible for this position to be held by a female officer, however as Chapter 6 notes, very few female officers work in male prisons.

<sup>35</sup> As stipulated in the Directive to Wardens 2006. In Japanese prisons, the use of names is prohibited as between staff and prisoners, and at least in theory, even as between prisoners. Inside the custodial area, staff are identified solely by rank and service number, prisoners by number alone. See *Le Japon: A Double Tour* (Japan from Inside) (Arts & Facts Productions 2000) 61 minutes [www.youtube.com/watch?v=BJp9nKaO7c4](http://www.youtube.com/watch?v=BJp9nKaO7c4) accessed 2 April 2023; *Keimusho no naka* (Doing Time) (Yōichi Sai dir, Big World Eisei Gekijō 2002) 146 mins.

<sup>36</sup> For example, the spaces designed for the control or protection of individual prisoners: *hogo shitsu* (bare concrete 'protection' cells), *seion shitsu* (soundproof 'calming' cells), ordinary cells used for administrative or disciplinary segregation, and individual outdoor exercise cages.

screening and discussion. When the committee was ready, the liaison returned to give initial responses to overseer queries about matters raised by prisoners. Where a prisoner had given their name, overseers sometimes ask to interview that prisoner on their next visit, ideally by late September. Some prisons required prisoners to request the form suggested in the Ministry Guide for Overseers (2015) from officers before writing. This made anonymity impossible. In other prisons, prisoners could post any scrap of paper in the suggestion boxes.

The overseers asked the liaison to make inquiries and report at the next meeting regarding any issues of concern. If they remain concerned after that report, they raised the matter in a written opinion to the warden. The warden provided a written response by the next meeting after that. These written responses completed the cycle and were threefold. They either agreed to modify a practice at that prison – limited to the duration of the warden’s short tenure; rejected the opinion – citing a lack of authority, budgetary restrictions or security risks; or undertook to consider the matter further.<sup>37</sup>

The Ministry Guide for Overseers (2015) suggested that the fifth meeting, ideally held by the end of January, should focus on preparing the overseers’ final written opinion, while the final meeting, held by mid-March, should review the prison’s responses across the year and plan for the next year. However, as we will see below, overseers often tried to collect prisoners’ letters at all six meetings.

Some committees at large prisons received so many letters that they could only divide them for analysis after hours, postponing discussion until the next meeting. Committees that received few prisoner letters sometimes discussed running a survey to elicit prisoner input. Others asked to interview staff – particularly junior custodial officers – to discuss their working conditions, including whether understaffing was preventing them taking annual leave.

A few committees announced *ad hoc* inspections of secure custodial areas during their meetings. Staff still accompanied these *ad hoc* inspection tours closely and provided narration. However, the overseers would direct the route taken and ask observant, well-informed questions along the way.

While the 49 male mainstream prisons covered by the study cover four broad security classifications<sup>38</sup> and there is diversity inside each prison’s population,<sup>39</sup> oversight procedures are ‘one

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<sup>37</sup> See also the tabulated summaries provided annually online: Ministry of Justice Correction Bureau, ‘Jukeisha ni taisuru shakuhōji anke-to shūkei kekka’ (Aggregated Results of Prisoner Pre-Release Surveys) (Ministry of Justice Correction Bureau nd) [www.moj.go.jp/kyousei1/kyousei\\_kyouse26.html](http://www.moj.go.jp/kyousei1/kyousei_kyouse26.html) accessed 2 April 2023. Senior staff, including wardens, rotate frequently around Japan. A typical tenure is one to two years.

<sup>38</sup> Category A, LA, B and LB prisons: Category A prisons are for those who have committed a first or minor offence. Category B prisons for those who have committed a subsequent or serious offence. Category L prisons are for those serving sentences of ten years or longer.

<sup>39</sup> All prison populations include subpopulations with differing needs and vulnerabilities, whose level of risk in prison varies accordingly. These subpopulations include *yakuza* gang affiliated prisoners and sex offenders as well as foreign, gender diverse, younger and older prisoners.

size fits all.’ All parts of all prisons experience the same oversight frequency and activities, irrespective of their level of risk.<sup>40</sup>

#### 7.1.4 Overseer’ conditions and resources

Under the *ateshoku* (*ex officio*) selection process discussed in Chapter 4, the duty – and privilege – of serving as a Japanese civil prison overseer attaches to a certain role within each sending body. As it is awkward for nominees to decline, appointments can be quasi-involuntary. Overseers’ status as casual civil servants means that they are bound by a duty of secrecy, so may not speak or write publicly about their work.<sup>41</sup> They receive no training<sup>42</sup> and have no office space, budget or secretariat, so must ask the prison liaison officer if they need administrative help. Each committee operates in isolation, even from nearby committees,<sup>43</sup> despite Japan having over 70 civil prison oversight committees<sup>44</sup> and replica mechanisms in police, immigration, and juvenile detention facilities nationally.

##### *Overseer perceptions*

Over two-fifths (43%) of the 47 overseers who made written comments mentioned committees’ conditions and resources. Sentiment was strongly negative ( $M = 1.60$ ,  $SD = 0.50$ ). Overseers desired increased resources, including allowances so they could ‘come to the prison more often’ and have their ‘own secretariat’.<sup>45</sup> They also wanted longer terms and expanded duties, including the ability to ‘attend prison disciplinary hearings’.<sup>46</sup> Above all, overseers wanted more independence and authority; ‘like an ombudsman’ or ‘like Her Majesty’s Inspectorate of Prisons’.<sup>47</sup> They wanted to ‘issue media releases’ and have standing to ‘engage directly with the prisons administration’, as well as ‘network and train with other oversight committees’.<sup>48</sup> On this last point, the overseer cohort as a whole agreed.<sup>49</sup>

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<sup>40</sup> Some prisons have branch prisons which are an exception. As overseers at these prisons are also paid for just six visits annually, they can typically make only one visit to these satellite facilities each year.

<sup>41</sup> However, as we have seen in Chapters 1 and 4, some attorney chairs and legal scholars have published scholarly accounts of their experience of serving on committees.

<sup>42</sup> With the exception of the half-yearly seminar and materials provided by the Japan Federation of Bar Associations for attorney chairs, which are discussed in Chapter 4.

<sup>43</sup> There is anecdotal evidence that in some regions, committees from different prisons meet periodically, at their own expense, to share information informally.

<sup>44</sup> Japan had 73 penal institutions and 105 branch facilities in April 2022: MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime) <https://hakusyo1.moj.go.jp/jp/69/nfm/mokuji.html> accessed 2 April 2023, Section 2-4-1.

<sup>45</sup> Overseer Surveys 74V99 and 93V95.

<sup>46</sup> Overseer Surveys 85V96 and 99V09.

<sup>47</sup> Overseer Surveys 90V99 and 73V99.

<sup>48</sup> Overseer Surveys 83V98, 91V97, 96V97 and 64V96.

<sup>49</sup> The Japanese overseer cohort as a whole agreed slightly that networking with peer and similar oversight committees in Japan and abroad was desirable ( $N = 196$ ,  $M = 3.26$ ,  $SD = .80$ ). An *Overseer Networking* scale was

### *Staff perceptions*

Only 12 (6%) of the representative sample of 193 staff who also answered open-ended question raised overseers' conditions and resources. Most views were critical, although rationales varied. A majority found overseers' conditions and resources inadequate, feeling they should have more independence and power. They wanted to see overseers: paid more; serve 'longer terms'; be 'independent of local elites'; and have authority to 'investigate and make binding orders' in order 'clean up' problems in the prison.<sup>50</sup> Two staff wrote comments strongly in favour of oversight committees being networked with each other, while the staff cohort as a whole expressed weak agreement with the proposition that this was desirable.<sup>51</sup>

Some of these staff sensed that it was not prisoners but the regulatees, the prison staff as a whole, with whom the overseers needed to engage in order for oversight to be beneficial. They argued for this broader or deeper engagement between overseers and the staff – and particularly junior staff:

... we need to give rank and file officers more information about what overseers do... (Staff Survey 83C88)

... it would be better if overseers were given staff opinions on how prisoner treatment should be improved, rather than prisoners' opinions (Staff Survey 90C83)

However, others wanted to further limit overseers' conditions and resources. They suggested, for example, that overseer meetings be shorter and less frequent – even skipping some years, or that renewal of overseers' terms be restricted.<sup>52</sup>

### *Prisoner perceptions*

Some 16% of the representative sample of 344 prisoners ( $n = 54$ ) who also answered the open-ended question expressed views on overseer conditions and resources. Two subthemes emerged: consistency between oversight practices at different prisons; and the adequacy of overseers' power. The 20% of this group of 54 who wrote about inconsistent practices between prisons tended to be

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developed from three questions on this issue. The Cronbach's alpha value was good ( $\alpha = .816$ ) indicating internal consistency. The three items used to develop this scale asked whether the committee should be linked 'with other committees'; 'with similar visiting committees in Japan'; and 'with similar international bodies'. All three items used a scale of 1 to 5 where 1 was 'Don't think so at all' and 5 was 'Definitely think so'.

<sup>50</sup> Staff Surveys 54C88, 52C98, 94C95, 90C83 and 91C98.

<sup>51</sup> Staff Surveys 91C98 and 89C93. Japanese staff agreement with the *Overseer Networking* scale ( $N = 856$ ,  $M = 3.15$ ,  $SD = 0.78$ ) was weaker than that of Japanese overseers seen above in FN below. The Cronbach's alpha value for staff was good ( $\alpha = .860$ ), indicating internal consistency. The same three items were used to develop the scale. The difference in views was small but statistically significant ( $t(1052) = 1.745$ ,  $p < .01$ ).

<sup>52</sup> Staff Surveys 53C96, 70C74 and 99C74.

critical, stating that the quality of oversight was unreliable. These prisoners wanted overseers to send prisoners regular newsletters, or grant prompt interviews following prisoner requests.<sup>53</sup>

In this group of 54 prisoners, 89% questioned whether overseers had enough power. Sentiment was strongly negative ( $M = 1.29$ ,  $SD = 0.71$ ), although two felt that overseers had ‘authority’ or ‘protected’ prisoners:<sup>54</sup>

When they inspect inside the prison, the corrections officers are in control. They deliberately keep the overseers from seeing dodgy situations, places and times. It’s a sham. The overseers can’t actually tell people outside how we’re really treated, because what they see isn’t real. Maybe this endlessly closed-off world will never be reformed... (Prisoner Survey 57P96)

Prisoners felt that overseers ‘had no traction with the prison’ or were ‘ineffective’,<sup>55</sup> that they had ‘little authority’ or were ‘impotent’ or ‘powerless’.<sup>56</sup> Eleven described overseers as thoroughly ‘managed’ or ‘outmaneuvered’ by prison staff,<sup>57</sup> in ways that entrenched overseers’ incapacity:

When the overseers inspect inside [the secure custodial areas of] the prison, the corrections officers know they’re coming and call the shots, so there’s no way the overseers can understand what things are really like in here. It’s *exactly* like North Korea (Prisoner Survey 96P76)

Prisoners wanted overseers to: ‘stop to speak with prisoners during inspections’ inside the secure custodial areas; ‘reply to prisoner letters’; and hold a ‘monthly open interview day’ for any prisoner who wished to speak with them, or ‘regular overseer-initiated interviews of all prisoners’.<sup>58</sup> Prisoners felt that these changes would make overseers better-informed and ‘empowered’ to hold prisons accountable, intervene in staff excesses and ‘standardise’ improved conditions nationally.<sup>59</sup>

## 7.2 Views on Overseers’ Presence

We have seen above and in Chapter 4 that Japanese civil prison overseers must insert themselves into a tightly closed environment where abusive practices have flourished, yet have no corrections expertise, few resources and no official training. This raises the question of how they navigate these circumstances and interpret the MoJ’s *gyōsei shidō* (administrative guidance).<sup>60</sup> The first section below addresses how much time overseers spend at prisons and how they spend that time, with whom and where inside the prison. The second section reports on prisoners and staff views on the

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<sup>53</sup> Prisoner Surveys 95P88, 84P68 and 41P74.

<sup>54</sup> Prisoner Surveys 68P89 and 61P80.

<sup>55</sup> Prisoner Surveys 74P48 and 84P50.

<sup>56</sup> Prisoner Surveys 64P99, 91P90 and 61P86.

<sup>57</sup> Prisoner Surveys 77P78 and 71P50.

<sup>58</sup> Prisoner Surveys 74P80, 64P99, 58P44, 71P51 and 61P86.

<sup>59</sup> Prisoner Surveys 64P99, 74P80, and 68P76.

<sup>60</sup> In this study, the Ministry Guide for Overseers 2015.

overseers' presence. The final section evaluates the frequency and nature of prisoners' contact with overseers.

### **7.2.1 Overseers' activities**

Committee chairs' responses to the oversight activity survey, combined with additional frequency data from the MoJ (collectively,  $N = 47$ ),<sup>61</sup> show that 85% of committees met six times in fiscal year 2015-2016, as suggested by the Ministry Guide for Overseers (2015). Only two committees had fewer meetings and just five had additional – and therefore unpaid – meetings. Seventy six percent of 34 committee chairs responding to a question on meeting duration selected 'two to three hours'.

The great majority of committees were performing both of their mandatory duties: inspecting the prison and sending the warden written opinions. While a small minority of committees had not done so, they were not penalised in any way. To be specific, a 55% majority had inspected once or twice 28% had inspected three or more times. However, eight of the 47 committees for whom data was available had not entered the main prison's secure custodial areas during the 2015-2016 year.

Turning to duration, 81% of the inspections conducted by the 32 committees for whom the chair responded took an hour or less. Meanwhile, 60% of the 47 committees for whom data was available had sent written opinions to the warden up to five times and 40% had sent at least six opinions.

However, four committees had not written to the warden at all during that year.

In other words, most committees had spent no more than 18 hours at the prison across the year, with less than two of those hours inside secure custodial areas. Despite this brief exposure, over 90% of committees had sent an opinion to the warden at least once, as required.

Responses to questions on the frequency and duration of the various discretionary committee activities showed that 34 committee chairs responded to a question on emptying suggestion boxes and 76% of this number had done this six times, while another 15% had done so at least seven times. Only three committees had collected prisoners' letters on fewer than six occasions. Sixty three percent of the 32 committees whose chair responded to a question on the number of letters collected over the year selected 'up to 250 letters'. Of the remaining committees, 15% had received between 251 and 500 letters, while more than 20% had handled over 500 letters.<sup>62</sup> A majority (55%) of the 47 committees for whom data was available had granted between one and five prisoner

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<sup>61</sup> The oversight activities survey was administered to all 49 committee chairs, with 34 valid responses. The lowest number of chair responses to an individual question in this activities survey was 32. See Appendix B5. The MoJ provided a basic data set, containing items that are disclosed in the MoJ's annual public reports on committees' activities, on a further 13 committees' activities across April 2015 - March 2016. Accordingly, for few questions,  $N = 47$ .

<sup>62</sup> The committee meetings observed in Phase 1 in 2015 showed that prisoner letters can be from a few words to several pages long.

interviews, while 32% had granted six or more. However, 13% had granted no prisoner interview requests. While committees may also send reports directly to the Minister of Justice, 90% of the 47 committees for which data was available had not. However, one committee had sent these reports at least ten times.

These data show that most committees followed the schedule suggested in the Ministry Guide for Overseers (2015). They spent most of their time at the prison on processes and paperwork and interacted with very few staff or prisoners. This administrative busyness may explain why few committees had undertaken discretionary activities that require additional initiative and effort. Only 40% of the 34 committees for which the chair responded had acted of their own motion to interview at least one prisoner, while just 23% had opted to interview at least one officer. Only three of these 34 committees had conducted surveys – two surveyed staff; one surveyed prisoners.

### **7.2.2 Staff and overseer views: regrettable or culpable?**

Both overseers and prison staff expressed dissatisfaction with the overseers' presence but disagreed on the cause. Overseers felt their presence was somewhat inadequate but saw this as due to external factors. Staff found it very inadequate and attributed this partly to overseers.

#### *Overseer perceptions*

Nearly a quarter (23%) of the representative sample of 47 overseers who also answered the open-ended question mentioned the overseers' activities. Sentiment was somewhat negative, with several wanting more access, authority or training:

I want us ... to be proactively initiating surveys and interviews of prisoners and corrections officers ... I don't agree there should be just six meetings a year budgeted for all committees without exception. I want to audit prison disciplinary procedures too (Overseer Survey 99V99)

New overseers need training. We don't know how the prison works, so in prisoner interviews we just sit and listen to the prisoner complain – then our time's up (Overseer Survey 88V94)

This system is ten years old but hasn't helped prisons reflect the community's point of view. It's just a sham – it should be radically strengthened to make it a genuine oversight system – we need changes like more authority, more duties and a higher allowance (Overseer Survey 70V96)

#### *Staff perceptions*

Of the representative sample of 193 staff who also answered the open-ended question, 23% raised the issue of overseers' activities. Sentiment was strongly negative ( $M = 1.36$ ,  $SD = .61$ ). Most were concerned about the rarity of interactions between overseers and staff although some staff raised the lack of interaction between overseers and prisoners. Again, staff voiced concerns about the



relational distance between the overseers and the staff as a whole – including officers of junior rank. Staff felt that overseers were nearly invisible to most ranks:

... the staff in general don't really know what the overseers do, let alone the general public – it's not promoted or publicised enough. In the prison it's just the liaison officer and his General Affairs Section [*shomuka*] who know what is improving, the rest of the staff usually don't know what opinions the overseers put forward or how the prison responds. How about if they speak to an all-staff meeting once a year and tell us what they do?... (Staff Survey 65C93)

Staff also felt that overseers lacked enough access to prisoners to understand that staff treated them fairly and appropriately:

As well as their discussions in their meeting room, and interviews with prisoners, they should be having a careful look at prisoners' conditions – inside the [secure custodial area of] the prison, in the cells, in the factories. They can't understand prisoners' *actual* conditions just by doing a formal tour (Staff Survey 92C91)

Staff wanted overseers to be more present in several ways and to include even junior custodial officers in a more open, constructive and fair process, so that they could defend their practices and contribute their perspectives:

Overseers should discuss things more with custodial staff. All that happens now is that they accept anything prisoners tell them (Staff Survey 76C93)

It would be good if the committee and staff knew each other's faces – enough to speak frankly with one another (Staff Survey 59C92)

They're part-time prison staff [after all], so we should have a system that gives them more opportunities to interact with prisoners. That way they can do their work knowing the *actual* conditions in the prison (Staff Survey 70C94)

### **7.2.3 Prisoner views: insincere and inaccessible**

Japanese prisoners can initiate contact with overseers by placing a letter in a suggestion box or requesting an interview. There is some overlap, as an interview request can be in a letter. However, prisoners' survey responses showed that few had tried to contact overseers by either means. Those who had tried had done so just once or twice during their current sentence. Prisoners often raised issues that had deterred them from contacting overseers in their written comments when expressing dissatisfaction with the nature and extent of overseers' presence.

#### *Prisoners making contact*

At least 96% (lowest  $n = 1396$ ) of the 1451 prisoners who participated in the main survey answered questions concerning their contact with overseers. Eight percent had sent at least one letter via the suggestion boxes. Of these 115 prisoners, 63% had written just once or twice. Just 5% had requested an interview with overseers. Of these 66 prisoners, 83% had made no more than two requests for an

interview. Just 136 prisoners, or 9% of participating prisoners, had tried to contact overseers by either or both means. Including interviews that overseers had initiated, a total of 13% of prisoners had had some kind of contact with overseers – whether by sending a letter or having an interview.

Among the 66 prisoners who had requested an interview, 83% ( $n = 55$ ) indicated the outcome. Overseers denied 12 prisoners' requests. Of the 40 who indicated the waiting time until their interview, 25 had an interview within two months, nine waited for three months and six waited for longer than six months.

Of the 68 prisoners who answered a question on overseers' interview skills, the majority (62%) felt that overseers had listened carefully ( $M = 3.6$ ,  $SD = 1.2$ ).<sup>63</sup> Among the representative sample of 344 prisoners who also answered the open-ended question, just a handful described what happened when they had an interview and sentiment was negative. These prisoners' comments included the terse '[i]t was too short, the overseers were rude, they didn't listen.'<sup>64</sup> Only one prisoner expressed a positive view about the interview experience – and this was in the context of a negative comment:

The doctor and the attorney listened properly but the layperson not only turned their chair side-on, they even turned their body away from me – and didn't say a word (Prisoner Survey 54P72)

### *Prisoners avoiding contact*

As just 9% of prisoners had tried to contact overseers, 91% had not.<sup>65</sup> Some 1304 prisoners answered a multiple-response question on their reasons for avoiding the system. The main answers prisoners selected were that: they 'had no problem important enough' to justify making contact (58%); 'nothing would have changed' (33%); 'consulting an officer or filing an internal appeal would have been enough' (25%); and they 'didn't want to be thought of as a problem prisoner' (20%).<sup>66</sup>

Prisoners' written comments shed light on these multiple-response answers. Almost two-thirds (63%) of the 344 prisoners who contributed written comments wrote about the nature of the overseers' presence ( $n = 218$ ). The overarching theme was opacity and three subthemes emerged.

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<sup>63</sup> As overseers initiate some interviews themselves, this number of prisoners replying regarding their experience of being interviewed is higher than the 66 prisoners who stated that they requested an interview. In total, among the 1396 prisoners who answered a question as to whether they had had an interview, 102 individuals indicated that they had had this experience. Prisoner interviews are normally carried out by a pair of overseers, usually including one of the legally or medically-qualified overseers, due to their experience in interacting with clients or patients.

<sup>64</sup> Prisoner Survey 95P55. As Patricia Bazeley notes, it is not unusual for less formal data collection methods to elicit more negativity: *Integrating Analyses in Mixed Methods Research* (Sage Publications 2018) 267. The difference between the scaled survey question responses and these few comments does not necessarily imply inconsistency in the data.

<sup>65</sup>  $N = 1440$ .

<sup>66</sup> The other individual options selected from the multiple choice alternatives were: 'it was a bother' (17%); 'it was not appropriate given prisoners' status' (15%); 'corrections officers would have found out the details [of my complaint]' (12%); 'didn't know I could' (7%); 'other' (6%); and 'my Japanese wasn't good enough' (1%).

These were that: prisoners found it hard to grasp what the overseers did; the information prisoners did glean about civil oversight suggested orchestration by the prison; and prisoners found the system inaccessible.

Of these 218 prisoners who wrote about the system's opacity, 39% focused on its comprehensibility. Sentiment was strongly negative ( $M = 1.16$ ,  $SD = 0.36$ ). All prisoners receive a *Prison Handbook* on admission, which contains a few lines of official text explaining the oversight system.<sup>67</sup> However, some expressed confusion due to prison instructions that the system was not for individual complaints.<sup>68</sup>

I really don't know what the oversight committee is or what it does. When I tried to contact them about something that concerned me as an individual, a corrections officer explained that they don't accept requests concerning personal matters, so I gave up (Prisoner Survey 52P91)

Prisoners know there's an oversight committee, but the prison should explain in detail the type of work it does and how it helps us. It seems there's not much point sending them a letter. Every so often there's a prison broadcast saying that letters to overseers are not the place for prisoner complaints... (Prisoner Survey 65P93)

Prisoners felt this lack of practical knowledge about how the system worked made it difficult to understand:

Basically, none of us know what the overseers do. So, how could we know what they've achieved? (Prisoner Survey 73P74)

The second subtheme in prisoner responses was unfavourable impressions from the information they did gather about the system. Three-fifths (59%) of this group of 218 focused on this issue in their written comments. Opinion was strongly negative ( $M = 1.17$ ,  $SD = 0.41$ ).<sup>69</sup> Some were dismayed by evidence of long abandoned or discouraging overseer attempts to inform prisoners. One wrote that the only information for prisoners he had ever seen was 'a four-year-old oversight committee bulletin stuck on a noticeboard'.<sup>70</sup> Another noted:

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<sup>67</sup> This handbook is produced by each prison for local conditions and is not publicly available. A typical name is *Shonai seikatsu no tebiki* (Guide to Prison Life). The description of the oversight system is typically two or three short paragraphs, in a handbook of a hundred or so A4 pages. It is clear from the multiple response question reported immediately above that prisoners generally knew that the oversight system existed. Only 7% ( $n = 91$ ) of the 1304 prisoners who answered this question selected 'didn't know I could' use the system.

<sup>68</sup> Civil oversight systems typically exist in parallel with prisoner grievance or appeals processes. See Kitty Calavita and Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* (University of California Press 2014) for an empirical study of prisoner grievance processes.

<sup>69</sup> This lack of confidence in the oversight system is underscored by the 33% of the 1217 prisoners who chose 'nothing would've changed' in answer to the multiple-response question on reasons for not using the system.

<sup>70</sup> Prisoner Survey 64P99. A prisoner at a different prison noted an overseer bulletin displayed in his factory was eight years old: Prisoner Survey 82P82. There is no obligation on overseers to keep either individual or all prisoners informed as to their activities in the prison or outcomes of those activities. However, it seems that some committees had tried to do this in the past.

I've been here eight years... Just once I saw staff had put up a committee bulletin showing [overseers'] questions and prison's responses. They'd asked the prison if officers were telling us to stiffen our fingers, swing our arms more and chant loudly when they march us from place to place. The prison's answer was false. They'd said 'No, we just tell them to march naturally' (Prisoner Survey 93P86)

At another prison, a prisoner who had seen a similar bulletin stating that the overseers had advised the prison to allow prisoners to walk naturally wrote:

... there's *nothing* natural about the way they tell us to "Swing your arms more! Lift your knees!" The oversight system's ended up being just a sham<sup>71</sup>

Other prisoners found the role staff played in oversight processes disturbing. They highlighted the choreographed nature of the overseers' inspections of the secure custodial areas.<sup>72</sup> Some noted that inspections mimicked displays of domainal lords' status and power from the Tokugawa era, when peasants were made to lower their heads as their rulers passed by:<sup>73</sup>

... the committee parades around the prison like a *daimyō gyōretsu* [procession of feudal lords]. What's the point ...? (Prisoner Survey 54P93)

When anyone tours the factory or around the prison we get yelled at by the corrections officers: "Don't look!" "Don't raise your head!". Nobody knows *when* the overseers came through on an inspection (Prisoner Survey 73P77)

Some were suspicious of staff walking around the prison collecting suggestion boxes:

Very occasionally I see staff collecting the suggestion boxes, but if the overseers are the ones with the keys, why wouldn't they be collecting them, not the staff? Everyone's worried that it's the staff that are actually reading our letters... (Prisoner Survey 82P82)<sup>74</sup>

The third theme was inaccessibility. Nearly half ( $n = 106$ ) of the 218 prisoners who wrote about the overseers' presence raised this issue. Views were strongly negative ( $M = 1.32$ ,  $SD = 0.48$ ). Prisoners

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<sup>71</sup> Prisoner Survey 88P66. Strict requirements for prisoner marching and chanting during routine movements around the prison remain common, although the 2003 CARC Proposal recommended their abolition. See also Carol Lawson, 'Japan: Satoshi Tomiyama, Director General of the Correction Bureau' in Dilip K Das and Philip Birch (eds), *Trends in Corrections: Interviews with Corrections Leaders Around the World* (Routledge 2020) 133-134.

<sup>72</sup> The tendency of civil prison oversight tours to be sanitised, quasi-theatrical affairs is neither recent nor limited to Japan. See Francis Pakes (2015) 'Howard, Pratt and Beyond: Assessing the Value of Carceral Tours as a Comparative Method' 54 *The Howard Journal* 3: 265-276.

<sup>73</sup> During the Tokugawa era (1600-1867) *daimyō* (feudal lords) were required to spend half their time in Edo (now central Tokyo), where their wives and heirs were held as *de facto* hostages all year. This *sankin kōtai* (alternate attendance) system prevented regional rebellions and necessitated regular processions of *daimyō* retinues traveling to and from the capital. See generally Marius B Jansen, *The Making of Modern Japan* (Harvard University Press 2000).

<sup>74</sup> There was no evidence that staff open suggestion boxes or read prisoners' letters. However, in prisons holding non-Japanese prisoners, overseers sometimes receive prisoner letters written in languages other than Japanese or English. Overseers can ask staff to either translate these letters themselves or to send them to the Fuchū Prison translation section for translation.

described psychological and practical disincentives to accessing overseers through suggestion boxes, although these varied considerably between prisons:

... at [my old prison] the obstacles to sending a letter to the overseers were too high. It was every bit as difficult as when we had the old *jōgan* [ministerial petition] system. At other prisons like [this one] it's easier, more accessible... (Prisoner Survey 84P76)<sup>75</sup>

One prisoner reported a sign stating 'Prisoner Inside Writing to Overseers' placed on a cell door to notify passing staff when a prisoner had asked for a prescribed form with which to contact overseers. While this was likely to have been intended as a privacy measure, the prisoners experienced it as being labelled with a 'scarlet letter'.<sup>76</sup> Another wrote of prisoners' fear of breaking formation to try to post a letter:

You really have to understand the atmosphere in here around putting a letter in the suggestion boxes. We're all being yelled at as we're being marched [past the boxes], like to the factory in the morning. We usually can't muster the courage (Prisoner Survey 82P82)

Prisoners were keen to see changes that would make overseers' presence more credible and accessible, including through relocating suggestion boxes:

The suggestion boxes are right where other prisoners, and the corrections officers can see. If they were at the sports ground or in the gymnasium... overseers would get far more input from prisoners (Prisoner Survey 70P72)

... every morning when we're marched to work there's a corrections officer standing right in front of the box we go past, so it's hard to put a letter in (Prisoner Survey 81P94)

### 7.3 Views on Overseers' Performance

We have seen above and in Chapter 4 that layers of policy, legal, administrative, and practical constraints limit Japanese overseers' skills, resources and activities – both on paper and in practice. However, the data also shows that some committees strove to be more engaged and strategic in their role than others and we will examine the respective impacts of these more and less active committees in Chapter 8. This section reports each participant cohort's views on the overseers' performance. It also reviews whether this varied according to how much effort an individual committee put in to their oversight activities.

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<sup>75</sup> As we saw in Chapter 4, the failure of the *jōgan* (ministerial petition) system, which was in place from 1908 to 2005, was deeply implicated in the 2003 Nagoya Prison Scandal.

<sup>76</sup> Prisoner Survey 84P13. Nathaniel Hawthorne's *The Scarlet Letter* (Ticknor, Reed and Fields 1850) is commonly featured in the Japanese national high school curriculum. Set in Puritan Boston, it focuses on the stigmatisation of a woman who conceives a child out of wedlock.

### 7.3.1 Staff and overseer views: neutral or biased?

Overseers' assessed their own performance positively, particularly with respect to their level of engagement. They did not perceive themselves as biased towards prisoners. However, staff and prisoner views on overseers' performance were strongly negative.

#### *Overseer perceptions*

It was possible to develop two scales related to overseers' view of their own performance from their answers to multiple survey questions to which almost all 200 overseers responded. These were an *Overseer Bias Toward Prisoners* scale<sup>77</sup> and an *Overseer Engagement* scale.<sup>78</sup> Acceptable Cronbach's alpha values ( $\alpha = .768$  and  $\alpha = .755$ , respectively) indicated internal consistency for both scales. On a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so,' there was a slight tendency for overseers to think they were not biased toward prisoners ( $N = 196$ ,  $M = 2.90$ ,  $SD = .61$ ). There was a clear tendency for overseers to think they performed their role well ( $N = 197$ ,  $M = 3.77$ ,  $SD = .64$ ). None of the 47 overseers who made written comments raised their own performance directly.

#### *Staff perceptions*

While the same *Bias* and *Engagement* scales could not be built from the staff survey data, staff who responded to two individual questions on overseer neutrality tended to believe that overseers were biased in prisoners' favour.<sup>79</sup> Staff agreed slightly that overseers gave 'more weight to prisoner opinions than to those of corrections officers' ( $N = 710$ ,  $M = 3.19$ ,  $SD = 1.02$ ) and agreed somewhat that overseers gave 'more weight to prisoner treatment than to corrections officer working conditions' ( $N = 696$ ,  $M = 3.33$ ,  $SD = 1.04$ ).

In their written comments, staff expressed even stronger negative sentiment regarding overseer performance. This issue was a key concern, raised by 43% of the representative sample of 193 staff who also answered the open-ended question. Almost all focused on the subtheme of overseer neutrality,<sup>80</sup> expressing strong dissatisfaction ( $M = 1.61$ ,  $SD = 0.97$ ):

The overseers at my prison demand that we inquire into every single letter the prisoners send ...  
Sometimes when overseers have accepted the prison's reply, they review the issue later ... and

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<sup>77</sup> The four items used to develop this scale asked whether overseers 'give more weight to prisoners' opinions than to those of corrections officers'; 'give more weight to prisoner treatment than corrections officer working conditions'; 'should give more weight to prisoners' opinions over corrections officers' opinions'; and 'should give more weight to prisoners' treatment over corrections officers' working conditions'.

<sup>78</sup> The three items used to develop this scale asked whether overseers were 'enthusiastic about oversight activities', 'under[stood] the actual situation in the prison', and 'under[stood] the committee's legislated role'.

<sup>79</sup> Both questions used a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so'.

<sup>80</sup> Only four staff commented on whether overseers were engaged in their role, with views varied.

send yet *another* opinion about it. The prisoners ... have the overseers twisted round their little fingers ... (Staff Survey 99C88)

Staff felt that overseers lacked neutrality. Many felt their prison's committee had been captured by the attorney member's human rights agenda:

I've liaised with committees at [multiple] prisons, but the fact is some [attorney] overseers start with the attitude that 'whatever the prisoner says is true' and reject the prison's explanation without even trying to ascertain the facts. At one prison, the attorney who got the chair role treated the committee like it was his alone. Most others do their job right (Staff Survey 58C98)

Some staff focused on what they saw as the skewing influence of manipulative or deceitful prisoners on unsuspecting – even gullible – overseers:

When selecting overseers, it would be better to avoid attorneys who represent vexatious<sup>81</sup> prisoners currently in that prison... or who do criminal defence. They can't stay fair or neutral – they misinterpret what prisoners with grudges write and say (Staff Survey 41C83)

Overseers should have a better grasp of prison realities. They believe vexatious prisoners' stories – just swallow them hook, line and sinker – this system's useless. I want them to understand what we corrections officers *do*, and what prisoners are *like* (Staff Survey 69C94)

However, one officer felt that overseer views were legitimately representative and recommended constructive dialogue:

...If the overseers accept when the prison explains the circumstances without being stubborn, their opinions would be more useful. But if they're rigidly on the prisoners' side their relationship with the prison can deteriorate. It's important to have mutual trust. The prison should accept overseers' views as representing the people's views (Staff Survey 01C04)

### **7.3.2 Prisoner views: disengaged and complicit**

Nearly a fifth (19%) of the representative sample of 344 prisoners who also answered the open-ended question raised the overseers' performance. The two major subthemes were engagement and neutrality.<sup>82</sup> For 82% of these 66 prisoners, the engagement subtheme was the primary concern. Sentiment was strongly negative ( $M = 1.31$ ,  $SD = 0.50$ ). Prisoners wanted overseers to do more to advocate for their interests:

I want it to be a mechanism that stands up for prisoners more (Prisoner Survey 61P72)

They're not really trying – it's half-hearted. We don't need them if they're just going to play at it (Prisoner Survey 52P82)

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<sup>81</sup> In this study 'vexatious' (*kōsosei* in Japanese) refers to a staff and overseer perspective concerning prisoners who complain on multiple occasions using internal and external complaint mechanisms, whether formal or informal, in some cases concerning the same set of facts.

<sup>82</sup> Three prisoners at different prisons raise the issue of whether overseers maintained prisoner confidentiality. Two had experienced overseers disclosing their identities to staff after they spoke to overseers in confidence (Prisoner Surveys 58P95, 90P88 and 51P97).

I could tell from what the overseers said and did during my interview that they didn't really understand what I was telling them. I think it was because the interview time was too short... (Prisoner Survey 88P60)

... I want them to inspect every corner of the prison and come often to collect our letters from the suggestion boxes... The corrections officers are doing bad things where no one can see (Prisoner Survey 62P93)

We see them inspecting, but it's rare, and inspecting the way they do it is pointless. And them waiting for us to tell them how to improve the prison too - they should do regular surveys. It's the people who *don't* complain who have the best ideas for improvement (Prisoner Survey 68P69)

I heard they only discuss about two or three complaints each meeting, even if they get 200~300. We're all wondering what the overseers are for. I think they're just for show (Prisoner Survey 65P98)

I feel like their activities have dropped off compared to when the system was launched... (Prisoner Survey 74P83)

Turning to the neutrality subtheme, 53% of the 529 prisoners who responded to a 5-point Likert scale question on perceptions of overseer bias felt that overseers were biased towards prison staff ( $M = 2.32$ ,  $SD = 1.16$ ).<sup>83</sup> Just over a quarter (27%) of the 66 prisoners who made written comments on overseer performance raised their neutrality. Critical views were common, with prisoners describing overseers as condescending, or in a collusive relationship with the prison:

It doesn't matter what anyone says... they're always on the prison's side... We don't need them if it's just a performance (Prisoner Survey 62P95)

The oversight committee is just a front – actually they're cozy with the prison... (Prisoner Survey 69P54)

... I think the truth is that overseers don't actually *want* to look into the corrections officers' faults... (Prisoner Survey 74P39)

Everyone thinks they're complicit in... the corrections officers' human rights breaches (Prisoner Survey 74P18)

I don't know if it's deliberate... but it seems like they're looking down on us and laughing. Even when they're inspecting, it seems like they're thinking that we're criminals after all, so it's only natural that we should suffer... (Prisoner Survey 71P50)

## 7.4 Conclusion

This evidence on the nature of civil prison oversight in Japanese prisons confirms some distinctive features of Japan's regulatory state governance in this criminal justice domain. When the state asks civil prison overseers to 'row' by delivering prison regulation, there is no empowerment involved.

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<sup>83</sup> On a scale of 1 to 5, with 1 being 'They're strongly biased towards prisoners', 3 being 'They're neutral' and 5 being 'They're strongly biased towards corrections officers'.



Recruits are harnessed into committees in a fixed position – facing the state, with no peer-to-peer interaction – inside a finely woven web of controls designed to curtail their access and influence. In practice, the administrative guidance documents examined in Chapter 4 translate into ‘steering’ that is so heavy and pervasive that it suggests that this mechanism is in substance ‘command and control’ style ‘welfare state’ governance.<sup>84</sup>

These data also reveal a mechanism that is both static and uniform. It incorporates none of the resource-intensive continuous improvement processes found in the theories of ‘really responsive’ and ‘risk-based’ regulation that were described in Chapter 2.<sup>85</sup> For example, oversight frequency and activity does not differentiate between lower and higher risk prisons and prisoner populations<sup>86</sup> and there is no evaluation and modification cycle.<sup>87</sup> Moreover, overseers’ toolkits begin and end with dialogue and internal reporting. If prisons do not self-regulate, overseers have no rewards or supports to offer and can neither escalate to more intrusive, coercive measures<sup>88</sup> nor network with other mechanisms in ‘smart’ regulatory arrangements.<sup>89</sup>

#### *Staff perspectives: social alignments and motivational postures*

Chapter 2 also explained that social psychology plays a key role in regulation. Particularly where a mechanism relies solely on persuasion, the complementary theories of ‘social alignments’ and ‘motivational postures’ are useful.

We saw in Chapter 4 that policy and corrections elites defined the need for Japan’s mechanism far from prison cellblocks and factories, constructing and imposing it in a top down process that precluded collaborative ‘co-design’.<sup>90</sup> Despite the Correction Bureau’s last minute effort to convince staff that overseers would align with their interests, as seen in the Wheel of Social Alignments model,<sup>91</sup> the data above suggest that when implemented, the attributes and conduct of the intermediaries on both sides hardened this high ‘relational distance’ between overseers and staff.<sup>92</sup>

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<sup>84</sup> David Levi-Faur, ‘The Odyssey of the Regulatory State: From A “Thin” Monomorphic Concept to A “Thick” and Polymorphic Concept’ (2013) 35(1-2) *Law & Policy* 29.

<sup>85</sup> Ayres and Braithwaite (1992); Black and Baldwin (2010).

<sup>86</sup> Black and Baldwin (2010).

<sup>87</sup> Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems & Managing Compliance* (Brookings Press 2000).

<sup>88</sup> John Braithwaite, ‘The Essence of Responsive Regulation’ (2011) 44 *University of British Columbia Law Review* 475. See Figure A.

<sup>89</sup> Gunningham and Grabosky (1998).

<sup>90</sup> Martin Innes, Bethan Davies and Morag McDermont, ‘How Co-Production Regulates’ (2019) 28(3) *Social and Legal Studies* 370.

<sup>91</sup> Valerie Braithwaite (2017). See Figure D.

<sup>92</sup> Donald Black, *The Behaviour of Law* (Academic Press 1976) 40-41. See Figure C.

It seems likely at this point that the overseers' limited physical access to the prison – and the dual regulatee-side intermediaries who stood between them and most staff,<sup>93</sup> may have largely prevented them from influencing prison operations. The liaison officer served the first line of defence and the warden the second: both acting as shields rather than channels for prison staff as a whole, preventing 'co-delivery' of the regulatory agenda in a 'co-regulatory' effort.<sup>94</sup> Accordingly, it is clear that staff as a whole are not included in the mechanism – whether on paper or in practice. We have seen above that this bothered staff participants and that mattered, with the mid-career and senior managerial staff who participated in Japan advocating for the equitable inclusion of junior ranks.

Crucially, staff reject overseers' legitimacy as regulator-side intermediaries, seeing them as manifestly unqualified and insensitive to both public opinion and the realities of prison work. We have seen that respect is often missing and with rare exceptions, trust is unlikely. There were manifold indications of poor social alignment between overseers and staff. For example, staff expressed a sense of grievance at overseers intruding into the specialised prison workplace and seeking to substitute their judgment for that of staff, particularly in the case of the attorney overseers. There was fundamental disagreement on 'values, norms, beliefs and processes'.<sup>95</sup> Staff interpreting the regulatory aim of 'bringing community common sense' into prisons as ensuring that prisons reflected punitive public sentiment informed by Japan's victims' rights movement, while the overseers, led by the attorney chairs, saw the proper aim as protecting prisoners' human rights and often adopted the 'white knight on a charger' persona.<sup>96</sup>

The strong influence of these overseers, who typically serve as chairs, is consistent with the historical trend identified by Anderson and Nolan in 2004 for 'narrow' participatory bodies in Japanese governance to be dominated by the legal profession, even when the body is meant to represent diverse views. It was clear that this rank asymmetry inside civil prison oversight committees mattered. The other overseers on a committee deferred to the attorney's elite status, so it was the legal version of 'community common sense' that prevailed. The staff antagonism towards this combative attorney agenda, so misaligned with their own, points to the 'zealous' public interest group dysfunction predicted by Ayres and Braithwaite in 1992.<sup>97</sup> Rank asymmetry mattered yet again in this respect – as between staff and the overseers who members of the legal and medical professions. Staff saw the legally and medically qualified overseers as improperly leveraging their elite social status to dominate committee agendas.

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<sup>93</sup> See Figure G.

<sup>94</sup> Innes, Davies and McDermont (2019).

<sup>95</sup> Valerie Braithwaite (2019) 29.

<sup>96</sup> Ayres and Braithwaite (1992) 75.

<sup>97</sup> *ibid.*

The siloing of each oversight committee from its peers compounded the overseers' isolation from most prison staff and the lack of a larger national conversation that might have identified common ground on the meaning of the 'community common sense' standard and fair oversight procedures. There was no structure involving all of Japan's civil prison oversight committees, let alone one that also included the regulated corrections workforce. Yet finding common ground on how human rights concepts should inform the mechanism was not an unreasonable goal. After all, as Chapter 4 showed, the oversight system was part of a response to public outrage over abuses in which prisoners died, for which eight officers were prosecuted, and we have seen that the Correctional Administration Reform Council (CARC) Proposal 2003 contained dozens of references to protecting prisoners' 'human rights' or 'humanity'.<sup>98</sup>

Although Chapters 8 and 9 explore this in more detail, we have seen that staff often expressed strong negative feelings towards overseers. This is concerning as we know from the theories of social alignments and motivational postures that a lack of 'social alignment' between regulator-side intermediaries and regulatees of this nature makes defiance more likely.<sup>99</sup> We would expect staff to express openness and empathy if overseers had been successful in their persuasive role.

#### *Overseer and prisoner perspectives*

The data reported above show that the other two participant cohorts also had doubts about the nature of the mechanism. Overseers were aware of their inadequacies as oversight personnel and the paltry nature of their presence in the prison. They felt ill-equipped and under-resourced, knowing that they could not effectively scrutinise the entire operations of each prison, as the wording of Penal Detention Act 2005 arts 7 to 9 implies.<sup>100</sup> However, most of all, they chafed at their lack of independence. Some feared they had been appointed to dampen public anxiety about prisons, rather than to fill a substantive role. Nonetheless, overseers' perception of their own performance, was overwhelmingly positive, even though they had no way to confirm the validity of this perception.

Prisoners knew little of overseers' credentials and had almost no prospect of meeting them in person. What little they could observe of overseers moving around the prison, in moments when they had not been ordered to avert their gaze or turn their backs, did not impress. Prisoners saw overseers as a remote, ceremonial presence and found the mechanism inaccessible and risk laden.

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<sup>98</sup> Correctional Administration Reform Council, *Gyōkei kaikaku shingikai teigen: kokumin ni rikai sare, sasaeraru keimusho e* (Correctional Administrative Reform Council Proposal: Towards Prisons that will be Understood and Supported by the People) (22 December 2003) [www.moj.go.jp/content/000001612.pdf](http://www.moj.go.jp/content/000001612.pdf) accessed 2 April 2023.

<sup>99</sup> Valerie Braithwaite (2014).

<sup>100</sup> The phrase 'the administration of the penal institution' is repeated four times in Penal Detention Act 2005 arts 7-9, once with the word 'improving the' beforehand.

They feared that overseers were incompetent, unaware of the realities of prison life, aligned with the prison and indifferent to prisoners' concerns.

This leads to the question of the impacts of Japan's oversight system on Japanese prisons. Chapter 8 addresses the benefits that participants felt had accrued due to the Japanese mechanism, while Chapter 9 reports participants' views on its unintended consequences.

## Chapter 8 Soft Civil Prison Oversight in Japan: Benefits

Chapter 7 focused on what the data reveal about the *nature* of civil prison oversight in Japanese prisons. This chapter is the first of two that explore what the data have to tell us about the *impact* of the mechanism in Japanese prisons.

We saw in Chapter 1 that over recent decades, there has been a groundswell of faith in civil prison oversight as a vital, benign ingredient in modern prison governance. Jurisdictions like Japan and the Australian Capital Territory (ACT) have introduced it in a spirit of optimism. However, a lack of empirical examination has left the assumptions supporting this mechanism largely untested.

In Chapter 2, we noted that not all regulatory impacts are benign. Regulation generates both beneficial and unintended consequences, whether tangible or intangible.<sup>1</sup> Accordingly, it makes sense for empirical studies to be sensitive to the potential for both positive and perverse outcomes. This chapter reports on the extent to which each participant cohort in Japan perceived benefits, while the next chapter reports on the extent to which each cohort perceived unintended consequences.

### *Benefits for whom?*

This study sought participants' views on the stated aims of each regulatory mechanism, as well as the aims that are normative for similar systems globally. As we saw in Chapter 7, the stated aims of Japan's mechanism shifted somewhat between the policy and implementation stages. The Correctional Administration Reform Council (CARC) Proposal 2003 framed the proposed mechanism as protecting prisoners' human rights by 'preventing the recurrence of physical abuse by staff',<sup>2</sup> as well as holding prisons accountable by reorienting them to 'reflect society's common sense' and form 'deepened ties' with local communities.<sup>3</sup> We have seen that while this policy document returned repeatedly to the need to protect prisoners' 'human rights' or 'humanity', it did not position Japan's new oversight bodies as benefitting staff by addressing their working conditions.

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<sup>1</sup> Peter Grabosky, 'Counterproductive Regulation' (1995a) 23 *International Journal of the Sociology of Law* 347; Michael Power, 'The Audit Society: Second Thoughts' (2000) 4(1) *International Journal of Auditing* 111; Steve Martin, 'Knowledge from Inspection: External Oversight and Information to Improve Performance' in Kieran Walshe, Gill Harvey and Pauline Jas (eds), *Connecting Knowledge and Performance in Public Services: From Knowing to Doing* (Cambridge University Press 2010). See generally Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981).

<sup>2</sup> Correctional Administration Reform Council, *Gyōkei kaikaku shingikai teigen: kokumin ni rikai sare, sasaeraru keimusho e* (Correctional Administrative Reform Council Proposal: Towards Prisons that will be Understood and Supported by the People) (22 December 2003) [www.moj.go.jp/content/000001612.pdf](http://www.moj.go.jp/content/000001612.pdf) accessed 2 April 2023, 27.

<sup>3</sup> CARC Proposal (2003) 11.

However, as noted in Chapter 4, by 2005 there was a clear shift. The implementing legislation and administrative guidance that emerged in that year diluted the goal of protecting prisoners' human rights.<sup>4</sup> This blueprint for how the mechanism was to function now touched on staff working conditions, if just once and briefly,<sup>5</sup> and repeatedly mentioned 'the administration of prisons' as a whole.<sup>6</sup> This is not necessarily inconsistent with the earlier, human rights-oriented vision, but indicates a subtle switch from prisoners being the primary beneficiaries of civil oversight to prisons in that role. This is despite the fact that overseers' limited expertise and resources make it unlikely that they would be able to fulfil such an ambitious remit – as we saw in Chapter 7.

Nonetheless, high-level Japanese policy statements have continued to connect the Japanese mechanism with international human rights norms protecting prisoners. Japan has mentioned Penal Institution Visiting Committees in its periodic reports under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and the International Covenant on Civil and Political Rights (ICCPR) since late 2005.<sup>7</sup> Further, the data from Japan reported in Chapter 7, this chapter and Chapter 9 show that at least some participants in each participant cohort understood Japan's mechanism as intended to protect prisoners' human rights. Lastly, we have seen in Chapters 1 and 4 that some Japanese scholarly literature on this regulatory mechanism also articulates this position, as do various Japan Federation of Bar Association (JFBA) publications.

This tension between policy, bureaucratic and public interest group beliefs concerning whom Japan's mechanism should properly benefit is a useful lens through which to view the data on each cohort's perceptions on benefits. We know from Valerie Braithwaite's empirically-derived theories of social

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<sup>4</sup> In an appendix, the *Heisei 27-nen 8-gatsu 11-nichi Hōmushō kyōsei kyoku keiji shisetsu shisatsu i'inkai katsudō no tebiki* (Ministry of Justice Correction Bureau Guide for Penal Institution Visiting Committee Activities 11 August 2015) (Ministry Guide for Overseers) cites passages from the CARC Proposal (2003) that mention prisoners' 'human rights' four times. However, the main text of the Ministry Guide, which is authored by the Correction Bureau, goes no further than mentioning prisoners' 'humanity' twice.

<sup>5</sup> The *Heisei 18-nen 5-gatsu 23-nichi Hōmushō tsūtatsu dai-3255-gō* (Ministry of Justice Directive No. 3255 of 23 May 2006) [www.moj.go.jp/content/000074535.pdf](http://www.moj.go.jp/content/000074535.pdf) accessed 2 April 2023 (Directive to Wardens) and the Ministry Guide for Overseers 2015 do mention the adequacy of staffing levels, but only as one item in the list of 15 matters regarding which wardens must inform overseers annually. The same 15 matters are listed under art 6(1)(iii) of the *Keiji shisetsu oyobi shūyōsha no shōgū ni kansuru kisoku* (Regulations for Penal Institutions and Treatment of Inmates) 2006 [www.japaneselawtranslation.go.jp/en/laws/view/3227](http://www.japaneselawtranslation.go.jp/en/laws/view/3227) accessed 2 April 2023.

<sup>6</sup> The phrase 'the administration of the penal institution' is repeated four times in *Keiji shūyō shisetsu oyobi shūyōsha to no shōgū ni kansuru hōritsu* (Act on Penal Detention Facilities and the Treatment of Inmates and Detainees) 2005 [www.japaneselawtranslation.go.jp/en/laws/view/2796](http://www.japaneselawtranslation.go.jp/en/laws/view/2796) accessed 2 April 2023 (Penal Detention Act) arts 7-9, once with the word 'improving the' beforehand.

<sup>7</sup> UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT). See, for example, Government of Japan, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - First Periodic Report' (20 December 2005) UN Doc CAT/C/JPN/1, 85. UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). See, for example, Government of Japan, 'International Covenant on Civil and Political Rights - Fifth Periodic Report' (20 December 2006) UN Doc CCPR/C/JPN/5, 61.

alignment and motivational postures that benefits for regulatees are a prerequisite for success in persuasive regulation.<sup>8</sup> These theories also tell us that regulatees are more likely to see a persuasive mechanism as beneficial, fair and worthy when it aligns with their existing 'values, norms, beliefs and processes'.<sup>9</sup>

#### *Data sources and outline*

This chapter reports on the same three types of data collected from the same cohorts at the same time as the data on the nature of Japan's civil prison oversight system in Chapter 7.<sup>10</sup> These are the observational data collected in Phase 1 in 2015 and the mixed methods data gathered in Phase 2 in 2016.<sup>11</sup>

The first part of the chapter evaluates whether participants perceived any benefits for prisons, staff or the public. Viewed as entire cohorts, overseers expressed strongly positive views, while staff were less sanguine. Staff saw both public relations and symbolic gains for prisons yet felt that they had not benefitted as staff. Prisoners indicated modest support for abstract, symbolic gains for staff but were ambivalent concerning any gains for the public. The written responses provided by the representative samples of each cohort who also answered the open-ended question enhance this picture.<sup>12</sup> The responses of the representative sample of staff confirm and explain the modestly positive view of the staff as a whole, while the responses of the representative samples of overseers and prisoners contradict the responses given by each of these cohorts as a whole. The representative sample of overseers cites no examples or evidence of any gains for the prison, staff or public. Meanwhile, the representative sample of prisoners strongly rejects any gains for staff or the public.

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<sup>8</sup> Valerie Braithwaite, 'Defiance and Motivational Postures' in David Weisburd and Gerben Bruinsma (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer Science & Business Media 2014); Valerie Braithwaite, 'Closing the Gap Between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017).

<sup>9</sup> Valerie Braithwaite (2017) 29.

<sup>10</sup> Quantitative results are reported using descriptive and inferential analysis performed using SPSS 26, employing multi-question scales wherever possible. Each scale was developed from between three and eight individual questions on the basis of face validity, theoretical salience and the absence of theoretical or empirical overlap with other measures. Reliability was measured using Cronbach's alpha, which was satisfactory or good in all cases. Qualitative data were analysed thematically using Dedoose. See Appendix C Phase 2: Open-Ended Survey Question.

<sup>11</sup> See Appendix A Phase 1: Exploratory Data Collection; Appendix B Phase 2: Main Data Collection.

<sup>12</sup> Emphasis in the comments by Japanese participants who also answered the open-ended question is reproduced in the translated excerpts using italics and punctuation as appropriate. Square brackets in excerpts from participant responses indicate either details that have been removed to prevent the re-identification of participants, or those added for clarification. The open-ended questions in the staff and overseer surveys both asked: 'Please write any additional thoughts or views you may have about the [oversight system in your jurisdiction or its] activities – especially how to improve [it]. The open-ended question in the prisoner surveys asked: 'Please write any thoughts you have about the [oversight system where you are] – especially how [it] could be made better'. See Appendix B Phase 2: Main Data Collection.

The second part of the chapter reports participants' views on benefits for prisoners. Viewed as entire cohorts, overseers were again strikingly confident concerning multiple benefits, while staff were again more reserved. Prisoners were equivocal as to whether they had seen any benefits. However, the written responses by the representative samples of all three cohorts who also answered the open-ended question reveal striking internal variations concerning views on benefits for prisoners. Despite strong overall overseer belief in a smorgasbord of benefits for prisoners, the particularly well-informed sample of overseers who also provided written responses expressed a much bleaker view. Further, while staff as a whole saw symbolic gains for prisoners, the staff who also gave written responses expressed complex views on whether human rights benefits had accrued – and whether they should accrue. Finally, the prisoners who also gave written responses were strongly negative regarding any benefits for their cohort.

It is important to view the disparity between Japanese prisoner and overseer views on benefits in the light of 'information asymmetry'<sup>13</sup> – in this case concerning what goes on inside prisons. Of the three Japanese cohorts, prisoners were by far the least able to judge the mechanism's impact outside prisons. At the same time, overseers were by far the least able to gauge the mechanism's impact inside prisons. As overseers neither live nor work in prisons, we can speculate that this disparity might occur in even jurisdictions like the ACT, where that the overseers' exposure to secure custodial areas is frequent, prolonged and unstructured (as we will see in Chapter 10), rather than rare, brief and choreographed (as we saw in the case of Japanese overseers in Chapter 7).

The third part of the chapter presents bivariate correlations performed to test for relationships between levels of oversight activity and perceived benefits. This analysis involved a two-step methodology. The first step was to create two multi-question summary measures to assess two distinct theoretical concepts relating to overseer activities: *Routine Oversight Activities* and *Extended Oversight Activities*. The second step was to conduct bivariate correlation analysis between the two summary measures and eight scales of actor perceptions of benefits, which are introduced in the first two parts of the chapter.

The chapter concludes by evaluating the data gathered from all participants concerning the benefits of Japan's civil prison oversight mechanism, focusing on what the perceptions of staff reveal about the impact of this persuasive regulatory mechanism in Japan.

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<sup>13</sup> See Encyclopedia Britannica, 'George A Akerlof – American economist' (*Encyclopedia Britannica*, 2023) [www.britannica.com/biography/George-Akerlof#ref749262](https://www.britannica.com/biography/George-Akerlof#ref749262) accessed 2 April 2023.



## 8.1 Benefits for Japanese Prisons, Staff and the Public

This section details participants' views on whether the civil oversight system had produced benefits for the 'prison side' of the equation: that is, prisons as institutions, the staff who work in them and the public that relies on them. The potential benefits raised by the main surveys, which actors often considered in their written comments, ranged from concrete benefits like operational improvements to abstract gains like improved prison transparency and staff morale.<sup>14</sup>

### 8.1.1 Staff views: institutional and abstract gains

The staff data offer insights into this cohort's views on three possible 'prison side' benefits: increased support for prisons; increased support for staff; and symbolic meaningfulness.

#### *Support for prisons but not staff*

It was possible to build two scales from staff responses to multiple quantitative questions on impacts primarily benefitting prisons as institutions, or staff as a workforce, to which at least 99% of the 862 staff participants responded.<sup>15</sup> These were a *Supports Prisons* scale<sup>16</sup> and a *Supports Corrections Officers* scale.<sup>17</sup> Good Cronbach's alpha values ( $\alpha = .840$  and  $\alpha = .857$ , respectively) indicated internal consistency for both scales. On a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so' staff provided a clear positive response that civil oversight supported the prison ( $N = 855$ ,  $M = 3.58$ ,  $SD = .71$ ). However, corrections officers did not express a positive response ( $N = 851$ ,  $M = 2.84$ ,  $SD = .82$ ) regarding whether civil oversight supported them as staff.

The questions in the *Supports Prisons* scale focused on improving prison operations and enhancing public support for prisons, but all the questions in this scale adopted phrasing from the official 'blueprint' for the oversight system described in Chapter 7. As senior staff would be particularly familiar with this official Ministry of Justice (MoJ) policy and legal boilerplate, they may have felt professionally obliged to agree with it. Given this possibility, the written comments from the

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<sup>14</sup> Code weighting was applied using a five-point scale. I applied the value '5' where a participant strongly agreed with a code, '3' where a participant took a neutral position, and '1' where a participant strongly disagreed. See Appendix C Phase 2: Open-Ended Survey Question for code trees and weighting metrics.

<sup>15</sup> In this study,  $N$  refers to the entire sample size and  $n$  to a cell size.

<sup>16</sup> The four items used to develop this *Supports Prisons* scale asked if oversight activities were: 'effective in improving the way the prison is run'; 'effective in helping secure public support for the way the prison is run'; 'effective in helping the way the prison is run reflect community common sense'; and 'effective in backing up legitimate positions taken by the prison side'.

<sup>17</sup> The four items used to develop this *Supports Corrections Officers* scale asked if oversight activities were: 'effective in raising public awareness of the reality of corrections officers' working conditions'; 'effective in raising corrections officer's morale'; 'effective in striving to reduce corrections officers' workloads'; and 'valuable from corrections officers' perspective'.

representative sample of staff who also answered the open-ended question are especially valuable. They confirm and explain staff views on how the mechanism supports prisons, but not staff.

Twelve percent of the 193 staff who answered the open-ended question articulated views on the improved public support for prisons they saw as a benefit of the mechanism ( $n = 24$ ,  $M = 3.3$ ,  $SD = .80$ ). Most of the positive opinions in these responses reflected a utilitarian approach. Staff saw interaction with overseers as a vital opportunity to defend and advocate for the prison in front of an influential local audience. Some advocated for increased publicity for civil oversight activities to maximise this benefit for prisons:

Overseers serve as our 'spokesmen' in a way, linking us with the community (Staff Survey 74C97)

To progress prisoner rehabilitation, we need to promote more public understanding of the prisons administration. The [overseers] can be one way we do this, but my impression is that we're not using them fully. We on the prison side should build a closer relationship with the [overseers] (Staff Survey 86C91)

... prisons are closed institutions, so we definitely need scrutiny from outside. But if you ask whether prisoners are all remorseful, that's not the case at all. The public doesn't know this; the trend is to for them think we bully prisoners. So, we want overseers to work to dispel this idea among the public. How about if overseers listened to victims' views as well? (Staff Survey 63C86)

In other words, staff tended to see the proper direction of influence through oversight as *outwards* – from the prison to the community – rather than the other way around. Staff expected overseers to, in effect, become their local champions. It was vanishingly rare for staff to articulate the CARC Proposal 2003 vision of community influence also flowing *inwards* as overseers held prisons accountable to societal values of humanitarianism and human rights:

The oversight system should continue. It's a strategy for earning public trust; we need it to eliminate the harms due to prisons being isolated from society and run according to our own rules (Staff Survey 53C99)

... I myself think there's a problem with prison staff being insensitive to outside perspectives, so overseers' views are valuable – that way we can always remember 'community values'. If how we do things or how we explain ourselves doesn't satisfy overseers, then it certainly won't fly with the public in general... (Staff Survey 54C93)

Accordingly, the clearly positive sentiment seen in the *Supports Prisons* scale reflects a staff belief that the mechanism presented an unprecedented opportunity to give local elites regular exposure to staff views on the legitimacy and value of prison practices, as well as the challenges prisons face. Staff understand oversight as offering a channel for overcoming the public fear and resistance

generated by *mikkō shugi* – the policy of strict secrecy that had isolated Japanese prisons from society until 2005.<sup>18</sup>

Only 8% of the 193 staff who also responded to the qualitative question raised whether the oversight system had improved prison operations. Sentiment was negative ( $n = 16$ ). Several staff cited an excessive focus on prisoner complaints as behind a failure to improve operations, while others made a complementary argument that the cause was lack of attention to poor staff working conditions:

My impression is that all the overseers do is react to prisoner's views; it's not clear that they do anything to improve how staff are treated or how the prison runs. They spend all their time finding fault, not suggesting improvements – it's not constructive (Staff Survey 90C85)

The overseers at my prison really mainly consider what prisoners say and write to them. In the two years I've dealt with them they've never raised our working conditions, our increased burden from high-needs prisoners... the prison facilities, environment, resources. There's no balance. It's like overseers are a *mouthpiece* for prisoners (Staff Survey 81C99)

### *Symbolic gains*

Staff perceived the abstract external impact of the oversight system as positive, when asked if it was 'valuable from the perspective of the public as a whole' ( $N = 857$ ,  $M = 3.31$ ,  $SD = .99$ ).

This perception was even stronger in staff responses to the open-ended question. A fifth (21%) of the 193 staff who responded clearly articulated the view that civil oversight was worthwhile or 'meaningful' in some way ( $n = 41$ ,  $M = 3.6$ ,  $SD = 1.1$ ). The mean code weight value for this benefit was a strongly positive result when viewed in comparison to the various measures of staff views in this study.<sup>19</sup>

The code 'meaningful' was applied when a participant cited abstract symbolism in relation to civil oversight. However, it is important to view this positive result in context. Staff often wrote vague, upbeat statements on the mechanism's general meaningfulness to soften specific critical comments:

Quite a few years have passed since oversight committees were established, and while various improvements have been made to institutions, this is not really known – not even by most staff let alone the public - because there isn't enough publicity ... Oversight committees are meaningful for both prisons and prisoners (Staff Survey 65C93)

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<sup>18</sup> Carol Lawson, 'Reforming Japanese Corrections: Catalysts and Conundrums' in Leon Wolff, Luke Nottage and Kent Anderson (eds), *Who Rules Japan? Popular Participation in the Japanese Legal Process* (Edward Elgar 2015) 139, 146-148.

<sup>19</sup> As discussed in Chapter 6, staff responses to Likert scale questions showed a strong Middle Response Style (MRS) tendency. See Appendices C1 and C4 for weighting metrics for staff responses to the open-ended question.

### 8.1.2 Overseer views: institutional and staff gains

As almost all the questions in the overseer and staff surveys were the same, it was possible to see if the scales that could be developed from staff responses, which are reported above in 8.1.1, could also be developed from overseers' responses.

#### *Support for prisons and staff*

This effort to build identical scales for staff and overseers succeeded in the case of the *Supports Prisons* and *Supports Corrections Officers* scales introduced above. Each of these overseer scales incorporated the same questions as those for staff. The four items used to develop the *Supports Prisons* scale asked if potential benefits associated with the official aims of the oversight system had accrued. Both staff and overseers would have been familiar with the wording of these stated aims, which concerned improved prison operations, increased public support for prisons, holding prisons accountable to 'society's common sense' and supporting the prison's positions in public discourse. The four items used to develop the *Supports Corrections Officers* scale asked about benefits in line with staff expectations, which were not part of the system's stated aims. These potential staff benefits concerned letting the public know about the realities of staff working conditions, improving staff morale, reducing workloads and general meaningfulness for staff. Adequate Cronbach's alpha values ( $\alpha = .713$  and  $\alpha = .711$ , respectively) indicated internal consistency for both scales.

On a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so', overseers believed more strongly than staff that the oversight system *Supports Prisons* ( $N = 197$ ,  $M = 3.74$ ,  $SD = .527$  vs  $N = 855$ ;  $M = 3.58$ ;  $SD = .71$ ). The difference between the views of overseers and staff was small but statistically significant ( $t(1050) = 3.575$ ,  $p < .001$ , 2-tailed). Overseers also clearly agreed that the system *Supports Corrections Officers*, while staff disagreed somewhat ( $N = 196$ ,  $M = 3.39$ ,  $SD = .566$  vs  $N = 851$ ;  $M = 2.84$ ;  $SD = .82$ ). This difference between the views of overseers and staff was substantial and statistically significant ( $t(1045) = 11.179$ ,  $p < .001$ , 2-tailed).

#### *Symbolic gains; potential for accountability*

Overseers perceived the abstract external impact of the oversight system as positive, when asked if it was 'valuable from the perspective of the public as a whole' ( $N = 197$ ,  $M = 3.57$ ,  $SD = .86$ ).

The representative sample of overseers who also answered the open-ended question were silent as to whether any benefits had in fact accrued to the prison or staff. The only mention of benefits came from three overseer comments suggesting that the system could *potentially* hold the prison accountable to the public in the way envisaged by the CARC Proposal:

Prisons are special institutions, so have to be completely isolated from the general public. This means the oversight system is needed so someone who brings an external perspective can listen to prisoners and staff (Overseer Survey 69V93)

I think the oversight role is to help improve treatment so that the prison is not focused on keeping the prisoners under supervision and control, but on helping them gain the ability to live independently in society – as people (Overseer Survey 69V95)

This silence in Japanese overseers' written comments regarding whether prisons had actually benefitted is not surprising. As Chapter 7 notes, Japanese overseers' firsthand knowledge of how a prison might be changing over time depends on brief, heavily supervised glimpses of the secure custodial areas. While committees do receive uncensored letters from prisoners and conduct confidential prisoner interviews, this information is by itself contingent, fragmented, asynchronous and second-hand. Most have almost no opportunity to observe prison operations or how staff treat prisoners. In contrast, staff spend roughly 2000 hours inside the prison each year. Meanwhile, prisoners naturally have ample opportunity to observe changes in prisons. Moreover, we saw in Chapter 7 that the prisoner cohort in this study was particularly qualified to comment, as nearly 50% had experienced life in prison before the mechanism's introduction in 2005.

### **8.1.3 Prisoner views: ambivalent at best**

Overall, Japanese prisoners were ambivalent concerning benefits for staff or the public – which could be seen as indirectly benefitting prisons.<sup>20</sup> Prisoners as a whole gave a marginal response to an individual question regarding whether the oversight system was 'valuable' for staff ( $N = 1451$ ,  $n = 901$ ,  $M = 3.24$ ,  $SD = 1.27$ ).<sup>21</sup> In addition, the cohort as a whole was equivocal on two questions regarding benefits for the public. These were whether the oversight system was: 'useful' in terms of external transparency through 'informing the public regarding corrections officers' actual working conditions' ( $N = 895$ ,  $M = 3.09$ ,  $SD = 1.36$ ); and 'valuable for the public' ( $N = 891$ ,  $M = 3.03$ ,  $SD = 1.33$ ).<sup>22</sup>

The data from the representative sample of Japanese prisoners who also answered the open-ended question clarifies these equivocal views on gains for staff or the public seen in the data from the overall cohort. Prisoners' written comments emphatically rejected improvements in either external

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<sup>20</sup> The Correction Bureau set limits on the length, nature, and content of the prisoner survey. However, three Likert scale questions concerned potential benefits for staff or the public – which would indirectly benefit the prison: Qs. 5-3, 5-10 and 5-11. These questions did not form a scale and are reported here individually. See Appendix B.

<sup>21</sup> A two-tailed  $t$ -test found no significant difference between this marginally positive  $M$  in Japan and the marginally negative  $M$  in the ACT for prisoner sentiment in response to this individual question.

<sup>22</sup> While in each case  $M$  is slightly above the midpoint 3, the relatively large  $SD$  means it is not possible to say with confidence that sentiment was above the neutral position.

or internal transparency – meaning not only transparency as between the prison and the public, but also transparency as between the prison and prisoners. Further, they saw no symbolic gains.

### *Transparency*

Prisoners' written comments suggest that the ambivalence seen in the cohort as a whole regarding gains in external transparency may be due to prisoners' general lack of access to information. It is not likely that they would have seen the MoJ reports on overseers' activities, or scholarly, public interest group and media commentary on those reports. While Japanese prisoners do have limited access to television news programs and newspapers, media coverage of the civil prison oversight system is rare, and prisoners have no Internet access.

Fourteen percent of the 344 prisoners who also answered the open-ended question raised the issue of whether the mechanism had improved prison transparency, whether internal or external.

Sentiment was strongly negative ( $n = 48$ ,  $M = 1.2$ ,  $SD = 0.4$ ). This representative sample was concerned with whether the prison had become a more open institution. One way these prisoners gauged this dimension was by evaluating the transparency of the workings of the oversight system itself:

We're all told by a prison broadcast when the overseers are coming to inspect, but I've never really understood the oversight system. Oversight is a big deal for prisoners, so I wanted to be told in writing about its aims and the procedure for using it. I've heard we can use it, but I think it'd mostly be complaints to overseers about corrections officers, and I don't know if the overseers would really *hear* us. It should be a bit more transparent... (Prisoner Survey 60P92)

I want a more transparent explanation of oversight activities, their outcomes, and the system's aims (Prisoner Survey 60P86)

There's not a prisoner in here who knows what types of improvements have happened because of overseers' activities (Prisoner Survey 66P73)

... there's no way overseers can find out what life inside is really like, how staff and prisoners interact, the way things really are. It's good to have the oversight activities and system, but it's not working. Prisons are secret, isolated places in the end – you have to be in prison to know what it's like. They're designed so no information gets out (Prisoner Survey 77P78)

### *Meaningfulness*

Twenty two percent of the representative sample of 344 prisoners who also responded to the open-ended question raised the issue of whether the mechanism was meaningful. Sentiment was clearly negative ( $n = 75$ ,  $M = 1.8$ ,  $SD = 1.4$ ). That said, prisoners raised and dismissed six potential benefits in all and their views on meaningfulness were less negative than the other five.<sup>23</sup> Although some took a

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<sup>23</sup> In addition to 'transparency' and 'meaningfulness', these were 'comfort/calm', 'advocacy/voice', 'problem-solving' and 'protects human rights'. See Appendix C3.

philosophical stance, most were despairing. Prisoners saw the prison as gaming oversight rather than benefitting from it. One even critiqued the system as an irresponsible use of public funds:

... It's important that prisons don't fall behind the times, so prison reform is a very good thing.  
(Survey 69P58)

Inspections the prison knows about ahead of time mean that in the end the overseers only get to see areas that pass muster; both my and my friend's interviews with the overseers went well but that was useless too; the prison got its way as usual – that's all this system is... (Prisoner Survey 67P90)

... Basically, it's meaningless – a complete waste of taxpayers' money (Prisoner Survey 71P50)

## **8.2 Benefits for Japanese Prisoners**

Overall, staff felt that the system was 'valuable' for prisoners in an abstract sense, including in terms of protecting their human rights. However, they were lukewarm or sceptical concerning concrete benefits for prisoners. Only a few staff among the representative sample who also provided written comments mentioned benefits for prisoners. Some of these staff stated that improved conditions would be an inappropriate outcome. For these corrections officers, human rights were important in principle, but properly limited in practice by the interests of others – that is, the interests of the public, victims of crime and staff.

In sharp contrast, the overseer cohort as a whole felt that prisoners had received a range of benefits in the areas of advocacy, comfort and public awareness. The overseers also expressed enthusiastic agreement that prisoners had also received both human rights benefits and symbolic benefits. However, the representative sample who also answered the open-ended question offered no examples or evidence in support of this broad optimism and a small group of better-informed overseers expressed negative views.<sup>24</sup>

Prisoners rejected the proposition that they had received human rights protection and other benefits. Those among the representative sample of prisoners who also answered the open-ended question who mentioned potential benefits for prisoners tended to be sharply critical. In their view, the oversight system had failed to solve problems, advocate for prisoners, protect their rights, or provide comfort.

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<sup>24</sup> Whether overseers were 'better-informed' was evaluated by reference to overseers' professional background, length of service on the committee and the holding of committee leadership positions.

### 8.2.1 Staff views: human rights and abstract gains

Responses to survey questions for Japanese staff on benefits for prisoners were used to build an *Informs Public and Includes Prisoners* scale<sup>25</sup> and a *Comforts Prisoners* scale.<sup>26</sup> Cronbach's alpha values were acceptable for the *Informs Public and Includes Prisoners* scale ( $\alpha = .733$ ) and good ( $\alpha = .875$ ) for the *Comforts Prisoners* scale, indicating internal consistency for both. On a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so', staff were neutral as to whether the oversight system informed the public or included prisoners ( $N = 849$ ,  $M = 2.89$ ,  $SD = .78$ ), or calmed prisoners ( $N = 852$ ,  $M = 2.86$ ,  $SD = .77$ ).<sup>27</sup>

These views are consistent with the corrections officer data reported above showing that staff saw the mechanism as primarily intended to benefit the prison. They also dovetail with the staff belief that Japan's mechanism was not intended to prioritise prisoner needs, which we saw in Chapter 7. In other words, these scales reflect staff perceptions that the system not only does not benefit prisoners but should not do so.

However, staff responded positively to two of three individual questions that were not included in these two scales, but also asked about human rights protection and symbolic gains for prisoners. These three questions used the same five-point scale. Staff were equivocal as to whether the system had been 'effective in providing human rights relief for prisoners' ( $N = 724$ ,  $M = 3.21$ ,  $SD = .99$ ) but agreed somewhat with the proposition that it was 'valuable in protecting prisoners' rights and interests' ( $N = 856$ ,  $M = 3.49$ ,  $SD = .94$ ). Their most positive view on benefits for prisoners was in response to the most abstract question of the three. This question asked if the system was 'valuable from prisoners' perspective' ( $N = 858$ ,  $M = 3.67$ ,  $SD = .82$ ).

Sentiment concerning benefits for prisoners was mixed among the representative sample of staff who also answered the open-ended question., although just a handful of these 193 staff touched on this issue ( $n = 9$ ,  $Mdn = 3$ ). None gave examples of oversight protecting prisoners' human rights. Some described the activities of overseers and prisoners who contacted them as impeding prisoners' remorse and rehabilitation:

Oversight committees have asked for our meticulous rules on military-style marching and chanting when we move prisoners around the prison to be relaxed, and prisons around the

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<sup>25</sup> The three items used to develop this *Informs Public and Includes Prisoners* scale asked whether the committee's work was 'effective' in 'raising public awareness of how prisoners are really treated'; 'helping prisoners too to have a say in the running of prison'; and 'letting the public know about prisoners' concerns'.

<sup>26</sup> The three items used to develop this *Comforts Prisoners* scale asked whether 'prisoners who write letters feel calmer'; 'prisoners who have interviews feel calmer'; and the committee's work was 'effective in calming prisoners'.

<sup>27</sup> While in each case  $M$  is slightly below the midpoint 3, the relatively large  $SD$  means it is not possible to say with confidence that sentiment was below the neutral position.



country are considering this. But the prisoners who oppose or complain about these rules are almost all the vexatious or disruptive type; prisoners who are genuinely trying to rehabilitate want strict discipline and order. The prisoner movement rules undergird that order, so they want them to be strict too. Lots of them say this kind of thing in their pre-release essays.<sup>28</sup> In particular, they 'want to at least be allowed to raise their voices when they're marching' (Staff Survey 58C87)

...The prison and staff are carrying out their duties properly under the law. While creating an environment where prisoners' human rights are respected is obviously important, we must remember that crimes have victims and bereaved family members. To promote prisoners' independent rehabilitation, we should neither make life in prison excessively free nor have them assert their rights. We should make prison life austere - to make them reflect on their crimes (Staff Survey 51C89)

I think the oversight committee's activities have raised awareness of prisoners' human rights among prison staff (Staff Survey 61C04)

These written comments from corrections officers are consistent with the written comments from staff reported in Chapters 7 and 9, which portray overseers who persistently raise human rights as disruptive and prisoners who drive these overseer concerns as manipulative. Accordingly, the limited staff agreement with abstract benefits for prisoners seen in their responses to the three individual scale questions may be due to familiarity with the strong human rights emphasis in the 2003 CARC Proposal. The staff survey population consisted of mid-ranked and senior officers; some 67% of the 862 staff participants had served for at least 20 years. They may have felt professionally obliged to agree with this official policy position in their responses to scale questions, which can appear to be official data collection. These participants may have seen the field for responding to the open-ended question as a more appropriate place for expressions of personal ambivalence or scepticism.<sup>29</sup> Overall, it is reasonable to see the staff position as in-principle agreement with the protection of prisoners' human rights, but in-practice rejection of overseers elevating rights discourse and activism above existing prison priorities.

### **8.2.2 Overseer views: pervasive optimism**

It was not feasible to use overseer responses to replicate the scales constructed from the Japanese staff data on benefits for prisoners.<sup>30</sup> Nonetheless, as shown in Table C, it was still possible to assess overseers' answers to the nine individual questions on benefits for prisoners and compare them to

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<sup>28</sup> Prisoners' pre-release essays are not included in the results of the Correction Bureau's prisoner pre-release survey published online each year. See Ministry of Justice Correction Bureau, 'Jukeisha ni taisuru shakuhōji anke-to shūkei kekka' (Aggregated Results of Prisoner Pre-Release Surveys) (Ministry of Justice Correction Bureau nd) [www.moj.go.jp/kyousei1/kyousei\\_kyouse26.html](http://www.moj.go.jp/kyousei1/kyousei_kyouse26.html) accessed 2 April 2023.

<sup>29</sup> The benefit of the different data collection methods used in mixed methods research is that they commonly access different participant knowledge, which can be context-dependent, as in where a participant holds one view in public and another in private, or one view in general and another in specific cases: Bazeley (2018) 267.

<sup>30</sup> Low Cronbach's alpha values indicated poor internal consistency.

staff answers to the same nine questions. These are same six individual questions used to build the scales concerning staff views on prisoner benefits, as well as the three further individual questions on human rights and symbolic gains, which were not included in the scales.<sup>31</sup>

**Table C** Japan: Overseer and staff responses to individual questions - benefits for prisoners

| Questions                                                                              | Overseers |          |           | Staff    |          |           | 2-tailed<br>t-test               |
|----------------------------------------------------------------------------------------|-----------|----------|-----------|----------|----------|-----------|----------------------------------|
|                                                                                        | <i>N</i>  | <i>M</i> | <i>SD</i> | <i>N</i> | <i>M</i> | <i>SD</i> |                                  |
| <i>'effective in raising public awareness of how prisoners are really treated'</i>     | 198       | 3.14     | .92       | 777      | 3.38     | 1.06      | $t(973) = 3.170$<br>$p < .01$    |
| <i>'effective in helping prisoners too to have a say in the running of the prison'</i> | 198       | 3.12     | .86       | 738      | 2.55     | 1.03      | $t(934) = -7.941$<br>$p < .001$  |
| <i>'effective in letting the public know about prisoners' concerns'</i>                | 198       | 2.79     | .89       | 744      | 2.67     | 1.00      | Not significant                  |
| <i>'prisoners who write letters sometimes feel calmer'</i>                             | 195       | 3.30     | .68       | 658      | 2.63     | .98       | $t(851) = -10.853$<br>$p < .001$ |
| <i>'prisoners who have interviews sometimes feel calmer'</i>                           | 192       | 3.45     | .65       | 635      | 2.69     | .99       | $t(825) = -12.367$<br>$p < .001$ |
| <i>'effective in calming prisoners' emotions'</i>                                      | 198       | 3.64     | .68       | 751      | 3.11     | .96       | $t(947) = -8.858$<br>$p < .001$  |
| <i>'effective in providing human rights relief for prisoners'</i>                      | 198       | 3.69     | .74       | 724      | 3.21     | .99       | $t(920) = -7.467$<br>$p < .001$  |
| <i>'valuable in protecting prisoners' rights and interests'</i>                        | 197       | 4.00     | .72       | 856      | 3.49     | .94       | $t(1054) = -9.237$<br>$p < .001$ |
| <i>'valuable from prisoners' perspective'</i>                                          | 198       | 4.12     | .56       | 858      | 3.67     | .82       | $t(1051) = -8.422$<br>$p < .001$ |

Overseers echoed staff in agreeing that the mechanism had been 'effective in raising public awareness of how prisoners are really treated' although not quite as strongly. This difference was observable and statistically significant. We can gain insights into each cohort's view from the written comments of the representative samples who also answered the open-ended question. They suggest that overseers understood this question as asking if the public was now more aware of how *poorly* prisoners are treated, while staff understood the question as asking if the public was now more aware of how *well* prisoners were treated.<sup>32</sup>

Overseers agreed that the system had been 'effective in helping prisoners too to have a say in the running of the prison', while staff clearly disagreed. The difference was substantial and statistically

<sup>31</sup> As reported above, all nine questions adopted a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so'. At least 96% of the 200 overseer participants responded.

<sup>32</sup> Staff responses to the open-ended question suggesting that prisoners are 'really treated' well included: Staff Surveys 70C94, 73C97, 78C89, 92C91 and 98C90. Overseer responses to the open-ended question suggesting that prisoners are 'really treated' poorly included: Overseer Surveys 70V91, 70V96, 73V99 and 90V99.

significant. However, neither overseers nor staff felt that the system had been 'effective in letting the public know about prisoners' concerns'.

Overseers expressed clear agreement that 'prisoners who write letters feel calmer', that 'prisoners who have interviews feel calmer' and that the oversight system had been 'effective in calming prisoners', while staff expressed tepid agreement with only the last of these statements. These differences were notably large for the first two questions and substantial for the third, with all reaching statistical significance.

Overall, Japanese overseers felt that five of these six proposed benefits for prisoners applied, agreeing most strongly with the proposition that the system was a source of comfort or calm for prisoners. This contrasts with the views of staff, who felt that only two proposed benefits applied: 'effective in raising public awareness of how prisoners are really treated'; and 'effective in calming prisoners'.

We can see an increase in the intensity of overseers' belief in oversight benefits for prisoners in their responses to the three individual questions on human rights protections and symbolic gains.

Overseers strongly agreed that the mechanism had been: 'effective in providing human rights relief for prisoners'; 'valuable in protecting prisoners' rights and interests'; and 'valuable from prisoners' perspective'. This was in contrast to staff, who – as we saw above – also agreed, but less emphatically. These differences in views were all substantial and reached statistical significance.

Nonetheless, the representative sample of overseers who also answered the open-ended question did not support these optimistic views regarding benefits for prisoners. Like staff, overseers were largely silent as to even potential benefits for prisoners and gave no examples or evidence of benefits accruing. A small group of the 47 who responded raised the issue of whether oversight had solved problems in the prison. Sentiment was somewhat negative ( $n = 12$ ). One overseer felt that the civil oversight system acted as a way for prisoners to 'let off steam' and had helped make problems more apparent.<sup>33</sup> Another was glum:

There are far too many prisoners here for the time and resources we have; our views are basically ignored; the Ministry of Justice has no power to do anything – no budget. What's the point? What we really should do is fundamentally rethink the future of custodial sentences, but this country is probably incapable of doing that (Overseer Survey 90V95)

This small group of a dozen overseers consisted mostly of those with medical or legal backgrounds, at least four years of oversight experience and committee leadership experience or a combination of

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<sup>33</sup> Overseer Survey 83V98.

these attributes.<sup>34</sup> In other words, these overseers were more likely than others to know about the impact of the system over time.

### 8.2.3 Prisoner views: from scepticism to distrust

It was possible to build two scales from prisoner responses to multiple questions on the mechanism's potential benefits for prisons, to which at least 1327 prisoners responded. These were a *Protects Human Rights* scale<sup>35</sup> and a *Benefits Prisoners* scale.<sup>36</sup> Cronbach's alpha values were good for the *Protects Human Rights* scale and acceptable for the *Benefits Prisoners* scale ( $\alpha = .893$  and  $\alpha = .774$ , respectively). This indicated internal consistency for both scales. As a whole, prisoners were ambivalent as to whether the civil prison oversight system had protected their human rights ( $N = 1327$ ,  $M = 2.95$ ,  $SD = .83$ ) or provided them with other benefits ( $N = 1337$ ,  $M = 2.92$ ,  $SD = .84$ ).<sup>37</sup>

The representative sample of prisoners who also answered the open-ended question raised and rejected four potential benefits for prisoners. These were that the oversight system might solve problems in the prison, advocate for prisoners, protect prisoners' human rights or offer comfort.

#### *Problem-solving*

Seventeen percent of the representative sample of 344 prisoners who also answered the open-ended question raised the question of whether the mechanism solves problems in the prison. Prisoner comments were sharply negative overall ( $n = 58$ ,  $M = 1.2$ ,  $SD = .50$ ). Prisoners felt that the oversight system was an ineffective way to resolve issues they experienced in custody:

I've never heard of something changing or improving after the overseers visited. If there's anything the corrections officers don't want them to know they have countless ways of concealing things, so I think [the system's] meaningless... (Prisoner Survey 74P39)

Another prisoner wrote to the overseers on our behalf about things that were unfair, how we felt and what we wanted to happen, but I guess they never looked at the letter (Prisoner Survey 72P64)

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<sup>34</sup> Nine of the 12 overseers who commented that the oversight system did not solve problems in the prison met at least one of these criteria.

<sup>35</sup> The four items used to develop this *Protects Human Rights* scale asked whether the oversight system had 'help[ed] prevent human rights abuses', 'led to improvements in the running of the prison', was 'valuable for prisoners' and gave 'more weight to the views of prisoners or to corrections officers'. All four items used a scale of 1 to 5: for the first three items 1 was 'Don't think so at all' and 5 was 'Definitely think so'; however, for the final item, 1 was 'Strongly favours corrections officers' and 5 was 'Strongly favours prisoners'.

<sup>36</sup> The three items used to develop this *Benefits Prisoners* scale asked whether the oversight system was 'useful to inform the public regarding how prisoners are really treated', 'used by a wide range of prisoners, not just a particular minority' and 'allows prisoners too to participate in the running of the prison'. All three items used a scale of 1 to 5 with 1 being 'Don't think so at all' and 5 being 'Definitely think so'.

<sup>37</sup> While in each case  $M$  is slightly below the midpoint 3, the relatively large  $SD$  means it is not possible to say with confidence that sentiment was below the neutral position.

## *Advocacy*

Ten percent of the representative sample of 344 prisoners who also answered the open-ended question mentioned the issue of advocacy. Their comments related to whether overseers served as effective advocates for prisoners, or the mechanism gave prisoners a 'voice' in the prison, allowing them to advocate for themselves. Prisoners were strongly sceptical ( $n = 34$ ,  $M = 1.1$ ,  $SD = .60$ ). Prisoners who ruled out advocacy benefits tended to remark that the system only gathered the views of a segment of the prison population, was too opaque to be regarded as representing prisoners' interests, or was too timid:

I think it's only certain prisoners that send letters to the overseers. It would be better if they surveyed all of us, so the whole prisoner body could say what we think (Prisoner Survey 78P92)

I think there are heaps of prisoners other than those who ask for interviews that want to talk to the overseers, so I've often thought while I been in here that it would be great for them to listen to what these *other* prisoners have to say on a range of topics, and it's important to listen to a range of prisoners too (Prisoner Survey 58P68)

There's no reports about any improvements they've achieved so who knows if we need them. We just give up – it's a waste to go to the bother of having an interview for its own sake when nothing will change. The paperwork's a pain, so the reality is that average prisoner with a bit of common sense doesn't make formal complaints against the prison, and doesn't have an interview with the overseers (Prisoner Survey 61P67)

## *Human rights protection*

Eight percent of the 344 who answered the open-ended survey question raised the matter of whether the system protected prisoners' human rights. Prisoners took a dim view of the mechanism's influence in this area ( $n = 28$ ,  $M = 1.4$ ,  $SD = .90$ ). Many called for overseers to be more sensitive to prisoners' needs and to exert more pressure concerning how they were treated:

I want overseers to treat what prisoners say as important and do everything they can to pressure the prison to improve. I want them to be especially strict on human rights abuses (Prisoner Survey 59P97)

One highlighted the feeble nature of civil oversight as a regulatory intervention when contrasted with the immense power exercised by warden as a highly ranked regulatee-side intermediary:

It seems like prisoners' human rights are protected by law now, but they're actually not. Just like under the old Prison Act [1908] it's still the warden himself who controls every aspect of the prison. Prisons won't change unless there is a revolution in how corrections officers think (Prisoner Survey 81P88)

## *Comfort*

Only a handful of prisoners raised the prospect that the mechanism might be a source of comfort or a calming influence for prisoners. Prisoners desired this benefit, but none had experienced it ( $n = 6$ ). Two were wistful:

... [I]f just the fact that it exists comforted prisoners and prevented riots then I guess it would be meaningful (Prisoner Survey 74P83)

I want it to be easy to get the chance to talk to the people on the oversight committee. We only see them once a year, so there's no way they'd understand any of our frustrations... (Prisoner Survey 94P84)

### **8.3 Overseer Activity and Benefits in Japan: Correlated?**

Observing nine Japanese civil prison oversight committees in the preliminary phase of the study in 2015, for a half-day on each occasion, showed that some committees did no more than the minimum requirements for the role, while others went far beyond. For example, some committees entered the secure custodial area no more than once a year and did not collect suggestion boxes at every meeting. When they did collect the boxes, they tasked staff with bringing them to the meeting room rather than entering the secure custodial area to collect them themselves. These more relaxed committees asked staff to inquire into fewer issues raised by prisoners; declined or delayed responding to prisoner requests for interviews; did not plan to instigate their own interviews or surveys of staff or prisoners; and sent fewer written opinions to the warden.

In contrast, more proactive committees made confidential plans to make unannounced inspections of different secure custodial areas during every visit, personally collected and emptied the suggestion boxes and planned to visit the prison in their free time so that prisoner letters were collected and read more promptly. These committees asked for numerous inquiries into prisoner concerns and planned to interview as many prisoners as possible; write to both the warden and the Minister of Justice frequently; and initiate their own staff and prisoner surveys and interviews.

#### **8.3.1 Overseer performance summary measures**

This wide variance in overseer activity in Japan offered an interesting avenue for analysis. The data collected incorporated information on the frequency and duration of various oversight activities in fiscal 2015-2016. Thirty-four or 69% of the 49 Penal Institution Visiting Committee chairs participating in the study provided this information.<sup>38</sup> In addition, there were already eight

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<sup>38</sup> While 15 chairs did not respond to the questions on frequency and duration of oversight activities, the 15 prisons for which this activities data was not available occurred at random, not due to systematic exclusion.

psychometric scales developed from the data provided by all Japanese participants to test whether the three participant cohorts saw the system as beneficial in various ways. Accordingly, it was possible to test if more proactive oversight activities, which served as a proxy measure for enhanced overseer engagement, correlated with study participants perceiving increased benefits.

It was possible to build two summary measures concerning oversight activities. The first assessed committees' *Routine Oversight Activities*. It gauged the extent to which each committee engaged in four routine activities: holding committee meetings; collecting prisoner letters; reading prisoner letters; and writing to the warden.<sup>39</sup> It was created by calculating the means of the standardised values of four questions on the frequency of these routine oversight activities ( $n = 34$ ,  $Min = .98$ ,  $Max = 4.69$ ,  $M = 2.70$ ,  $SD = .71$ ).

The second summary measure concerned *Extended Oversight Activities*.<sup>40</sup> It evaluated the extent to which each committee engaged in oversight tasks that were not routine but required initiative. It was built from the standardised values of 12 questions about the frequency, duration and timeliness of activities like touring the secure custodial area of the prison, surveying and interviewing prisoners and staff and writing to the Minister of Justice ( $n=34$ ,  $Min = .16$ ,  $Max = 4.34$ ,  $M = .95$ ,  $SD = .74$ ).<sup>41</sup>

There was no correlation between the *Routine Oversight Activities* and *Extended Oversight Activities* summary measures ( $r(34) = .27$ ,  $p > .05$ ). This indicates that they were conceptually distinct.

### 8.3.2 Correlation with benefits scales

The starting hypothesis was that as routine and extension oversight activities increase, so would the degree to which the respective participant cohorts perceived the oversight system as beneficial. The

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This means this analysis relies on a 34-prison sample, which is representative of the entire 49-prison study, for calculating both the overseer performance summary measures and the benefits scales. As an additional safeguard before running the bivariate correlation analysis, the descriptive statistics for all eight benefits scales calculated from the participants in the 34-prison sample were compared with those for all participants at the 49 prisons. Any differences that did exist were so small as to be negligible and statistically not significant.

<sup>39</sup> The four items from which this measure was developed asked: how many 'times did the committee meet at the prison'; 'times did the committee collect prisoner letters from the suggestion boxes'; 'prisoner letters did the committee read'; and 'times did the committee write to the warden'.

<sup>40</sup> The 12 items from which this measure was developed asked: how many 'times did the committee tour the main prison's secure custodial area'; 'times did the committee tour any branch prison's secure custodial area'; 'interviews requested by prisoners were carried out'; 'prisoner interviews initiated by the committee were carried out'; 'staff interviews initiated by the committee were carried out'; 'times did the committee inquire into/ask for inquiries into an incident'; 'times did the committee survey prisoners'; 'times did the committee survey staff'; 'times did the committee write to the Minister of Justice'; how long, on average 'did a committee tour of the main/branch prison's secure custodial area take'; 'did a committee interview with a prisoner take'; and how many months, on average 'did it take from a prisoner request until the committee's interview'.

<sup>41</sup> As the low mean value for the *Extended Oversight Activities* summary measure shows, committees tended, on average, to do much less of these activities that require more initiative.

results for staff and prisoners were a particular focus, as these two participant cohorts have the most opportunity to observe the presence or absence of the potential benefits of civil oversight.

However, bivariate correlation analysis found no association between either of the oversight activities measures and any of the eight benefits scales. As Tables D and E below show, no association reached statistical significance at the .05 level. This means that neither the extent to which an oversight committee engaged in routine activities, nor the extent to which a committee undertook activities requiring initiative, had any influence on any of the benefits scales built from the three cohorts' data. Participants' perceptions of benefits remained the same, irrespective of the amount or type of work that overseers performed.

**Table D** Japan: Summary of correlations - Routine Oversight Activities measure & benefits scales

|                      |                                              | <i>N</i> | Pearson correlation coefficient | p-Value (2-tailed) |
|----------------------|----------------------------------------------|----------|---------------------------------|--------------------|
| Corrections Officers | <i>Supports Prisons</i>                      | 553      | -.080                           | .061               |
|                      | <i>Supports Corrections Officers</i>         | 549      | -.039                           | .361               |
|                      | <i>Comforts Prisoners</i>                    | 551      | -.014                           | .747               |
|                      | <i>Informs Public and Includes Prisoners</i> | 548      | -.030                           | .479               |
| Overseers            | <i>Supports Prisons</i>                      | 144      | .022                            | .794               |
|                      | <i>Supports Corrections Officers</i>         | 145      | .155                            | .062               |
| Prisoners            | <i>Protects Human Rights</i>                 | 836      | .014                            | .698               |
|                      | <i>Benefits Prisoners</i>                    | 827      | -.002                           | .957               |

**Table E** Japan: Summary of correlations - Extended Oversight Activities measure & benefits scales

|                      |                                              | <i>N</i> | Pearson correlation coefficient | p-Value (2-tailed) |
|----------------------|----------------------------------------------|----------|---------------------------------|--------------------|
| Corrections Officers | <i>Supports Prisons</i>                      | 553      | -.063                           | .137               |
|                      | <i>Supports Corrections Officers</i>         | 549      | -.038                           | .379               |
|                      | <i>Comforts Prisoners</i>                    | 551      | .037                            | .381               |
|                      | <i>Informs Public and Includes Prisoners</i> | 548      | -.035                           | .415               |
| Overseers            | <i>Supports Prisons</i>                      | 144      | .000                            | .999               |
|                      | <i>Supports Corrections Officers</i>         | 145      | .064                            | .446               |
| Prisoners            | <i>Protects Human Rights</i>                 | 836      | -.012                           | .730               |
|                      | <i>Benefits Prisoners</i>                    | 827      | -.002                           | .955               |

This is consistent with the evidence we have seen in terms of the nature of the Japanese mechanism, both on paper and in practice. We know from the Wheel of Social Alignments model<sup>42</sup> that regulatees must see the regulator-side intermediaries as legitimate and in a close, socially-aligned relationship with regulatees. In Chapter 7 we saw corrections officers do not regard the overseers as

<sup>42</sup> Valerie Braithwaite (2017) 31. See Figure D.



legitimate or socially-aligned with staff ‘values, norms, beliefs and process’.<sup>43</sup> Both overseers’ identity and their beliefs, including the standards they seek to apply, are problematic from the staff perspective. Accordingly, it is not likely that varying what overseers do in prisons, or how often, would influence staff views on the merits of the mechanism and induce them to cooperate, generating observable increases in benefits that one or more cohorts might report.

## 8.4 Conclusion

We know from the theories of social alignments and motivational postures introduced in Chapter 2 that regulatees – in this case staff – decide how they will respond to a regulatory mechanism depending on its value proposition.<sup>44</sup> Seeing the mechanism as beneficial is crucial and happily, benefits need not be personal; they can also be communal, accruing to any of the various professional interests or identities with which the regulatees identify.<sup>45</sup>

The first part of this chapter showed that staff did see Japan’s civil prison oversight mechanism as delivering symbolic and public relations gains for their workplaces. They believed that it had helped integrate prisons into local communities after the Nagoya Prison Scandal. We saw that they made confident, satisfied comments about the opportunities it had offered to defend and advance the prison’s interests by engaging with the prominent local citizens appointed as regulator-side intermediaries – that is, civil overseers.

This goal is not in itself controversial. Indeed, we saw in Chapter 4 that it was central to the vision for Japan’s oversight mechanism expressed in the CARC Proposal 2003. Improving relationships between prisons and local communities is, in general, a valid aim, because a loss of public confidence threatens prisons’ ability to fill their assigned role in the criminal justice system. Demonised institutions struggle to attract political support, public funding, quality hires and partnerships with local employers and charitable organisations. In Japan, prisons also need manufacturing contracts for their factories to fulfill.<sup>46</sup> These factors mean that it is defensible – even desirable for civil oversight to play a role in re-legitimizing a scandal-affected prison system.

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<sup>43</sup> *ibid* 29.

<sup>44</sup> Valerie Braithwaite (2014); Valerie Braithwaite (2017).

<sup>45</sup> Valerie Braithwaite and Michael Wenzel, ‘Integrating Explanations of Tax Evasion and Avoidance’, in Alan Lewis (ed.), *Cambridge Handbook of Psychology and Economic Behaviour* (Cambridge University Press 2008).

<sup>46</sup> Although June 2022 reforms to the Penal Code 1907 mean that the ubiquitous *chōeki* sentences ‘with work’ will end in 2025, some prison factories are likely to continue operating for the sake of prisoners serving existing sentences, and for those assigned to vocational training programs in future. See generally Yuri Ishihama, ‘Revised Penal Code Shifts Focus to Rehabilitation’ *The Japan News* (Tokyo, 17 June 2022) <https://japannews.yomiuri.co.jp/society/general-news/20220617-38443/> accessed 2 April 2023.

Turning to direct benefits for staff, while overseers and prisoners both felt that these had accrued, the better-informed staff refuted these perceptions. Nonetheless, we can speculate that the reputational gains for prisons may have indirectly benefitted staff in ways that they did not contemplate. A community that feels more supportive towards its local prison may well also be more supportive towards prison staff – who typically live near their workplace.<sup>47</sup>

*Did the benefits staff perceived lead to their cooperation?*

Taken in isolation, these findings bode well for persuasive regulatory success. However, the data reported in the rest of the chapter gives reason for pause. We saw that inferential analysis found no correlation between the specific level of effort put in by the overseers at each prison and any participant cohort's views on the mechanism's benefits.<sup>48</sup> This suggests that it was the mere fact that the mechanism existed, rather than overseers' actual activities in prisons, which had provided the public relations benefits that staff identified. It appears that the overseers, who did not inspire staff confidence inside prisons, did inspire confidence among the public – outside prisons.

Moreover, an examination of staff views on whether prisoners had benefitted also revealed complexity. A representative sample of staff ruled out gains for prisoners that staff as whole agreed were present and described these benefits as undesirable, even improper.

This dissonance is consistent with the high relational distance between Japanese overseers and staff noted in Chapter 7.<sup>49</sup> While Abbott and others note that intermediaries can improve regulatory efficacy and reduce costs by 'enhancing trust' and 'regulatory dialogues',<sup>50</sup> we saw that the 'values, norms, beliefs and processes' of this pairing of regulator-side intermediaries and regulatees were not aligned.<sup>51</sup> Staff rejected overseers' credentials and disputed their aims and standards. Accordingly, it makes sense that we have seen staff who agree in the abstract with the importance of overseers protecting prisoners' rights and interests strongly contesting the idea that corrections officers should accept overseers' advice in practice – and defending the status quo with gusto.

Many comments by all three cohorts reported in this chapter point towards defiant motivational postures in staff, in particular the two postures that reject the regulatory authority. The first is 'game-playing', where regulatees appear to engage with a mechanism, but actually disregard it.<sup>52</sup> The

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<sup>47</sup> Junior officers usually live immediately outside the prison in subsidised staff apartment blocks. Japan's vulnerability to natural disasters means that other staff typically live nearby, for easy access in an emergency.

<sup>48</sup> See Table D Japan: Summary of correlations - Routine Oversight Activities measure & benefits scales; Table E Japan: Summary of correlations - Extended Oversight Activities measure & benefits scales.

<sup>49</sup> See Figure C.

<sup>50</sup> Kenneth W Abbott, David Levi-Faur and Duncan Snidal, 'Theorising Regulatory Intermediaries: The RIT Model' (2017) 670 *The Annals of the American Academy of Political and Social Science* 14, 23-24.

<sup>51</sup> Valerie Braithwaite (2017) 29.

<sup>52</sup> *ibid* 34-35.

second is ‘disengagement’ where the staff dismiss a mechanism as irrelevant.<sup>53</sup> Comparatively few comments indicate the third defiant motivational posture of ‘resistance’, which is where regulatees accept a regulatory authority, but express constructive disagreement with the regulatory mechanism, and even fewer signalled the cooperative postures of ‘capitulation’ or ‘commitment’.<sup>54</sup>

#### *Overseers and prisoners*

Overseers as a whole were consistently confident that their work had had a wide range of benefits for the prison, staff, the public and prisoners in accordance with the system’s stated and normative aims. However, their lack of expertise and access to the prison, the lack of examples in the comments made by the representative sample who also answered the open-ended question, as well as the dour views of a group of better-informed overseers, suggests that this optimism was largely aspirational. Overseers were so unlikely to have been able to judge what had or had not changed in their prison as a result of oversight that it is difficult to avoid the conclusion that confirmation bias had influenced their views.<sup>55</sup>

While both staff and overseers felt that prisoners had benefitted from the mechanism, prisoners as a whole were ambivalent and once more, the representative sample who also gave written answers to the open-ended question disagreed. These prisoners raised a range of potential benefits but ruled each out, often emphatically, with relevant examples and evidence. Once more, we saw that rank mattered – with one prisoner highlighting the imbalance between the weight of the warden’s authority and that of the opinions expressed by civil oversight committees.

The Wheel of Social Alignments includes two further prerequisites for persuasive regulatory success: regulatees experiencing a regulatory mechanism as procedurally fair and feeling a sense of moral obligation to comply.<sup>56</sup> While the data reported in this chapter raise the possibility that these further prerequisites may also not be in place, we will explore these themes in detail in Chapter 9, which addresses the unintended consequences of Japan’s oversight system.

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<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.* 34.

<sup>55</sup> See Encyclopedia Britannica, ‘Dictionary - confirmation bias’ (*The Britannica Dictionary*, 2023) [www.britannica.com/science/confirmation-bias](https://www.britannica.com/science/confirmation-bias) accessed 2 April 2023.

<sup>56</sup> Valerie Braithwaite (2017) 31. See Figure D.

## Chapter 9 Soft Civil Prison Oversight in Japan: Unintended Consequences

This chapter completes the empirical evaluation of the nature and impact of civil prison oversight in Japan. The story began with Chapter 7, which addressed the day-to-day nature of the system – the shape it has taken in practice in prisons. Chapter 8 reported the participant cohorts' views on whether it had produced beneficial impacts for prisons, staff, the public or prisoners. However, while regulation can serve a constructive social purpose and 'enhance wellbeing',<sup>1</sup> we know that it can also be counterproductive.<sup>2</sup> Accordingly, this final chapter on the data gathered in Japan addresses this question of the mechanism's underbelly – whether it also had unintended impacts that 'undermin[ed] the social fabric' of the regulated environment.<sup>3</sup>

We have already seen in Chapters 7 and 8 that while staff perceived oversight as providing public relations benefits to prisons, this was unrelated to anything overseers did and several prerequisites for successful persuasive regulation were missing. Staff did not see overseers' 'values, norms, beliefs and processes' as aligned with their own.<sup>4</sup> They took a dim view of these regulatory intermediaries' credentials in the prison environment and disagreed with their views on the mechanism's aims and standards. Moreover, they had experienced oversight as procedurally unfair and much of their data signalled 'defiant motivational postures', notably 'disengagement' and 'game-playing'.<sup>5</sup>

Understanding the negative impact of a regulatory mechanism is an important part of responsive regulation.<sup>6</sup> As Grabosky notes, poorly designed or targeted regulatory mechanisms can make some regulatees 'avoidance entrepreneur[s]' who use 'creative adaptation' to form an 'organised culture of resistance'.<sup>7</sup> These mechanisms can also damage regulatees' underlying trust in the authorities responsible for the regime, so that this 'collateral damage' dwarfs any benefits.<sup>8</sup>

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<sup>1</sup> Valerie Braithwaite (2017) 'Closing the Gap Between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017) 25.

<sup>2</sup> Valerie Braithwaite (2017) 26-30, 26. See also Peter Grabosky, 'Counterproductive Regulation' (1995a) 23 *International Journal of the Sociology of Law* 347; Michael Power, 'The Audit Society: Second Thoughts' (2000) 4(1) *International Journal of Auditing* 111; Steve Martin, 'Knowledge from Inspection: External Oversight and Information to Improve Performance' in Kieran Walshe, Gill Harvey and Pauline Jas (eds), *Connecting Knowledge and Performance in Public Services: From Knowing to Doing* (Cambridge University Press 2010). See generally Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981).

<sup>3</sup> Valerie Braithwaite (2017) 26

<sup>4</sup> *ibid* 29.

<sup>5</sup> *ibid* 33-37.

<sup>6</sup> See generally Peter Grabosky (1995a).

<sup>7</sup> Peter Grabosky (1995a) 349, 352.

<sup>8</sup> *ibid* 347.

We saw in Chapters 1 and 2 that several works have identified perverse outcomes of civil prison oversight – but we still know little about their nature and origins.<sup>9</sup> These matters are far from arcane, as prisons are fragile, risk-laden places for both staff and prisoners.

### *Data and patterns*

Relatively few quantitative questions in the main surveys addressed the issue of whether the mechanism had had unintended consequences.<sup>10</sup> This was due to understandable concern on the part of the Ministry of Justice (MoJ) that the survey content should not generate discontent. Nonetheless, many participants in the three representative cohorts – of staff, overseers, and prisoners – who also answered the open-ended question provided written comments that mentioned negative impacts.

Broadly speaking, participants reported two kinds of negative impacts. The first type related to heavy workloads, which both staff and overseers reported. This maps to the functional disruption outcome in Sieber's perverse results taxonomy.<sup>11</sup> The second type of unintended consequence related to psychological impacts and was felt among all three participant cohorts. There were two recurrent patterns across the data set: mutual suspicion and distress. Many members of each participant cohort critiqued the others, attributing the perceived dysfunction of the oversight system to them. Staff saw overseers as disruptive and gullible – prone to capture by an unauthorised and overblown human rights agenda and felt that prisoners were manipulative and disingenuous. Overseers agreed that some prisoners were vexatious<sup>12</sup> and saw staff as guilty of rigid resistance and obstructionism. Prisoners saw overseers as weak, captured by the prison, aloof and prone to ritualism.

These intersecting vectors of negativity point to the provocation and placation outcomes in Sieber's taxonomy of unintended consequences,<sup>13</sup> particularly inside prisons, where the polarization was palpable. When staff and prisoners saw each other as 'gaming' the system for the benefit of their own side it provoked existing tensions, while the mechanism's placating effect, which took better regulation off the reform agenda, cruelled their hopes of relief from stressful conditions. However,

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<sup>9</sup> See for example, Carol Martin and David Godfrey, 'Prisoners' Views of Boards of Visitors: A Question of Credibility' (1994) 34(3) *British Journal of Criminology* 358; Noel Whitty, 'Human Rights As Risk: UK Prisons and the Management of Risk and Rights' (2011) 13(2) *Punishment & Society* 123; Tom Daems, 'Slaves and Statues: Torture Prevention in Contemporary Europe' (2017) 57(3) *British Journal of Criminology* 627; Sophie van der Valk and Mary Rogan, 'Experiencing Human Rights Protections in Prisons: The Case of Prison Monitoring in Ireland' (2021) 18(1) *European Journal of Criminology* 101.

<sup>10</sup> See Appendix B Phase 2: Main Data Collection.

<sup>11</sup> Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981) ch 3.

<sup>12</sup> In this study 'vexatious' (*kōsosei* in Japanese) refers to a staff and overseer perspective concerning prisoners who complain on multiple occasions using internal and external complaint mechanisms, whether formal or informal, in some cases concerning the same set of facts.

<sup>13</sup> Sieber (1981) ch 6.

all cohorts expressed some degree of distress, from disquiet to dismay, regarding their experience of the system. Positive sentiments were vanishingly rare.

### 9.1 Workload Impacts for Japanese Staff and Overseers

Both the staff and overseer cohorts agreed that their respective workloads associated with the oversight system were somewhat excessive. Staff had stronger feelings, articulating a sense of grievance in their written comments.<sup>14</sup> They noted that overseers had not only failed to reduce staff workloads, but had in fact increased them. A few staff expressed the view that overseers' duties were stressful or excessive and the handful of overseers who wrote on this issue agreed.

When viewed as a whole, both staff and overseers rejected the proposition that overseers' presence in the prison was intrusive. However, staff expressed only mild disagreement, while overseer disagreement was significantly stronger. Written comments made by the representative sample of staff who also answered the open-ended question show that these officers, who were likely to have interacted with overseers, perceived them to be insensitive and combative.

#### 9.1.1 'Busywork' and futility

We have already seen in Chapter 8 that staff felt the oversight system did not support them as workers. One of the questions included in the *Supports Corrections Officers* scale reported in that chapter asked if the oversight system 'was effective in reducing the corrections officers' workload'. Accordingly, a further *Oversight Workload* scale<sup>15</sup> was developed for both staff and overseers from six quantitative questions to which at least 53% of staff participants and 94% of overseer participants responded. Cronbach's alpha values were high for staff ( $\alpha = .927$ ) and acceptable for overseers ( $\alpha = .770$ ) indicating internal consistency. On a scale of 1 to 5, with 1 being 'None / Not enough' and 5 being 'Too much' staff clearly agreed that their oversight workload was excessive, while overseers'

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<sup>14</sup> The emphasis in the original written comments made in Japanese by the Japanese participants who also answered the open-ended question is reproduced in the translated excerpts quoted in this chapter using italics and punctuation as appropriate. Square brackets in excerpts from participant responses indicate either details that have been removed to prevent the re-identification of participants, or those added for clarification. The open-ended questions in the staff and overseer surveys both asked: 'Please write any additional thoughts or views you may have about the [oversight system in your jurisdiction or its] activities – especially how to improve [it]. The open-ended question in the prisoner surveys asked: 'Please write any thoughts you have about the [oversight system where you are] – especially how [it] could be made better'. See Appendix B Phase 2: Main Data Collection.

<sup>15</sup> The six items used to develop this *Oversight Workload Scale* asked participants to select a point on the 5-point scale between 'None/Not enough' and 'Too much' for the workload associated with: 'inspections inside the secure custodial area'; 'prisoner letters to overseers', 'prisoner interviews with overseers'; 'notifying prisoners of overseer activities' and 'written opinions overseers send to wardens', as well as for the 'overall workload associated with overseers' activities'.

agreement was marginal. The difference was observable and reached statistical significance ( $N = 454$ ,  $M = 3.37$ ,  $SD = .655$  vs  $N = 188$ ,  $M = 3.06$ ,  $SD = .410$ ;  $t(640) = 7.49$ ,  $p < .001$ ).<sup>16</sup>

The written comments from staff and overseers provide insights into their rationales.<sup>17</sup> Fourteen percent of the representative sample of 193 staff who also answered the open-ended question remarked on the change in workload that they had experienced due to the oversight system ( $n = 28$ ,  $Mdn = 1$ ). Sentiment was strongly negative. Staff wanted overseers to 'be reasonable' and to stop 'making too many proposals' and requesting too many inquiries because it 'increases our workload':<sup>18</sup>

... We have to inquire into every single request made by prisoners whose sole interest is asserting their own rights, which increases our workload... it'd be better if overseers could suggest reducing our workload. Every time there's an incident, it causes what is essentially unnecessary busywork to confirm the details. We could use the freed up time focusing on prisoner treatment to build a better environment for both staff and prisoners (Staff Survey 80C86)

Staff pointed out that their lack of corrections' expertise made it difficult for overseers to tell whether a prisoner's complaint was insincere:

Please focus on the burden of the workload imposed on staff. Don't be fooled into doing what prisoners want – they are masters of manipulation. Even the time I've spent answering this survey has been a waste (Staff Survey 77C91)

Other staff wanted to reduce the amount of administrative work the prison had to do for its overseers, even if their visits were reduced to fewer than the current level of six half-days each year:

I want things changed so that all the administrative work associated with the oversight committee is done by its own secretariat (Staff Survey 70C99)

... In the largest prisons the corrections officers who interact with the oversight committee have to spend an enormous amount of time and effort on the administrative work the committee generates, including on prisoner interviews. This workload should be lightened – for example by reducing the number of times the committee meets (Staff Survey 78C89)

A handful of staff commented on overseers' workloads. These participants acknowledged overseers' physical and mental workloads, but were not always empathetic:

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<sup>16</sup> In this study,  $N$  refers to the entire sample size and  $n$  to a cell size. Quantitative results are reported using descriptive and inferential analysis performed using SPSS 26, employing multi-question scales wherever possible. Each scale was developed from between three and eight individual questions on the basis of face validity, theoretical salience and the absence of theoretical or empirical overlap with other measures. Reliability was measured using Cronbach's alpha, which was satisfactory or good in all cases.

<sup>17</sup> Qualitative data were analysed thematically using Dedoose. Code weighting was applied using a five-point scale. I applied the value '5' where a participant strongly agreed with a code, '3' where a participant took a neutral position, and '1' where a participant strongly disagreed. See Appendix C Phase 2: Open-Ended Survey Question.

<sup>18</sup> Staff Surveys 63C92 and 91C97.

The overseers' time is used up listening to prisoners' complaints. This must be distressing for them - I feel for the overseers (Staff Survey 81C86)

The committee members' workloads can get unbalanced... the overseers who are responsible for doing the tedious physical work of opening and sorting prisoners' complaints are prone to complain... (Staff Survey 78C89)

Only four of the 200 overseers who participated commented on the physical and mental workloads associated with their role, but all agreed with the staff assessment of overseer workloads. Two cited 'huge' volumes of prisoner letters or the difficulty of servicing prisons with large prisoner populations.<sup>19</sup> Others found their duties overwhelming or seemed perturbed by prisoners' complaints:

Everything in this role is brand new for me. It's highly stressful - for corrections officers, for prisoners, and for me too. I keep reminding myself that it's important to keep myself under control. I don't know if these oversight committees will change anything - I only found out through this survey that it's already ten years since they started (Overseer Survey 82V95)

The prisoner requests we discuss in meetings are almost all complaints, which are violations of prison rules. Prison life is not meant to be pleasant - it's obvious that it should be so harsh that prisoners realise that they don't want to come back (Overseer Survey 79V96)

### 9.1.2 Intrusion and neglect

It was possible to develop an *Overseer Intrusion*<sup>20</sup> scale from staff and overseer responses to multiple quantitative questions. These questions asked whether staff saw overseers as attempting to intrude into matters exclusively determined by corrections officers and the prisons administration and exceeding the proper moral or legal boundaries of their role. At least 98% of the 200 overseer participants and almost 100% of the 862 staff participants responded to these questions. Cronbach's alpha values were adequate for staff and good for overseers ( $\alpha = .727$  and  $\alpha = .877$ ), indicating internal consistency. On a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so' staff disagreed somewhat with the proposition that overseers were intrusive ( $N = 861$ ,  $M = 2.63$ ,  $SD = .88$ ). Overseers also disagreed, but much more strongly ( $N = 196$ ,  $M = 1.93$ ,  $SD = .75$ ). The difference between the views of Japanese staff and overseers was large and statistically significant ( $t(1055) = 27.80$ ,  $p < .001$ ).

The data provided by the representative sample of staff who also answered the open-ended question assist with interpreting this differing intensity in staff and overseer views. Most of the 28 officers who wrote about the staff workload generated by the oversight system focused on the

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<sup>19</sup> Overseer Surveys 54V97 and 90V95.

<sup>20</sup> The four items used to develop this *Overseer Intrusion* scale asked if overseers give opinions: 'on matters exceeding the prison's physical or human resources'; 'on matters outside the prison's discretion'; 'that would impede discipline and order' and 'that would differ from those of victims and the public'.



nature of the work generated, although the volume was also problematic. These staff felt their time was being wasted on frivolous complaints and misguided requests that the prison had neither authority nor budget to meet:

It's alright for them to mostly think about how prisoners are treated, but they need a deeper grasp of the fact that some things we can do – and some we can't... (Staff Survey 82C95)

Some context is important. Firstly, these 28 staff included 25 whose positions made them likely or certain to have direct experience of the workload generated by each committee.<sup>21</sup> As this workload is largely siloed in a single administrative section in each prison,<sup>22</sup> these participants would have been far better-informed on this aspect of the system than most. Secondly, as we saw in Chapter 4, Japanese prison staff are prohibited from unionising<sup>23</sup> and face rigid and exacting productivity and performance expectations under the *kanri gyōkei* system of carceral micromanagement introduced in the 1970s. In other words, overseers' requests often run counter to rules and requirements that staff cannot alter.

Japanese corrections operated in strict secrecy for a long time, and while I can understand that the new prisons legislation is an opportunity for all kinds of reforms, overseers no doubt often question... how we treat prisoners – which has been built up across our long history and traditions. It's because they just arbitrarily state their opinions without understanding the purpose or effect of our fundamental practices that we end up in a stalemate (Staff Survey 64C80)

Two staff felt that overseers presented a security risk. One offered a reminder that overseers had a duty of secrecy as part-time civil servants and risked criminal penalties if they publicised their oversight activities – possibly a reference to the fact that some attorneys and legal academics on committees have published detailed accounts of their committees' activities.<sup>24</sup> Another felt that indulging prisoners' complaints would lead to:

...the eventual destruction of lawful institutional operations so that we deteriorate into a lawless domain overrun by gangsters... (Staff Survey 84C85)

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<sup>21</sup> Meaning five who were currently serving in the General Affairs Section Director (*shomu kachō*) oversight committee liaison role, and 20 who were in roles equal or directly subordinate to that rank.

<sup>22</sup> The General Affairs Section (*shomuka*).

<sup>23</sup> Under art 108-2(5) of the *Kokka kōmuin hō* (National Public Service Act) 1947

[www.japaneselawtranslation.go.jp/en/laws/view/2713#je\\_ch3sc11at1](http://www.japaneselawtranslation.go.jp/en/laws/view/2713#je_ch3sc11at1) accessed 2 April 2023. See further Yūichi Kaido, 'Japan' in Dirk van Zyl Smit and Frieder Dünkel (eds), *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions* (2<sup>nd</sup> edn, Kluwer Law International 2001).

<sup>24</sup> Staff Survey 83C86. See for example the series of detailed accounts published by Satoshi Mishima, beginning with 'Ōsaka iryō keimusho shisatsu i'inkai: nenji hōkokusho ken iken: 2006 nendo - 2007 nendo ni tsuite' (Ōsaka Medical Prison Visiting Committee: Annual Report and Opinions for Fiscal 2006-2007) (2008) 55(1) *Ōsaka Shiritsu Daigaku Hōgaku Zasshi* 406.

Many staff who wrote about their workload had the expectation that overseers would oversee prison operations as a whole, including advocating for improved working conditions and reduced workloads for staff – an expectation that we have seen elsewhere in the Japanese staff data.<sup>25</sup> Accordingly, it is not surprising that they would feel aggrieved by overseers increasing staff workloads, while leaving their working conditions unaddressed. For staff, this seemed to be a misguided – even perverse – choice:

... The first principle of prison management is to maintain proper discipline and order. Accordingly, it is necessary to restrict prisoners' freedom of conduct, within reasonable limits. The reality is that I struggle to bring the overseers to understand that prisoners will obviously complain about these restrictions, but if we ease off prison life will actually be worse for them – less safe and fair. What I actually want overseers to advocate for is improved staff working conditions (Staff Survey 69C99)

Oversight committees have become just another prisoner complaint mechanism. It's hopeless - they'll never improve our working conditions. All they do is listen to prisoners' excuses... (Staff Survey 72C95)

A few staff put careful thought into expressing corrections officers' needs, making articulate appeals for overseers' understanding and assistance:

... frankly speaking, sometimes I think we get how we treat prisoners wrong. Naturally how staff treat prisoners is central to overseeing prisons, but we'd like overseers to also grasp and advocate our working conditions and the areas in which we are anxious about our own welfare and speak up for us too. After all, prisons can't operate without our labour (Staff Survey 86C85)

Most corrections officers know that oversight committee activities aim at improving prison conditions for prisoners, and don't extend to improving the workplace or working conditions for staff, so I want committees to understand what we go through, and actually contribute to improving our situation. For example, the long overnight shifts, and 'on duty' periods for senior staff (they start work before 7 am and work through to 5 am the next day), and how we only get an allowance when we work weekends – no time off in lieu to recover from the physical toll. We want help, for the committee to understand these things and take responsibility for considering improvements to our work environment (Staff Survey 53C87)

One of the dimensions in the *Overseer Intrusion* scale provides a useful link to the psychological impacts for staff discussed below. A question included in the scale asked whether participants felt that overseers ignored the feelings of victims of crime and the public. Twelve percent of the representative sample of 193 staff who also answered the open-ended question raised this issue. Sentiment was somewhat negative ( $n = 24$ ,  $Mdn = 2$ ). These staff comments depict the prisons' priorities as aligned with those of victims of crime and a vengeful public who wanted prison conditions to be harsh, especially for prisoners who lack remorse. In contrast, staff depict overseers' agendas as repudiating these prison priorities:

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<sup>25</sup> See, for example, Staff Surveys 81C99 and 90C85.

All the overseers do in recent years is emphasise respect for prisoners' rights, they make requests that ignore victims – more and more prisoners are demanding improved treatment and neglecting their own [need to show] remorse, even though they're in prison serving time for crimes! And there are more organisations supporting these prisoners now. It impedes the prison life they should actually be experiencing. Overseers need to understand that prisons are not hotels... before they go and listen to prisoners (Staff Survey 54C89)

The committee has degenerated into an advocacy body that exists to realise prisoners' selfish claims. Prisoners have them twisted around their little finger – overseers give no thought to victims' human rights and feelings – and how the public feels. They'll just make prison pleasant and promote reoffending (Staff Survey 88C83)

## **9.2 Psychological Impacts for Japanese Staff and Overseers**

As entire cohorts, both staff and overseers agreed with the proposition that some prisoners misused the mechanism, with staff agreeing more strongly. Staff saw overseers as having been duped by prisoners. Both staff and overseers also agreed that overseers were biased against staff, with staff sentiment again strong. However, staff comments suggesting that this was a culpable subversion of the mechanism, while overseers' comments depicted overseer bias against staff as unavoidable, even if it was also regrettable. Finally, both staff and overseers reported experiencing prison or prisons administration obstruction of the oversight system. Of the two cohorts, overseers held the stronger views on this count.

Staff and overseers reported instances of prisoner misuse, overseer subversion or corrections obstruction of the mechanism, often expressing anger or frustration. Both cohorts found these instances to be a source of psychological distress. However, some reflected on whether their respective cohorts should do more to make the system work.

### **9.2.1 Perceptions of prisoner misuse**

As entire cohorts, both staff and overseers felt that some prisoners misused Japan's civil oversight system. However, neither cohort felt that the system had led to prisoners feeling inappropriately entitled or that the misuse was intended to hamstring staff. While it was not possible to build multi-question scales relating to these concepts, it is possible to compare their views through four individual survey questions, as shown in Table F. In all four cases, the differences between staff and overseer views are large and statistically significant. Staff were strongly sceptical concerning prisoners' motivations for using the mechanism, while overseers were less so.

**Table F** Japan: Staff and overseer responses to individual questions - prisoner misuse

| Individual Questions                                                                                | Overseers |      |     | Corrections Officers |      |      | 2-tailed<br>t-test               |
|-----------------------------------------------------------------------------------------------------|-----------|------|-----|----------------------|------|------|----------------------------------|
|                                                                                                     | N         | M    | SD  | N                    | M    | SD   |                                  |
| '...some prisoners who write letters are vexatious'                                                 | 196       | 3.87 | .94 | 736                  | 4.54 | .68  | $t(930) = -9.349$<br>$p < .001$  |
| '...some prisoners who have interviews with overseers are vexatious'                                | 190       | 3.67 | .98 | 709                  | 4.51 | .72  | $t(897) = -11.033$<br>$p < .001$ |
| '...the oversight system makes prisoners feel frustrated or inappropriately entitled' <sup>26</sup> | 198       | 2.13 | .86 | 748                  | 2.78 | 1.06 | $t(944) = -8.982$<br>$p < .001$  |
| '...the oversight system is misused by prisoners to hamstring corrections officers'                 | 198       | 2.15 | .94 | 761                  | 2.91 | 1.17 | $t(897) = -9.605$<br>$p < .001$  |

Staff and overseers agreed with two individual questions asking whether some prisoners who used the oversight system were 'vexatious'. While both cohorts agreed strongly, the strength of staff views was exceptional. These differences were large and statistically significant for both questions at the  $p < .001$  level. Both staff and overseers disagreed with two related questions concerning unintended consequences potentially imposed by civil oversight. One question asked if the system gave prisoners an inappropriate sense of entitlement, while the other asked if it enabled prisoners to impede the work of staff. Staff expressed mild disagreement with these questions, while overseers expressed stronger disagreement. These differences were also large and statistically significant at the  $p < .001$  level.

The differences between the staff and overseer answers to these four questions are consistent with the pattern of overseers taking a strikingly positive view of the impact of the oversight system compared to the better-informed staff – which we saw in Chapter 8.

#### *Staff comments on prisoner misuse*

Turning to the representative sample of Japanese overseers who also answered the open-ended survey question, comments regarding prisoners using the mechanism were positive. Overseers did not see prisoners who contacted them as manipulative or insincere. However, staff made critical comments about overseers being captured by prisoners' agendas, enabling prisoner misuse. They felt that overseers' inexperience led them to believe fabricated prisoner complaints, which wasted staff time.

<sup>26</sup> In the Japanese surveys 'frustrated' and 'inappropriately entitled' were separated by the particle 'ya'. This meant these terms were examples in an incomplete list. Accordingly, they did not indicate competing concepts, but pointed to a single, if silent, subject – whether oversight had a counterproductive i.e. agitating effect on prisoners. This single common concept was stated expressly in the surveys for staff and overseers in the ACT. See Q. 6(14) in Appendices B2, B3, B6 and B7.

Just over 40% of the representative sample of 193 corrections officers who also answered the open-ended survey question wrote about overseer neutrality, with many making negative comments to the effect that the overseers were gullible. Sentiment was strongly negative ( $n = 80$ ,  $M = 1.6$ ,  $SD = 1$ ):

I want overseers to know who these prisoners who send them opinions and proposals *really* are. I want to have overseers propose making prison conditions harsher, not relaxing them (Staff Survey 89C92)

Prisoners tend to say nothing but complaints about the prison. I am painfully aware that we need newly appointed overseers to be given training so that, instead of swallowing what prisoners say hook, line and sinker, in future we can have them offer external perspectives on the best policies for us to adopt to become the sort of prison the public wants (Staff Survey 94C99)

### 9.2.2 Perceptions of overseer subversion

Five individual survey questions, shown below in Table G, asked about overseer respect for staff and whether overseers preferenced prisoners' needs. Staff and overseers agreed that overseers felt and showed respect towards staff. However, they also agreed that overseers preferenced prisoners' concerns over those of staff concerning working conditions and that overseers could improve in their attitudes and behaviours towards staff. Overseers agreed strongly that they felt and showed respect towards staff, while staff agreement was significantly weaker. Meanwhile, staff agreement was significantly stronger than that of overseers regarding whether overseers preferenced prisoners' concerns and needed to respect staff more. These differences were as expected, given the overall trend for overseers to be significantly more positive about the mechanism than staff.<sup>27</sup>

**Table G** Japan: Staff and overseer responses to individual questions - overseer subversion

| Questions                                                                                                      | Overseers |      |     | Corrections Officers |      |      | 2-tailed<br>t-test              |
|----------------------------------------------------------------------------------------------------------------|-----------|------|-----|----------------------|------|------|---------------------------------|
|                                                                                                                | N         | M    | SD  | N                    | M    | SD   |                                 |
| '...overseers think highly of the views of the prison and corrections officers' <sup>28</sup>                  | 198       | 4.11 | .67 | 694                  | 3.86 | .96  | $t(890) = 4.169$<br>$p < .001$  |
| '...overseers pay respect to the expertise of corrections officers'                                            | 198       | 4.22 | .65 | 701                  | 3.89 | .94  | $t(897) = 5.664$<br>$p < .001$  |
| '...overseers give more weight to improving prisoner treatment than to corrections officer working conditions' | 197       | 3.18 | .84 | 696                  | 3.33 | 1.04 | $t(891) = -2.093$<br>$p < .05$  |
| '...overseers should think more highly of the views of the prison and corrections officers'                    | 198       | 3.14 | .77 | 787                  | 3.57 | .83  | $t(883) = -6.912$<br>$p < .001$ |
| '...overseers should pay more respect to the expertise of prisons and corrections officers'                    | 198       | 3.27 | .75 | 790                  | 3.53 | .90  | $t(886) = -4.181$<br>$p < .001$ |

<sup>27</sup> While an *Overseer Bias & Respect* scale could be developed for Japanese and ACT prison staff, it was not possible to develop the same scale for Japanese overseers.

<sup>28</sup> The expression 'views of the prison and corrections officers' in some questions refers to the views of the prison as an institution, with which staff views are necessarily aligned in Japan, particularly at senior levels.

### *Staff comments on overseer subversion*

Another striking difference between these two participant cohorts emerged in their written comments. This concerned the psychological impact on staff due to their concerns that overseers were insufficiently responsive to staff needs or insufficiently respectful towards staff expertise and values. Staff saw overseers' prisoner-oriented conduct and values as a disturbing subversion of the oversight system, typically led by the attorney member. In contrast, overseers perceived their conduct and values as individually determined and based on rational choices dictated by necessity.

We return here to the written comments made by the 40% of the representative sample of 193 staff who raised overseer neutrality in the context of overseer performance. These staff felt that overseers' focus on prisoner complaints was an improper exercise of their discretion. Many felt that the attorney committee members were responsible, although some felt that the medical committee members were to blame. Staff felt that these overseers dominated committees and applied human rights and other standards that were normative in their professions, but irrelevant inside prisons.

These staff were asserting their own expertise and status – effectively 'claim[ing] jurisdiction'.<sup>29</sup> In their view, lawyers and doctors were no more than 'paraprofessionals' in the prisons domain, whose conduct amounted to an attempt to usurp corrections officers' exclusive professional jurisdiction.<sup>30</sup> Staff saw overseers with legal and medical backgrounds as contradicting the internal logic of Japanese prisons by seeing prisoners in the same light as their clients or patients – as rights holders, while overlooking their status as objects of the state's righteous wrath.

It is understandable that staff steeped in Japan's corrections culture, would perceive this conduct as a threat. This staff response should also be seen in the broader context of the intractable, long-term conflict between the Japan Federation of Bar Associations (JFBA) and the MoJ over the place of human rights in Japanese criminal justice.<sup>31</sup>

Staff regarded the influence of the overseers with legal and medical backgrounds as causing committees to fail in two duties: to oversee each prison as a whole, including staff working conditions; and to support victims and the public by refraining from sentimentality:

Attorneys play the central role in most oversight committees. It's the attorney's views that dominate what [committees] do and say – it's hard for any public policy, medical or community voice to get a word in (Staff Survey 67C85)

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<sup>29</sup> See Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 1988) 91.

<sup>30</sup> *ibid.*

<sup>31</sup> See generally Yūji Iwasawa, *International Law, Human Rights and Japanese Law* (Clarendon Press Oxford 1998) ch VI; Sylvia Croydon, *The Politics of Police Detention in Japan: Consensus of Convenience* (Oxford University Press 2016a).

... Sometimes the overseers even ask for reforms that the public would criticize; their judgment is way off. The attorney in particular is biased towards prisoners, for no reason. Since the attorney's way off base, even the other members – who are clueless about prisons – are *brainwashed* by what the attorney thinks (Staff Survey 99C88)

I've dealt with overseers at several prisons, and the fact is that some of them (from the Bar Association) start from the position that whatever the prisoners say is true and try to reject our explanations – without seeking the facts themselves. In some prisons, the attorney seemed to have taken control of the committee when they became the chair. I think however that most other overseers were carrying out their role properly (Staff Survey 59C98)

Staff often articulated their correctional creed to bolster their rebuttal of attorney members' human rights agendas. They reasoned that the conditions to which overseers tended to object were just and worthwhile:

The staff of this prison...wish for prisoners to be smoothly rehabilitated and are patiently persevering to this end. Just as there are rules and regulations in a healthy society so there are in prison. Some prisoners want to obey the rules in order to return to society, but unfortunately some wish only to break them... Amidst a range of legal restrictions our staff are working to resolve prisoners' sense of unfairness and dissatisfaction and help them acquire a willingness to be rehabilitated and reintegrated in society. Those incarcerated in penal facilities are not victims. They are *perpetrators*. We request that overseers reform their understanding of and attitude towards prisons (Staff Survey 84C85)

Thirteen percent of the staff who provided written comments raised the issue of overseer respect or deference towards staff. Sentiment was strongly negative ( $n = 26$ ,  $Mdn = 1.5$ ). These staff seemed to feel besieged. They had experienced overseers as insensitive, disrespectful, and even antagonistic:

[In the prison] where I am now, it feels like all that happens is we get attacked by the overseers because they have absolutely no respect for staff. If I could, I'd rather not meet with them. At my last prison, we could work with them it was like they wanted to cooperate with us to consider the prisoners and how to improve things together (Staff Survey 64C83)

... It's unclear to corrections officers if the overseers are contributing to improving prisoner treatment and optimising prison management... few of their suggestions are about helping us improve. All we get is them lambasting us, so it's not constructive (Staff Survey 90C85)

... Some of them just preach human rights theory – it's been exhausting to deal with them sometimes (Staff Survey 95C96)

... Depending on their personal views, some overseers take a position that is hostile to prisons, so there's no hope of constructive opinions, and they turn into a prisoner complaints body – which they were never meant to be (Staff Survey 99C86)

#### *Overseer comments on overseer subversion*

In contrast, the handful of overseers who commented on overseers' bias did so when discussing how they balanced their presence in the prison, not in relation to their performance in their role. When these overseers considered if they allocated their time appropriately, their verdict was somewhat

negative ( $n = 12$ ,  $Mdn = 2$ ). They were aware of their inability to focus on the needs of the prison as a whole – including staff working conditions – but saw this as outside their control due to a lack of authority or resources. This was cause for regret. These overseers acknowledged the needs of staff as workers and wanted to address them:

It's not just about prisoners; we also need to be working as a committee – more than we have until now – towards improving corrections officers' excessive workload (Overseer Survey 55V97)

I'm not sure if I ought to say this as its unrelated to the civil oversight system, but staffing should be increased so corrections officers can take their annual leave (Overseer Survey 87V98)

I'm not used to this kind of institution, and interviews with prisoners make me nervous, but I learn a lot. All kinds of people commit crimes and come into prison, but I want to express my respect for all the corrections officers who monitor them every day - even if it is their job (Overseer Survey 99V95)

We should be proactively striving to survey and interview prisoners *and* corrections officers (Overseer Survey 99V99)

### **9.2.3 Perceptions of corrections obstruction**

The dialogic process by which the overseers provided their opinions to the prison was slow. Three design features meant that it could take four months or more to complete a single dialogic cycle concerning an issue raised in a prisoner letter. These were having the liaison officer and warden interposed as regulatee-side intermediaries between the overseers and staff; letters being the only way committees could communicate with the warden; and the long intervals between meetings.

While the overseers did spend a substantial part of each oversight visit discussing issues that prisoners had raised with the liaison officer, the discussions that I observed in Phase 1 of the study in 2015 tended to be circular in nature. The liaison officer would defend existing prison practices on the basis that to adopt the overseers' suggestion would: impede the prison's security; require resources beyond what the prison could obtain; or exceed the warden's authority. In some cases, the prison would undertake to consider the overseers' views further or agree to make a change. However, any changes would be limited to the particular prison concerned and the short duration of current warden's tenure at that prison.

Some staff and overseer participants among the representative sample of each cohort who also answered the open-ended question reported structural impediments or resistance from senior officers or the prisons administration.

#### *Staff comments on corrections obstruction*

Seven percent of the representative sample of 193 staff who also responded to the open-ended survey question mentioned a braking or blocking role played by corrections actors, with sentiment



somewhat negative ( $n = 13$ ,  $Mdn = 2$ ). These staff wanted greater institutional openness or flexibility to maximise the oversight system's potential benefits to the prison:

... if we in the prison are proud of how we treat prisoners correctly under the law, then we should be completely open about what we do, no matter who we're talking to, and ready to meet them halfway [when they make suggestions] (Staff Survey 86C91)

... I personally think there's a problem with corrections officer insensitivity to external perspectives, so the overseers' views are helpful so we will always be aware of how the general public sees us. If we can't persuade the overseers with our explanations and methodologies, there is no way the public will be convinced (Staff Survey 54C93)

I think what is needed from corrections officers is cooperation so we honestly communicate what is really happening on the frontlines – how we are treating prisoners – so overseers can judge properly. It's a shame some senior staff tend to bend the truth and respond to overseers without thinking (Staff Survey 77C98)

Two staff wanted the overseers to be able to access decision makers directly, bypassing one or both of the regulatee-side intermediaries in Japan:<sup>32</sup>

[Apparently] the warden's involvement with the committee differs between prisons – some just leave dealing with them to the liaison officer. We can make the oversight system work if the warden himself listens to what the overseers say and dialogues with them. We need guidelines to govern how wardens should involve themselves (Staff Survey 98C99)

It's impossible to make most of the overseers' suggestions a reality without increased budgets and staff so as things are now the burden on the senior officers who deal with them is too heavy. It would work if we had a system where important, urgent overseer requests can go directly to the MoJ (or the Minister) as budget requests, and the Ministry makes them happen – if it can find the money. This would give prisons a break from dealing with overseers (Staff Survey 75C91)

#### *Overseer comments on corrections obstruction*

Twenty-eight percent of the 47 responses given by the representative sample of overseers who also answered the open-ended survey question raised reluctance or resistance concerning the mechanism on the part of senior staff or the prisons administration ( $n = 13$ ,  $Mdn = 1$ ). Sentiment was heavily critical; overseers had anticipated more traction, so were dissatisfied with the entrenched institutional attitudes they encountered. Overseers felt sidelined, far from policy-making processes:

Sometimes the public is not told enough about what we do through media and other channels. When we write a letter to the warden, we call the media ourselves and give our own press conference, but it's not clear what happens nationally. The MoJ should take the lead on this (Overseer Survey 91V97)

I want the warden to be submitting our opinions to Regional Corrections Headquarters, and a system and structure be designed where we have the status to make detailed submissions on the future shape of Japan's prisons (Overseer Survey 96V97)

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<sup>32</sup> See Figure G.

I don't think our opinions are being properly reflected in how the MoJ administers prisons (Overseer Survey 70V91)

I want consideration given to a system for handover to new wardens and how wardens are trained so that a change in warden doesn't mean the extent to which the prison cooperates with the oversight committee also changes (Overseer Survey 69V99)

### 9.3 Psychological Impacts on Japanese Prisoners

Civil prison oversight systems rely on prisoners acting as whistleblowers, to alert overseers to issues in the prison. This exposes people who are in an exquisitely vulnerable position to retaliation. While it was not possible to ask Likert scale questions about negative impacts for prisoners, it was clear that neither staff nor overseers were mindful of this risk. None of the 193 comments by the representative sample of staff who also answered the open-ended question considered whether the system had imposed unintended consequences on prisoners. Moreover, just one of the 47 comments made by the representative sample of overseers who also answered the open-ended question contemplated that the system might be a source of stress for prisoners.<sup>33</sup>

Yet many of the representative sample of 344 prisoners who also responded to the open-ended question described their experience of the system in negative terms. We will see below that comments mentioning psychological impacts, whether disillusionment or distrust, were common.

These responses should be read together with those made by a small number of prisoners ( $n = 22$ ) about the need for oversight. These prisoners articulated a sense of hope and the strong conviction that the mechanism was needed to fill a mediating role:

I think overseers' activities do protect the prisoners. If they are abolished, corrections officers will do whatever they want; their bullying, how they look down on us and make us slaves will get worse. Please keep protecting prisoners (Prisoner Survey 61P80)

Some expressed a selfless concern for staff and the public:

...for someone in my position, something like an interview with the overseers is really what you might call an 'act of desperation'. I saw from what they did and said during the interview that they weren't understanding what I was telling them, but I think it was because the interview was too short. It's a tremendous role they play - promoting the public interest, seeing the prison is run properly... (Prisoner Survey 88P60)

I want overseers to guide the prison, so it is run properly – for staff and for prisoners. There are still many areas where prisons should be reformed. (I am not saying I want my sentence or treatment improved – not at all). It's a dangerous place and the workload is heavy, but it is possible to make prisons places that are easy for corrections officers to work at. Overseers will

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<sup>33</sup> Overseer Survey 82V95.

understand if they look at the prison in a deep, focused way rather than a broad, shallow perspective. I want the overseers to be valuable for the Japanese public (Prisoner Survey 84P68)

### 9.3.1 Disillusionment and despair

Despite the sentiments of this altruistic group, many more prisoners expressed bleak views. These prisoners felt disillusionment concerning the oversight system's credibility or despair concerning its achievability.

#### *Credibility*

Over 27% of the representative sample of 344 prisoners who also responded to the open-ended question raised the credibility of the system. Sentiment was strongly negative ( $n = 94$ ,  $M = 1.2$ ,  $SD = 0.7$ ). These prisoners described the oversight system as an empty ritual designed to prevent genuine scrutiny. Prisoners highlighted the general lack of change in prison conditions after a decade of oversight, pointing out that the Spartan, disciplinary prison ethos was unchanged:

...it's fair to say that the oversight system has had absolutely no impact at all where our complaints about day-to-day life here are concerned... I think it is effective against serious breaches of human rights, but it has had no impact in terms of improving how we are treated, which makes no sense (Prisoner Survey 82P76)

...about once in six months they inspect the prison factory but then what? What changed? Am I the only one who doesn't know what issues [the overseers have] raised and what has changed [as a result]? I don't see the point... We ought to be allowed to watch a bit more TV, at least on weekends, or to change the channel (Prisoner Survey 76P89)<sup>34</sup>

Even if you want to write to or have an interview with the committee it's meaningless - they won't listen to any personal complaint. Even now the corrections officers at this prison freely use violence and abusive language. It's meaningless (Prisoner Survey 84P93)

I want them to know how we really feel. There's a thousand things I want to say to them, but I've never been given the chance. I've lost hope (Prisoner Survey 87P65)

Some felt that staff were responsible for this outcome and depicted them as 'gaming' the system:

I've been in here for 12 years but honestly, I've heard practically nothing about what the committee does or anything they've achieved, and even if they inspect the prison, it's all tailored to satisfy them so it's pointless them looking... (Prisoner Survey 86P85)

"There's no meaning or significance in this system: before the overseers inspect the prison, the staff hold a training session and tidy up the factory to show them a prettier picture than normal... (Prisoner Survey 82P84)

Frankly, as a prisoner, I think that the committee – the letters, the interviews and so on – is all a performance. I can't see any meaning in it. Seems like the prison has to have a Visiting Committee so they put up with it – it's a shame (Prisoner Survey 60P78)

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<sup>34</sup> The surveys in the main data collection phase, Phase 2, were administered in late summer and autumn 2016, including the period when the 2016 Olympic Games were televised.

An oversight committee with no authority is meaningless – and incredibly deceitful... (Prisoner Survey 99P61)

However, overseers did not escape critique. Prisoners saw them as complicit:

When I came in here, I heard about the Visiting Committee, but when you talk to them, they just reply in writing, and nothing in particular changes ... none of what you wanted is reflected in their response. The fact is the system is [oversight] in name only (Prisoner Survey 88P97)

I heard that even if they get 200-300 letters, they only bring up two or three with the prison. We're all wondering what this system is for. It's just for show (Prisoner Survey 68P98)

The Penal Institution Visiting Committee is just there for show – they're friendly with the corrections officers so they don't really understand anything (Prisoner Survey 69P46)

Even if the overseers listen to a prisoner... they take the corrections officers' side and either choose to make whatever finding protects the prison or have no choice – it's completely pointless (Prisoner Survey 86i92)

I want them to do a better, proper job of offering more interviews with Committee members and tell us they are doing it. I want them to inspect the prison regularly, and talk directly to prisoners, telling us who they are and listening to us. There's too much happening in this prison that's illegal, unfair or a breach of human rights. We all think the Committee members are complicit in it all.... (Prisoner Survey 84P18)

### *Achievability*

Just under 6% of the representative sample of 344 prisoners who also responded to the open-ended question reflected on whether it was feasible to improve conditions through oversight. Views were strongly negative ( $n = 19$ ,  $Mdn = 1$ ). Some cited the gap between the apparently high-minded policy that birthed the system and the realities of prison life. Overall, these prisoners felt that they remained powerless and invisible, positioned as inferior beings who were destined to suffer. They saw the mechanism as misconceived:

The Visiting Committee's influence is weak... Corrections officers will do their best to keep irrational rules that are convenient for the prison unchanged, so here we prisoners are – no way to [get relief]. When you are cut off from ordinary society and held under irrational conditions you slowly become warped. I want the overseers to get more and more involved so we can get common sense treatment, and the public should take an interest since prisons are a closed space. But sadly, the reality is that unlike westerners, most Japanese people can't see prisoners as anything but criminals. They look at us with jaundiced eyes – they think we don't deserve improved health care, meals or treatment (Prisoner Survey 84P50)

It seems like the real purpose of the Visiting Committee system is quite different to its outward facade. Meaningful reforms to a system like that are impossible (Prisoner Survey 60P98)

I don't understand the oversight system or know what kind of people the overseers are... I don't know what they've achieved, or how they make decisions. All I know is that a 'Visiting Committee' exists. Suggestion boxes are a trivial step – if the system was renewed and enhanced it would build a sense of their presence and credibility. You can see the intention behind the system just from looking at the suggestion boxes. The prison culture is another world – your

survey mentions concepts like 'rights', like 'human rights' and 'the Japanese people'. None of that is relevant in here. The Visiting Committee system is impossible. If you think some kind of change will happen because we make suggestions to them, you don't understand the situation we prisoners are in - it doesn't even calm us (Prisoner Survey 74P40)

### 9.3.2 Frustration and distrust

Prisoners also expressed frustration, feeling that staff resisted the mechanism – and distrust, particularly in order to explain why they had not tried to use it. This may partly explain the low levels of prisoner use that we saw in Chapter 7. It makes sense that prisoner perceptions of risk would be a barrier to using a system that placed them in the role of whistleblower.

#### *Prisoner frustration*

A third of the representative sample of 344 prisoners who also responded to the open-ended question raised the issue of staff willingness to change. Sentiment was strongly negative ( $n = 111$ ,  $M = 1$ ,  $SD = 0.4$ ). Prisoners saw staff as uncooperative and found this frustrating. Some described staff as unrepentant serial offenders, who were adept in sidestepping attempts to regulate their conduct:

I've seen both before and after the Nagoya Prison Scandal – which triggered the reform of the old *Prison Act*, and the Visiting Committee system is exactly the same as the completely useless *jōgan* [Ministerial petition] system we used to have. The Japanese bureaucracy is expert in pretending remorse and that it has learned from a scandal – even better than a habitual offender who has reoffended countless times. They just make a show of the *kaizen* (continuous improvement) that Japan is known to be good at, but the reality stays the same, so it's the same as what a habitual offender does. What's really happening is that they're getting better at concealing things and trickery (Prisoner Survey 96P82)

... [I]t seems like they come to look around the prison about once every few months, but we never get told we can meet with them, or how - even if we want to... [A]nd even if we go to speak with them, it's the senior corrections officers who decide everything in prison, so even if something does improve, when the [next] warden changes, it just flips back to the way it was (Prisoner Survey 64P94)

If the 'old guard' corrections officers at [this] prison aren't completely replaced, nothing will change.... Do they think this is the military?! Why are we made to parade around the prison?! And what on earth does *how well we parade* have to do with our factory's performance table?! (Prisoner Survey 83P61)

#### *Prisoner distrust*

Two items in a multiple-response survey question for prisoners who had never used the system related to the level of trust prisoners felt regarding the mechanism. Nearly one in five ( $n = 241$ ) of the 1304 prisoners who responded to this multi-response question indicated that they did not use the system in order to avoid staff and other prisoners 'seeing them as someone who complains a lot'.<sup>35</sup>

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<sup>35</sup> The wording used in the ACT prison was 'think of me as a whinger'. See Appendix B8.

More than one in ten ( $n = 150$ ) reported that they did not use the system due to fear that staff would 'find out the details' of their complaint.<sup>36</sup> Over 7% of prisoners who had not used the mechanism selected both these trust-related reasons for this avoidance ( $n = 94$ ) while nearly 23% of prisoners who did not use the system selected either one of these options ( $n = 297$ ). Given that we saw in Chapter 7 that only 136 of 1451 prisoner participants had initiated contact with the overseers, the number who had avoided the system due to one or more trust-related reasons well exceeded the number who had engaged with it.

We saw above that staff and overseers agreed that some prisoners using the system were vexatious. While overseers' agreement was clear, the agreement of the otherwise circumspect Japanese staff<sup>37</sup> was unusually enthusiastic, with over 80% of the staff cohort responding to both questions on this issue and mean values over 4.50.<sup>38</sup> This suggests a level of staff cynicism concerning prisoner use of the mechanism, which one officer expressed as follows:

... the prisoners who oppose or complain about these rules are almost all the vexatious or disruptive type ... (Staff Survey 58C87)

Some prisoners reported having constructive, community-minded intentions when they used the mechanism and at several of the Japanese committee meetings that I observed during Phase 1 in 2015, overseers read aloud prisoner letters expressing gratitude to the prison or staff. Of the 111 prisoners who responded to a survey question on gratitude as a motivation for using the system, a quarter ( $n = 30$ ) indicated that they had either expressed appreciation to staff or the prison or wished to do so. Further, when 113 prisoners who had written to overseers answered a multiple-response question asking for whose benefit they had written, the two responses indicating other-centredness were selected by more than half of those responding. Some 58 prisoners (51.3%) selected 'for other prisoners', while 60 (53.1%) selected 'for the prison as a whole.' Forty-nine (43.4%) chose the response 'for myself'.

It is possible that these prisoners perceived expressing thanks to the overseers as a way of currying favour with staff. However, the strength of the staff characterization of some prisoners who interacted with overseers as troublemakers and the general vulnerability of prisoners to staff displeasure suggest that avoiding the system may have been a rational decision.

Turning to the written comments made by the representative sample of 344 prisoners who also answered the open-ended question, 14% raised the issue of trust. Sentiment was strongly negative

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<sup>36</sup> The wording used in the ACT prison was 'find out what I talked to the [overseer] about'. See Appendix B8.

<sup>37</sup> Chapter 6 discusses the tendency of Japanese staff responses to Likert scale questions to follow the Middle Response Style.

<sup>38</sup> At least 700 of the corrections officer cohort of 862 responded in each case.

( $n = 47$ ,  $M = 1.3$ ,  $SD = 0.50$ ). These prisoners expressed reluctance, anxiety or fear regarding the mechanism.

Prisoners often gave reducing the possibility of subtle retaliation as a rationale for avoiding the system. They reported having experienced or witnessed harassment or discrimination after an attempt to contact the overseers. This manifested in ways that may have been imperceptible to the casual observer, but potentially intolerable for prisoners. For example, many wrote of staff attitudes souring towards prisoners who were known to have posted letters to the overseers:

I know there are suggestion boxes but a letter to the overseers is like a complaint so I'm worried that the corrections officers will treat me with disdain, and it'll affect my work assignment so I can't do the work I want to do. I think sending a letter could cause me trouble. I'd need to be able to solve this issue to use the system (Prisoner Survey 64P98)

If a prisoner [tries to contact the overseers], the corrections officers resent him and give him a hard time... (Prisoner Survey 61P86)

Even if I had something I wanted to have an interview with overseers about, I worry that the result for me could only be bad: it would be riskier for me in here, harder for me to do my time, wouldn't it? It's simpler for me to put up with it or be patient, to pretend I don't see... (Prisoner Survey 70P90)

The situation now where the corrections officers know who has sent a letter to the overseers means that we're afraid to, even if we want to. A prisoner who is writing to the overseers has a magnetic sign put on their cell door by corrections officers that says 'Prisoner Writing to Overseers'. There are blatant changes in some corrections officers' attitudes after that. My factory's supervisor is particularly bad. It's our right to send letters to the overseers but he pressures us, so we don't. If nothing's done about this the oversight system is meaningless (Prisoner Survey 84P13)

Some reported humiliation or retaliation by staff after overseers carelessly leaked a complaint that had been shared in confidence:

I contacted the committee to make three different allegations, but all three ended up with no more than a corrections officer coming to shout at me that an inquiry had found that none of them ever happened. I wasn't allowed to ask questions or object. It was the *overseers* I contacted, so I expected them to take responsibility and respond to me. I want them to take responsibility for inquiries, right to the end – if what happens... is the details of your allegation being leaked to corrections officers, the long-term impact will mean few prisoners contact them. If one corrections officer knows, then practically all of them know (Prisoner Survey 58P95)

A corrections officer told me the prison's response to the [matters] I raised in an interview with the committee... so what I told the inspectors in confidence was leaked to the corrections officers. So, this means that all that happened was I invited a result where I would be worse off? If the place you go to make an allegation that you can't make to the prison doesn't observe confidentiality what's the point of having an interview? (Prisoner Survey 51P97)

If the committee is a neutral body between corrections officers and prisoners, then it's clear that it won't work in the current environment where prisoners get the committee's responses via

corrections officers, and corrections officers can know when a prisoner [contacts the overseers]. (Prisoner Survey 73P77)

From prisoners' perspective, this made complaining to overseers regarding staff misconduct particularly risky:

If a prisoner asks for an interview with the overseers because of an issue with a corrections officer's attitude, that prisoner's treatment gets worse; he is now a marked man (a 'troublemaker') and targeted by corrections officers no matter what factory he goes to. I don't think the oversight system helps anyone in the end – not corrections officers and not prisoners (Prisoner Survey 70P23)

## 9.4 Conclusion

For decades, popular discourse on civil prison oversight has portrayed the mechanism as uniformly beneficial, despite a lack of empirical evidence to support this claim. While some studies in recent decades have noted that the mechanism has unintended consequences, they have been primarily descriptive, attracting little attention.<sup>39</sup> However, two scholarly toolkits offer a way forward. Responsive regulatory theory,<sup>40</sup> especially the theory of relational distance,<sup>41</sup> on which the theories of social alignments and motivational postures rely,<sup>42</sup> helps us to identify the design failures that generate these outcomes. Sieber's classic taxonomy of the unintended consequences of social regulation provides a useful heuristic for understanding their implications.<sup>43</sup>

While this chapter has reported the views of all three participant cohorts on the unintended consequences of Japan's soft form of the mechanism, it is staff views that are pivotal. They complete the picture we saw emerging from the Japanese data in Chapters 7 and 8 – of the mechanism's mixed performance in light of what we know theoretically about good persuasive regulation.

We can see that many features of Japan's minimalist design were defensive – intended to ensure that it would provide public relations benefits, while protecting staff from disruption by inexperienced committees led by members aligned with a 'zealous' public interest group.<sup>44</sup> However, we saw in Chapter 7 that two 'social alignment' prerequisites for persuasive regulatory success were absent: staff did not see overseers as legitimate regulator-side intermediaries and disagreed with their interpretation of the mechanism's aims and standards.<sup>45</sup> There was some encouragement in Chapter

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<sup>39</sup> Notably Martin and Godfrey (1994); Whitty (2011); Daems (2017); van der Valk and Rogan (2021).

<sup>40</sup> Ayres and Braithwaite (1992). See Figure A.

<sup>41</sup> Donald Black (1976) 40-48. See Figure C.

<sup>42</sup> Valerie Braithwaite (2017). See Figure D.

<sup>43</sup> Sieber (1981).

<sup>44</sup> Ayres and Braithwaite (1992) 75.

<sup>45</sup> Valerie Braithwaite (2017) 29.



8, which showed that one spoke of the Wheel model was present: the mechanism did secure some abstract gains and concrete public relations benefits – and we can perhaps speculate that it may have also protected junior staff.<sup>46</sup>

Unfortunately, Chapter 9 has revealed unintended consequences that rule out two final prerequisites for persuasive regulatory success in the Wheel model: that staff see the mechanism as procedurally fair and morally worthy.<sup>47</sup> This chapter has shown that the symbolic and public relations gains for Japanese prisons came at a steep cost just as Martin predicted in 2010.<sup>48</sup> Staff experienced the mechanism as onerous and unjust, with rank asymmetry a key aspect of their concerns. Officers resented the zealotry of the legally and medically trained overseers. The conduct of these overseers sent what Etienne would call ‘judgment’ relational signals, evincing doubt as to corrections officers’ integrity.<sup>49</sup> Moreover, Staff perceived their influence as an inappropriate challenge to their own expertise as corrections personnel, which had generated pointless busywork and prevented officers’ real needs being addressed. Many saw prisoners’ complaints as a misuse of the mechanism and overseers’ receptiveness to these complaints as subverting the mechanism for partisan purposes. In other words, Japanese staff experienced three different kinds of perverse outcomes in Sieber’s taxonomy: functional disruption, provocation and placation.<sup>50</sup> Unsurprisingly, most staff did not find the mechanism morally compelling. As one prisoner noted, this put the transformative power of persuasive regulation beyond reach:

Prisons won’t change until corrections officers themselves want it to happen. Until then [oversight] is useless (Prisoner Survey 82P88)

Many prisoners, some overseers and even a few staff felt that officers appeared to comply with the mechanism while actually evading or dismissing it. These behaviours map to the ‘game-playing’ and ‘disengagement’ motivational postures that we know regulatees are likely to adopt when a persuasive mechanism lacks the prerequisites illustrated by the Wheel of Social Alignments model.<sup>51</sup>

It seemed that there may also have been unintended consequences for the regulator-side intermediary overseers, in line with the personal costs of penal sector volunteering highlighted by

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<sup>46</sup> As Chapter 6 explains, junior staff were not included in the study in Japan.

<sup>47</sup> Valerie Braithwaite, Kristina Murphy and Monika Reinhart ‘Taxation Threat, Motivational Postures, and Responsive Regulation’ (2007) 29(1) *Law and Policy* 137, 142; See also Valerie Braithwaite, ‘The Hope Process and Social Inclusion’ (2004) 592 *The Annals of the American Academy of Political and Social Science* 128, 134, 148.

<sup>48</sup> Steve Martin (2010) 29.

<sup>49</sup> Julien Etienne, ‘Ambiguity and Relational Signals in Regulator - Regulatee Relationships’ (2013) 7 *Regulation & Governance* 30, 36-41.

<sup>50</sup> Sieber (1981) chs 3, 6 and 9.

<sup>51</sup> Valerie Braithwaite, ‘Defiance and Motivational Postures’ in David Weisburd and Gerben Bruinsma (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer Science & Business Media 2014) 917.

Quinn, Tomczak and Buck in 2022.<sup>52</sup> Some overseers' comments mentioned heavy workloads and psychological stress, while others expressed unhappiness at their inability to improve staff working conditions and a larger number voiced feelings of frustration due to a lack of staff cooperation. Finally, perverse consequences extended to prisoners, civil prison oversight's intended beneficiaries, who might also fall within Quinn, Tomczak and Buck's analysis of penal sector volunteers, given that civil oversight systems ask them to volunteer as whistleblowers. Reports of prisoner distrust and disillusionment were ubiquitous.

We have seen in Chapters 7 and 8 that when viewed as an entire cohort, overseers were relentlessly optimistic. However, the shared experience of the communities inside the prison was of struggling with an unwieldy mechanism that did not deliver as promised – and this had proved divisive. Both staff and prisoners were dissatisfied with overseers, unhappy regarding their own role in the mechanism and distrustful regarding each other's roles. Overall, it seems likely that mechanism had indeed 'undermin[ed] the social fabric' inside the prison.<sup>53</sup>

These findings pose interesting questions for the comparative study conducted in the Australian Capital Territory (ACT). We have seen that civil prison oversight did have some benefits for prisons in Japan. If this was also true in the ACT, a jurisdiction steeped in a human-rights oriented ethos, then perhaps staff recognised overseers' legitimacy, saw their 'values, norms, beliefs and processes' as aligned with their own<sup>54</sup> and embraced oversight as fair and worthy of cooperation. Chapter 10 addresses this possibility and the comparative insights that the two data sets offer.

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<sup>52</sup> Kaitlyn Quinn, Philippa Tomczak and Gillian Buck, "'How You Keep Going': Voluntary Sector Practitioners' Storylines as Emotion Work' (2022) *British Journal of Sociology* 1.

<sup>53</sup> Valerie Braithwaite (2017) 26.

<sup>54</sup> *ibid* 29.

## Chapter 10 Insights from Soft Civil Prison Oversight in the ACT<sup>1</sup>

This chapter explores the study's findings on the nature and impact of soft civil prison oversight in the Australian Capital Territory (ACT) and draws comparative insights from the findings in Japan.<sup>2</sup> In Chapter 5, we saw that the ACT design satisfied popular expectations of civil prison oversight, had been reviewed and strengthened – and unlike the restrictive Japanese design, reflected the traditional regulatory state governance seen in Chapter 2.<sup>3</sup> The state gave the private actors who were tasked with delivering civil prison oversight considerable autonomy – and largely refrained from telling them how to exercise it. This flexible, informal design and the ACT mechanism's human rights-oriented ethos supported the study's working hypothesis: that the regulatee ACT prison staff would have welcomed the overseers as regulator-side intermediaries and cooperated with their aims.

Yet ACT staff sentiment mirrored that in Japan. Staff again saw overseers as lacking legitimacy and clashing with their own 'values, norms, beliefs and processes'.<sup>4</sup> Results concerning benefits were, if anything, more negative and staff again found the system unjust and undeserving – once more reporting troubling perverse effects. Meanwhile, the views of the other cohorts also echoed those in Japan. Overseers believed that the mechanism generated many benefits. Prisoners saw no benefits and voiced disillusionment, particularly concerning the overseers, whom they saw as impotent and disengaged. Viewing these findings from the ACT against Sieber's taxonomy of unintended consequences,<sup>5</sup> in light of the findings from Japan in Chapter 9, we see even stronger evidence of ACT staff experiencing the mechanism as a vexing provocation,<sup>6</sup> even if the evidence of functional disruption and placation may be more muted.<sup>7</sup>

How can we make sense of these findings? We saw in Chapter 5 that the ACT oversight design process largely excluded prison staff, as in Japan. The theories of pyramidal regulatory enforcement

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<sup>1</sup> Indigenous readers should be aware that this chapter contains the name, description and words of a person who has recently died.

<sup>2</sup> This chapter draws on two data tranches: the first is the Phase 1 interview conducted in 2015 with both the overseers then serving at the ACT prison and a third former overseer. See Appendix A7. The second is the quantitative and qualitative data gathered when the surveys administered in Japan were administered in the ACT prison in early 2017. See Appendices B6, B7 and B8.

<sup>3</sup> David Levi-Faur, 'The Odyssey of the Regulatory State: From A "Thin" Monomorphic Concept to A "Thick" and Polymorphic Concept' (2013) 35(1-2) *Law & Policy* 29

<sup>4</sup> Valerie Braithwaite, 'Closing the Gap Between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 29.

<sup>5</sup> Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981).

<sup>6</sup> *ibid* ch 6.

<sup>7</sup> *ibid* chs 3 and 9.

and relational distance,<sup>8</sup> elucidated in the theories of social alignments and motivational postures,<sup>9</sup> establish the risks of designing a persuasive mechanism at a high relational distance. Regulators may fail to ‘design in’ regulatees’ interests and preferences, which can lead to distrust, detachment and regulatees being more likely to adopt defiant motivational postures, in which they oppose, ignore, or quietly sabotage the mechanism.<sup>10</sup> In short, this chapter shows that even a civil prison oversight mechanism that meets normative design expectations can backfire – and applies responsive regulatory theory to explain how and why this failure occurs.

## 10.1 Soft Civil Prison Oversight in the ACT: Nature

This section examines the nature of the ACT mechanism through three lenses: the oversight personnel, their presence in the prison and their performance in their role.

### 10.1.1 Personnel: experts or amateurs?

#### *Characteristics, selection and skills*

While four of the first five overseers, who were appointed from 2008 onwards, were men with prior Official Visitor, policing or legal backgrounds, four of the five appointed from 2013 onwards have been women with social work or criminology backgrounds.<sup>11</sup> Both the serving overseers during the ACT data collection period were mature-aged women from the post-2013 group.<sup>12</sup> The third overseer participant was from the pre-2013 group: now in his early 40s, he had been a lawyer before his 2010

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<sup>8</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992); Donald Black, *The Behavior of Law* (Academic Press 1976) 40-48. See Figure C.

<sup>9</sup> Valerie Braithwaite (2017). See Figure D.

<sup>10</sup> Valerie Braithwaite (2017) 28-35, 29.

<sup>11</sup> Geoffrey Potts (2008-2008), Craig Sams (2008-2009), Jeremy Boland (2010-2011), Tracey Whetnall (2011-2019) and Ivan Potas (2011-2014) were the first five. Subsequent appointees have been Judy Putt (2013-2017), Denise Brasser (2017-2023), Shannon Pickles (2017-2023), Vicki Quinn (2020-2023) and Violet Sheridan (2020-2023). *Explanatory Statements* for all Official Visitor appointments are available via the ACT Legislation Register. See ACT Government, ‘Corrections Management Act 2007 - Regulations & Instruments’ (*ACT Legislation Register*, 30 April 2023) [www.legislation.act.gov.au/a/2007-15/](http://www.legislation.act.gov.au/a/2007-15/) accessed 30 April 2023 for those appointed under the Corrections Management Act (CMA) 2007; ACT Government, Official Visitors Act 2012 – Regulations & Instruments (*ACT Legislation Register*, 30 April 2023) [www.legislation.act.gov.au/a/2012-33/](http://www.legislation.act.gov.au/a/2012-33/) accessed 30 April 2023 for those appointed under the Official Visitors Act (OVA) 2012.

<sup>12</sup> Tracey Whetnall and Judy Putt. Ms Whetnall, a Dharawal woman served for 8 years, passing away in mid-2019. See ACT Legislative Assembly, ‘Ms Tracey Whetnall - Motion of Condolence’ *Hansard* Week 9 (20 August 2019) [3117]-[3122]; See also Sherryn Groch, ‘Woman on the Inside: Meet Our Longest-Serving Official Prison Visitor’ *The Canberra Times* (Canberra, 22 February 2019) [www.canberratimes.com.au/story/5995665/woman-on-the-inside-meet-our-longest-serving-official-prison-visitor/](http://www.canberratimes.com.au/story/5995665/woman-on-the-inside-meet-our-longest-serving-official-prison-visitor/) accessed 2 April 2023. Dr. Putt served for 3.5 years to mid-2017. See Australian National University, ‘Judy Putt’ (*ANU College of Asia & the Pacific, Coral Bell School of Asia Pacific Affairs*, 2 April 2023) <http://dpa.bellschool.anu.edu.au/experts-publications/experts/judy-putt> accessed 2 April 2023.

appointment.<sup>13</sup> All three had responded to a public call for expressions of interest in a fixed term part-time position requiring relevant qualifications, experience or both. The job description positioned overseers as people able to interact with prisoners making complaints, not as those able to interact with staff, although a recent advertisement for a similar ACT position did state, somewhat vaguely, that overseers ‘need to command the continuing respect and confidence of relevant stakeholders and the community’.<sup>14</sup>

In the early years, the publicly-notified Explanatory Statement for each appointment included detailed grounds for selection, in an apparent effort to reassure external stakeholders.<sup>15</sup> Tracey Whetnall’s initial Explanatory Statement noted that she was ‘well known and well respected within the ACT community’, had been ‘actively involved with Indigenous agencies’ and had a ‘sound knowledge of the issues facing Indigenous prisoners and their families’.<sup>16</sup> Judy Putt’s Explanatory Memorandum advised that she had ‘extensive experience in related fields’ and had ‘demonstrated a balanced, measured concept of appropriate engagement with stakeholders in a correctional context and... interpersonal skills in dealing with disadvantaged or diverse people.’<sup>17</sup>

Yet the representative sample of 21 ACT staff who also answered the open-ended question did not have positive perceptions of the overseers as regulator-side intermediaries.<sup>18</sup> Over 70% of the staff

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<sup>13</sup> Jeremy Boland served for the year to early 2011 and was interviewed during Phase 1 of the study in 2015.

<sup>14</sup> The listing, for an Indigenous Official Visitor for the ACT juvenile detention centre, closed on 16 June 2021 and sought ‘highly motivated’ applicants with high levels of ‘integrity’, ‘suitable qualifications and/or experience’, ‘well-developed liaison and communication skills’, ‘capacity and willingness to communicate empathetically with [juveniles] in challenging situations’, and ‘[h]igh standards of... impartiality and objectivity’. Applicants had to understand ‘the ACT’s youth detention and criminal justice system’, ‘the Official Visitor processes for resolving grievances and... the ACT Human Rights Act 2004’. See Public Trustee and Guardian, ‘Official Visitor (Indigenous) Official Visitor Act 2012 Children and Young People Act 2008 Call for Expressions of Interest Expressions of Interest – Closing 16 June 2021’ (*LinkedIn*, 26 May 2021) <https://au.linkedin.com/jobs/view/official-visitor-indigenous-for-children-and-young-people-at-public-trustee-and-guardian-2563556946> accessed 26 May 2021.

<sup>15</sup> Boland’s Explanatory Statement noted his ‘wealth of experience working with people from diverse backgrounds, including people experiencing disadvantage and incarceration’, as a ‘community development facilitator’ and ‘youth homelessness services manager’. It highlighted his legal qualifications and experience, stating that he ‘demonstrates a sound understanding of the correctional environment’ and a ‘good understanding... of the Human Rights Act 2004 and of the processes for resolving grievances associated with human rights’. See Corrections Management (Official Visitor) Appointment 2010 Explanatory Statement (ACT).

<sup>16</sup> See Corrections Management (Indigenous Official Visitor) Appointment 2011 Explanatory Statement (ACT).

<sup>17</sup> Putt’s first Explanatory Statement in 2013 was unusually generic; the quoted text is from her second. See Official Visitor (Corrections Management) Appointment 2015 (No 1) Explanatory Statement (ACT).

<sup>18</sup> In this study, *N* refers to the entire sample size and *n* to a cell size. Quantitative results are reported using descriptive and inferential analysis performed using SPSS 26, employing multi-question scales wherever possible. Each scale was developed from between three and eight individual questions on the basis of face validity, theoretical salience and the absence of theoretical or empirical overlap with other measures. Reliability was measured using Cronbach’s alpha, which was satisfactory or good in all cases. Qualitative data were analysed thematically using Dedoose. Code weighting was applied using a five-point scale. I applied the value ‘5’ where a participant strongly agreed with a code, ‘3’ where a participant took a neutral position, and ‘1’ where a participant strongly disagreed. See Appendix C Phase 2: Open-Ended Survey Question. The open-

making written comments raised overseers' selection and skills ( $n = 15$ ). Most echoed the sentiments of Japanese staff, noting that the overseers were ill-prepared for the complex prison environment and suggesting recruiting former staff or providing hands-on training:

Visitors should have some custodial training prior to employment, understand victims [and] have a few days working as or with a corrections officer to understand corrections officers' duties [and] pressures (Staff Survey C133A)

Visitors appear to have little experience in dealing with detainees... I suggest visitors are recruited from ex-corrections backgrounds (Staff Survey C103A)

There is a large gap between the quality... [of] the official visitors... (Staff Survey C93A)

As in Japan, ACT prisoners would have had little knowledge of overseers' backgrounds and did not comment.

### *Conditions and resources*

In 2011, the then Attorney-General explained to the legislature that no training was needed other than basic security training, as the overseers 'are recruited on the basis that they have the skills to perform the role'.<sup>19</sup> However, all three overseer participants noted in interview that the lack of training meant that it took a long time to grasp how to do their job.<sup>20</sup> As we saw in Chapter 5 an early appointee had attracted public interest group protests, so when Boland was appointed in early 2010, he was encouraged to visit at least weekly<sup>21</sup> and make frequent oral reports to the Attorney-General via mobile phone and did so.<sup>22</sup> Whetnall's only training was a few hours with Boland:

[My training] was meeting Jeremy for a coffee, walking the prison over a day with [him]... to try and meet people... and then you're on your own basically... I thought I knew something about the criminal justice system... but I didn't. I had one or two relatives in prison like most of us, but like every day I'd go in there and learn something new... everything I've learned is all from the prisoners themselves and some of the staff... (Whetnall Interview, 2 November 2015)

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ended questions in the staff and overseer surveys both asked: 'Please write any additional thoughts or views you may have about the [oversight system in your jurisdiction or its] activities – especially how to improve [it]. The open-ended question in the prisoner surveys asked: 'Please write any thoughts you have about the [oversight system where you are] – especially how [it] could be made better'. See Appendix B Phase 2: Main Data Collection. Square brackets in excerpts from participant responses indicate either details that have either been removed to prevent the re-identification of participants or added for clarification. The emphasis, punctuation and spelling used in the original written comments by the ACT participants who also answered the open-ended question are reproduced without alteration in the excerpts quoted in this chapter.

<sup>19</sup> ACT Legislative Assembly, 'Corrective Services - Official Visitors (Question No 1952' *Hansard* Week 14 (8 December 2011) [6101].

<sup>20</sup> Interview with Jeremy Boland, Former ACT Official Visitor (Canberra, Australian Capital Territory, 18 June 2015); Interview with Judy Putt, ACT Official Visitor (Canberra, 18 June 2015); Interview with Tracey Whetnall, ACT Official Visitor (Canberra, 2 November 2015).

<sup>21</sup> Boland Interview (2015).

<sup>22</sup> Boland Interview (2015). Boland later joined JACS as an employee. Corrections Management (Official Visitor) Policy 2011 later relieved the Attorney-General of this burden.

This training vacuum led Putt, an experienced empiricist, to try to assess her own skills:

[After about two months] I did a little mini evaluation... and I tried to talk to some of the detainees, some of the staff, senior correctional staff, about what they thought was good and bad about my approach to the position... (Putt Interview, 15 June 2015)

In 2011, the ACT civil prison oversight funding was up to AUD 34,000 per overseer per year, with no funding limit for the Indigenous Official Visitor.<sup>23</sup> As of 2015, overseers could claim for up to four hours' attendance at the prison on a single day.<sup>24</sup> Their core task was to walk around the secure custodial areas of the prison at their own discretion, talking with prisoners who wished to speak to them. Each visit ended with brief meetings with the warden or senior staff to discuss any concerns. If this was not possible, overseers followed up with prison leaders by email.<sup>25</sup>

All three overseers expressed confidence in their own suitability, citing their experience with vulnerable, criminal justice-involved groups and describing altruistic motivations. This reflected prisons administration, public interest group and popular expectations concerning the credentials for the role. We saw in Chapter 5 that external actors pressured policymakers to appoint overseers whom prisoners would trust and at interview, all three overseers agreed that this was a priority.<sup>26</sup> There was no evidence of prisons administration, public interest group or popular attention to whether staff would see overseers as legitimate regulator-side intermediaries, although all three overseers believed that staff generally respected them.

### *Power and authority*

The overseers' external credibility and broad discretion gave them influence over how the role evolved. The quarterly Oversight Agency meetings between all the agencies monitoring the prison and prison leaders that are mentioned in Chapter 5 were just the start of their advisory role.<sup>27</sup> Outside the prison, they were seen as authoritative and invited to contribute to multiple public reviews and inquiries into the prison.<sup>28</sup>

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<sup>23</sup> ACTLA (2011) [6101].

<sup>24</sup> Putt Interview (2015).

<sup>25</sup> No mobile phone or computer is provided; overseers may use prison equipment during visits.

<sup>26</sup> Boland Interview (2015); Putt Interview (2015); Whetnall Interview (2015).

<sup>27</sup> At that time the ACT Public Advocate, ACT Human Rights Commission, and the ACT Ombudsman. JACS prisons administration personnel chaired these meetings with prison leaders: Interview with Sean Costello, Former ACT Justice and Community Safety Director Official (Canberra, 24 July 2019).

<sup>28</sup> For example, Boland contributed to Keith Hamburger and others, *Independent Review of Operations at the Alexander Maconochie Centre ACT Corrective Services* (Knowledge Consulting 12 March 2011) and was appointed to an elite five-member AMC Task Force to advise the Attorney-General on his response: Simon Corbell 'Government Tables AMC Review Reports' *Simon Corbell MLA Media Releases* (Canberra, 5 April 2011). Putt contributed to ACT Auditor-General, *The Rehabilitation of Male Detainees at the Alexander Maconochie Centre Report No. 2/2015* (ACT Government 2015).

We will see below that in the ACT, as in Japan, staff felt that overseers were intrusive and had too much authority, while prisoners saw them as having too little. Ten prisoners among the representative sample of 45 prisoners who also answered the open-ended question mentioned the overseers' power and nine expressed strongly critical views. As in Japan, these prisoners saw overseers as impotent:

[Overseers don't have] any real authority or ability to change/impacts situations that arise. Their influence seems limited and ability to help seems non-existent. It would be good if... [they] had some authority or powers... (Prisoner Survey D005A)

The visitor [should be] actually able to change procedure and enforce changes, ab[le] to dismiss custodial officers upon receiving a complaint, empowering the visitor to institute changes, based on in-mate feedback! We need one person with power on our side! (Prisoner Survey D056A)

Overall, overseer selection depended on genuine interest in the role and experience in a field related to criminal justice. Overseers enjoyed adequate remuneration, direct contact with prisoners, wide discretion, and external recognition. These attributes all run counter to the Japanese design. However, staff in both jurisdictions were strongly critical of appointees' suitability and skills.

#### **10.1.2 Presence: welcome, intrusive or inadequate?**

This section examines how ACT overseers interpreted their duties in practice, how prisoners and staff viewed the overseers' presence and the nature of overseer-prisoner contact.

##### *Overseer visits*

In 2016, Putt spent over 300 hours in the prison and Whetnall nearly 400 hours.<sup>29</sup> They received few messages and letters from prisoners but had each handled calls and letters about prisoners from other agencies, lawyers and prisoners' families on up to 30 occasions.<sup>30</sup> Whetnall would consult with up to three staff each visit, while Putt would consult with between four and six staff. These consultations were brief, taking approximately 15 minutes in total during each visit. Each overseer would ask the prison to investigate up to three prisoner concerns and send up to three emails to staff.

Each visit, Putt spoke with up to 10 prisoners who had asked to see her and up to 20 others. It would take under an hour for her to see a prisoner if they made a request during a visit. Meetings lasted up to 15 minutes. Whetnall spoke with up to 40 Indigenous prisoners each visit, irrespective of requests,

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<sup>29</sup> The overseers' survey responses showed that Putt visited for three half days per fortnight, Whetnall for four.

<sup>30</sup> Whetnall's interview transcript suggests that this was a gross underestimate in her case; she clearly performed significant additional unpaid hours assisting Indigenous prisoners and their families.

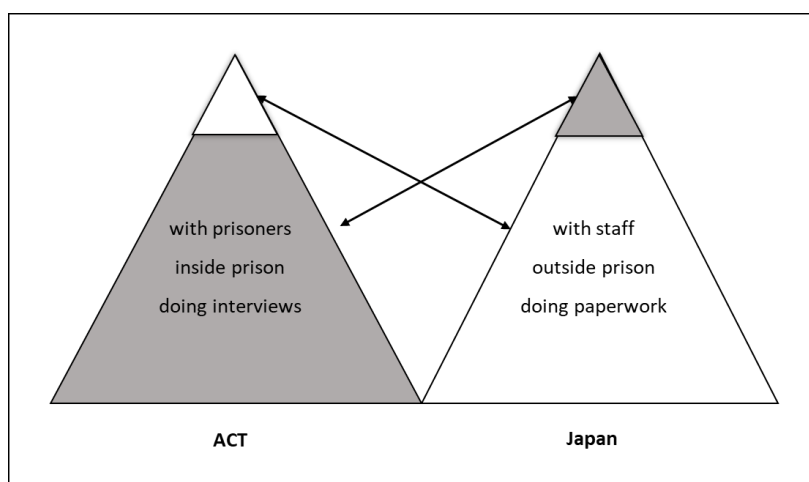


often in small groups, for periods of 15-30 minutes. It would take a few days for her to meet with a prisoner who made a request.

Neither overseer had ever made any urgent *ad hoc* reports to the Minister under OVA 2012 s 16 concerning breaches of the CMA 2007 human rights standards. Both had submitted all their quarterly written reports to the Minister under OVA 2012 s 17 and attended all four Oversight Agency meetings at the prison and an Official Visitors Board meeting, as required. In addition, Putt had also attended between six and nine monthly prisoner Delegate meetings.<sup>31</sup> They also wrote short statements for inclusion in each JACS Annual Report.<sup>32</sup>

In sum, ACT overseers had the access to prisoners and decision makers that Japanese overseers desired. As Figure H shows, the ACT and Japanese designs were opposites. The ACT overseers spent hundreds more hours at the prison, had thousands more meetings with prisoners and interacted with dozens more staff. They were also well networked with other oversight agencies and made direct reports to not only the warden and Minister, but also senior prisons administration figures and external bodies.

**Figure H** Japan and the ACT: Overseers presence in prisons - time allocation



<sup>31</sup> Prisoner representatives from each accommodation area at the ACT prison meet with senior staff monthly to discuss prisoner concerns.

<sup>32</sup> See, for example, ACT Department of Justice and Community Safety, *Annual Report 2008-09* vol 1 (ACT Government 2009) 209.

The three overseers interviewed each approached their role differently, although all felt that their first duty was to inform the Minister. Putt described herself as the Minister's 'canary in the mine',<sup>33</sup> while Boland described himself as 'the eyes and ears' of the 'relevant elected official'.<sup>34</sup>

Boland, a lawyer by training, felt he was 'not an advocate for prisoners' but responsible for speaking truth to power and developing law and literacy initiatives to benefit all prisoners.<sup>35</sup> Whetnall was an experienced Indigenous advocate and advisor who felt called to fulfill the traditional mature-age female pastoral role of 'Aunty', to serve as a 'lifeline' for Indigenous prisoners and their families:<sup>36</sup>

... I've had some of the old boys in there say 'We'd be lost without you, Sister, we'd be lost without you, Aunty. I'd die if you ever left us, Aunty' you know. 'We'd have no-one if you weren't around' (Whetnall Interview, 2 November 2015)

Putt, a veteran of 'action research' felt called to drive internal prison reforms, especially for the benefit of female prisoners.<sup>37</sup> She valued her ability to facilitate health and fitness programs, as well as to encourage prisoner self-advocacy through Delegates Meetings:

So, it's [being] a more informal agent of change potentially. Don't push it too hard, it's got to be their idea not mine. We got a veggie garden going in the women's area, which was fantastic last year (Putt Interview, 18 June 2015)

#### *Staff and overseers on overseers' presence*

The overseers' workloads increased as the prison population rose, but they felt productive and accepted by staff. Yet staff perceived their presence negatively. For example, a quarter of the representative sample of 21 staff who also answered the open-ended question<sup>38</sup> were dissatisfied with overseers' movements around the prison. They wanted more information and consideration:

Would be of benefit to correctional officers if the official visitor could phone the area that they want to visit for an appropriate time (Staff Survey C075A)

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<sup>33</sup> Putt Interview (2015)

<sup>34</sup> Boland Interview (2015)

<sup>35</sup> Boland founded a Legal Literacy program that brings Australian National University law students to the prison to teach prisoners ACT law: Boland Interview (2015); Boland J, *Finalisation Report: For the ANU College of Law Detainee Support Project* (2010) [https://law.anu.edu.au/sites/all/files/users/u4081600/legal\\_literacy\\_project\\_-\\_concluding\\_report.pdf](https://law.anu.edu.au/sites/all/files/users/u4081600/legal_literacy_project_-_concluding_report.pdf) accessed 2 April 2023. He also ran a '100 Books in 100 Days' book drive for the prison library: ACT Alcohol Tobacco and Other Drug Association (ATODA) 'Campaign Launch for Alexander Maconochie Centre – 100 Books in 100 Days' *Sector eBulletin* (Canberra, 31 November 2010).

<sup>36</sup> Whetnall Interview (2015).

<sup>37</sup> Putt is an anthropologist and criminologist. Action research has been described as 'the idea that research can and should be empowering and directly useful to research participants': Ida Dupont (2008) 'Beyond Doing No Harm: A Call for Participatory Action Research with Marginalized Populations in Criminological Research' (2008) 16(297) *Critical Criminology* 197, 197. See also Deborah H Drake, 'Researching Prisoner Experiences with Prison Officers: An Action Research-Inspired Approach' (2014) 12(1) *Action Research* 94.

<sup>38</sup>  $n = 5$ .

At present the visitor drifts... around the prison. There is very little interaction... with staff before or after visiting a unit. Some sort of debrief or discussion...would help (Staff Survey C097A)

The official visitor enters the yard then speaks to the detainees about any issues they may have. The official visitor then leaves without asking [staff] if there are any issues they may have. Try not to have the official visitor attend at times like muster... (Staff Survey C075A)

Nearly half the representative sample of 21 staff who also answered the open-ended question<sup>39</sup> felt that the overseers had low visibility to staff and had failed to interact with them. These staff wanted to be included in civil prison oversight processes:

A lot more information should be provided to officers regarding official visitors. Presently I am unaware who is currently appointed (Staff Survey C120A)

... I rarely talk to official visitors.... we just don't know what the 'visitors' take away from the gaol. We also don't know what impact, good or bad, they have outside the gaol. Because, in general, officers know little about the 'visitors', they are treated with caution (Staff Survey C105A)

[Need] more interaction with [junior staff] – [I e]xperience higher volume of interest when performing [senior staff] duties - little when performing substantive roll (Staff Survey C092A)

Have only met [one overseer] in the 14 months being a correctional officer (Staff Survey C060A)

These complaints are strikingly similar to those made by Japanese staff on overseers' presence.<sup>40</sup> Staff in both jurisdictions and especially junior ranks felt that overseers were almost invisible to them and felt ignored and excluded when they did notice overseers visiting.

#### *Prisoner contact with overseers*

Both Whetnall and Putt noted that it took time to gain prisoners' trust:

...it probably took over a year, a good 18 months... it took a level of time to get a bit of trust going... o]nce they really 'sussed me out then they, you know, won't let me alone now (chuckle)... (Whetnall Interview, 2 November 2015)

They also described overseers informally altering the mechanism in order to meet prisoners' needs and build trust.<sup>41</sup> While the CMA 2007 had authorised unannounced visits in the 'police raid' oversight mode, 'at any reasonable time', all overseers had removed the randomness of raids, choosing to work in a hybrid of the 'police patrol' and 'fire alarm' modes.<sup>42</sup> They made their visits

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<sup>39</sup>  $n = 10$ .

<sup>40</sup> See, for example, Japanese Staff Surveys 65C93, 76C93, 59C92 and 70C94.

<sup>41</sup> Putt Interview (2015); Whetnall Interview (2015).

<sup>42</sup> See CMA 2007 s 58(2)(c). See generally Mathew D McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms' (1984) 28(1) *American Journal of Political Science* 165; Mathew D McCubbins, Roger G Noll and Barry R Weingast, 'Administrative Procedures as Instruments of Political Control' (1987) 3(2) *Journal of Law, Economics and Organization* 247.

predictable – to reassure prisoners, mollify staff and make their own schedules workable, but within those half day visits responded as flexibly as possible to real-time prisoner requests to see them:

Yeah [I went through each area of the prison] at least once a week. And every time they say to you 'When are you going to be back next Aunt? Tuesday?' 'Yeah, I'll be back next Tuesday'... and they wait for me. And when you don't go in, they go 'Where were you Aunt? You didn't come in yesterday' (chuckles) (Whetnall Interview, 2 November 2015)

The overseers sensed that ambush-style visits would be inconsistent with the dialogic nature of their role and would damage staff trust. We have seen that staff saw overseers as inconsiderate. However, Putt acknowledged that the prison was 'invariably short-staffed', with routine operations complicated by its impractical open campus design, expressing empathy:<sup>43</sup>

Putt: I'm going two mornings at the moment ... regularly ... I don't go out of my way to suddenly spring my presence upon people ... Lawson: Better to be 'part of the furniture'? Putt: Yes, definitely ... So last week I went two days different from what I do usually and everybody's just, "Oh God, it's her again" ... the officers and the detainees ... (Putt Interview, 18 June 2015)

A 2013 amendment formalized this modified visiting mode, removing the word 'inspect' from the OVA 2012 as suggesting 'unreasonably intrusive' and possibly 'discriminatory' visits.<sup>44</sup> It also assisted staff by doubling the time period in which the prison was obliged to tell overseers of prisoner requests to see them, which had been 12 hours.<sup>45</sup>

ACT prisoners were unimpressed. As in Japan, prisoners desired more contact. The 56% of the representative sample of 45 prisoners who also answered the open-ended question and raised access to overseers wanted even more visits, information, certainty and privacy ( $n = 25$ ):

We don't get to see the Official Visitor very often, less than 1-2 times a month, & when they do come through, it's sort of luck of the draw if we are in the unit or asleep, or otherwise occupied. Because we don't get told [they are] coming... We can't make sure we are in the area at the right time. [There should be] scheduled times for each area for detainees to refer too (Prisoner Survey D009A)

[They should have] photo[s] of official visitor in every block notice board plus a regular monthly visit to meet with detainees (Prisoner Survey D030A)

... [B]efore their arrivals, [prisoners] should fill and sign a form to see the [overseers], that way the [overseers] can go straight to them and know how many people need to see them.<sup>46</sup> Having access to the interview room would be ideal so [we] can feel safe... (Prisoner Survey D051A)

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<sup>43</sup> Putt Interview (2015).

<sup>44</sup> See Official Visitor Amendment Bill 2013 (ACT) Explanatory Statement, 2; Official Visitor Amendment Act 2013 (ACT).

<sup>45</sup> See OVA (2012) s 21(2).

<sup>46</sup> The prison had a prisoner request form for meeting with overseers called a 'Bluey'. Neither overseer had received a Bluey in 2016.

[The] "Detainee Handbook" - a 16-page overview... provides little detail of the procedures and processes have & we have to ascertain most information from other detainees as it appears that [they] vary between cell blocks (Prisoner Survey D007A)

... I think that there should be a newsletter [from the overseers] ever 3 month from them to [prisoners] to let us no what is going on (Prisoner Survey D047A)

Both overseers supported enhanced prisoner access. Putt noted that the informal nature of oversight visits meant that the environment for meetings with prisoners could be 'quite public' and approved of a 2017 change allowing Prisoner Delegates to email overseers directly;<sup>47</sup> Whetnall wanted her personal mobile number included among those that prisoners could call without charge.<sup>48</sup>

### **10.1.3 Performance: effective, disruptive or incompetent?**

Neither Putt nor Whetnall glossed over the difficulties of oversight. For example, they both articulated the risks for prisoners as whistleblowers and for overseers of prisoners being dishonest:

...I'm... conscious of the fact that I'm not in that jail day in day out... I have to be careful... because I don't want to cause trouble amongst detainees or put a particular [prisoner] at risk. I also have to be careful of the relationships between [prisoners] and staff... it's not straightforward... if [prisoners] do tell you something it may not necessarily be true (Putt Interview, 18 June 2015)

Putt felt that her years of research field work in central Australia had offered useful 'hardening', allowing her to be 'sympathetic and compassionate' towards prisoners while approaching staff without asserting that the complaints that prisoners had made were true. Whetnall felt the same need for discretion, but reported a steep learning curve:

I take everything to heart because I'm really passionate.... It makes me angry and when I dive into it, they haven't always told me the truth you know. So, I really have to pull things apart with the [prisoner] before you take it to the next level (Whetnall Interview, 2 November 2015)

Both Putt and Whetnall also acknowledged the pressures affecting the ACT prison: its impractical design; the prevalence of high-needs prisoners; chronic underfunding, understaffing and overcrowding; and relentless media criticism. Both filled gaps in services for prisoners that were clearly outside their role, especially Whetnall. Putt saw herself as a vital backchannel between prisoners and staff and even between staff departments, as a 'broker' or 'bit of grease'. She had found that most prisoner complaints were about 'housekeeping'<sup>49</sup> issues that simply needed better communication and had only used her power to investigate informally once.

Both also expressed appreciation for staff:

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<sup>47</sup> Putt Interview (2015); Putt Overseer Survey (2017).

<sup>48</sup> Whetnall Interview (2015).

<sup>49</sup> Putt Interview (2015).

[There was] one great terrific female um [Indigenous] liaison officer... she was really the best. And that sort of smoothed my way in many ways you know (Whetnall Interview, 2 November 2015)

[T]here's a Deputy Manager who's been very helpful, so I tend to... talk to him about things... There's a respect and trust there that I have in what he tells me, and I appreciate his honesty and willingness to acknowledge when things haven't gone right...

I don't think it's an easy environment... to work in. So, I'm also sympathetic to the perspective of the people who are responsible for running the prison and I'm also aware that I'm not sure how well I could do my job if they didn't respect me and my position... (Putt Interview, 18 June 2015)

### *Staff views*

Nonetheless, almost all of the staff who also answered the open-ended question raised the overseers' performance.<sup>50</sup> As in Japan, most took a dim view. However, in the ACT the few staff who mentioned the overseers' neutrality had positive views:

I was impressed with one of the visitors, who advocated for the prisoners but also showed an acute awareness of the level of manipulation detainees were using and was not deceived by how loose they were with the truth (Staff Survey C136A)

... [W]hen they attend my post within the centre... [a]ll contact has been on a positive note with them taking my views + responses on board (Staff Survey C090A)

Staff felt that overseers lacked in deference – even respect – towards officers. They felt that overseers neither acknowledged nor consulted them when in secure custodial areas. Some found the overseers to be 'quite rude and unapproachable' and 'not totally aware' that they were in a prison:<sup>51</sup>

Her behaviour towards correctional staff is not appreciated or professional. There is never any acknowledgment from her of her arrival into accommodation areas officers are ignored when approaching her (Staff Survey C125A)

As in Japan, rank mattered.<sup>52</sup> Junior staff voiced resentment at overseers consulting only senior staff:

I have not seen the [overseers] speak with any staff member other than management, they don't even say hello when you walk past them and when there in the blocks. They just walk in and say I need to see such 'n' such no hello... they just walk around until some-one wants to talk to them... [They are] rude, [they] couldn't give a shit about staff (Staff Survey C111A)

One officer saw overseers as doing little for prisoners and prisoners as avoiding them:

The work [the overseers] provide to [prisoners] is minimal. However, this is also due to the fact that [prisoners] do not approach them (Staff Survey C120A)

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<sup>50</sup> 86% ( $n = 18$ ).

<sup>51</sup> Staff Survey C135A.

<sup>52</sup> See, for example, Japanese Staff Surveys 65C93, 76C93, 56C92 and 70C94.

## *Prisoners' views*

Forty percent of prisoners who also answered the open-ended question raised overseers' performance ( $n = 18$ ). Two found the overseers diligent. One stated that 'on all occasions they have followed up on my concerns regardless the result'.<sup>53</sup> Yet overall sentiment was negative. Most found follow up to be poor, stating that they were 'never advised of outcomes',<sup>54</sup> or that it 'would be better if the [overseer] would... get back to [us] when [we] make complaints'.<sup>55</sup> Two felt that overseers lacked neutrality or were indistinguishable from staff.<sup>56</sup> These critiques mirrored those in Japan.<sup>57</sup>

While two prisoners pinpointed overseers' lack of resources,<sup>58</sup> others perceived the overseers as disengaged or inefficient. Prisoners assumed that the overseers' function was to solve prisoners' problems and when this did not happen, perceived them as incompetent:

Well maybe if they made more of an effort and came down to the yard and talk to a few of us then that's a start I've only seen [them] around christmas that's it (Prisoner Survey D019A)

Time management should really be the main priority. The official visitors just come to the wing/yard and wait for someone to approach them, and they won't have time for others... (Prisoner Survey D051A)

Maybe the [overseer] should chase up more on what we say (Prisoner Survey D045A)

It would be good if the [overseer]...may not be afraid to use their [expanded] authority to mediate better (Prisoner Survey D005A)

## **10.2 Soft Civil Prison Oversight in the ACT: Impact**

We have seen that participants in both jurisdictions had similar perceptions of the nature of the two civil oversight systems, despite the dramatic differences in design. As in Japan, the overseers in the ACT were optimistic, while many staff and prisoners expressed negative sentiments. This section examines participant views on the ACT system's impact – whether beneficial or unintended – and compares these findings with those in Japan.

### **10.2.1 Impact on staff and the prison**

ACT staff felt that oversight offered no benefits for them or the prison, while overseers saw many benefits. The views of both these cohorts on benefits were more negative than those in Japan. ACT

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<sup>53</sup> Prisoner Survey D032A.

<sup>54</sup> Prisoner Survey D043A. Some wanted a regular newsletter to let prisoners know what outcomes had been achieved Prisoner Survey D057A; see also Prisoner Survey D047A.

<sup>55</sup> Prisoner Survey D055A.

<sup>56</sup> Prisoner Surveys D034A and D001A

<sup>57</sup> See, for example, Japanese Prisoner Surveys 62P95, 69P54, 74P39, 74P18 and 71P50.

<sup>58</sup> Prisoner Survey D008A. In addition, Prisoner Survey D062A commented that an overseer was a '[s]weet lady' who 'really needs access to more resources in order to do a better job'.

staff reports of unintended consequences highlighted perceptions that overseers were physically intrusive and disrespectful; and that prisoners misused the mechanism. Overseers either did not perceive or dismissed these impacts. Prisoners' views were equivocal, as in Japan.

*Benefits for staff: none, many or equivocal?*

Just as in Japan, overseers were optimistic about benefits for the prison and staff - which staff themselves ruled out, while prisoners were non-committal. However, the ACT staff and overseer responses were generally more sceptical than those of Japanese staff and overseers. This can be observed for staff in the mean values on scales in Tables H and Table J, as well as through a comparison of the written comments made by these participants cohorts in both jurisdictions. ACT participants tended to give frank, negative assessments without making softening statements.

*Staff views: no benefits*

ACT staff responses to the *Supports the Prison* and the *Supports Corrections Officers* scales were clearly negative, with means far more negative than for Japanese staff, as shown in Table H.<sup>59</sup>

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<sup>59</sup> These differences between the ACT staff results and those in Japan were large and reached statistical significance.



**Table H** Japanese and ACT staff responses to scales - benefits & unintended consequences

| Scale                                   |                                                              | N         | M    | SD  | N              | M    | SD  | 2-tailed t-test                           |
|-----------------------------------------|--------------------------------------------------------------|-----------|------|-----|----------------|------|-----|-------------------------------------------|
|                                         |                                                              | ACT Staff |      |     | Japanese Staff |      |     |                                           |
| Benefits for<br>- Prison                | <i>Supports the Prison</i> <sup>60</sup>                     | 80        | 2.66 | .76 | 855            | 3.58 | .71 | $t(933) = -10.352, p < .001$              |
| - Staff                                 | <i>Supports Corrections Officers</i> <sup>61</sup>           | 76        | 2.14 | .81 | 851            | 2.84 | .82 | $t(925) = 7.211, p < .001$                |
| - Public                                |                                                              |           |      |     |                |      |     |                                           |
| Unintended<br>Consequences<br>for Staff | <i>Oversight Workload</i> <sup>62</sup>                      | 48        | 3.10 | .54 | 454            | 3.37 | .66 | $t(500) = 3.219, p < .01$                 |
|                                         | <i>Overseer Intrusion</i> <sup>63</sup>                      | 81        | 3.24 | .54 | 861            | 2.63 | .89 | $t(940) = 9.073, p < .001$                |
|                                         | <i>Overseer Bias &amp; Respect</i> <sup>64</sup>             | 75        | 3.57 | .58 | 852            | 3.10 | .54 | $t(925) = 6.731, p < .001$                |
| Benefits for<br>Prisoners               | <i>Informs Public &amp; Includes Prisoners</i> <sup>65</sup> | 78        | 2.79 | .72 | 849            | 2.89 | .78 | $t(925) = -1.165, \text{not significant}$ |

<sup>60</sup> The Cronbach's alpha value for the *Supports the Prison* scale was good in the ACT data set ( $\alpha = .840$ ), indicating internal consistency. The four items used to develop this scale asked if oversight activities were 'effective in': 'improving the way the prison is run'; 'helping prisons gain public support'; 'helping the way the prison is run reflect community common sense' or 'backing up legitimate positions taken by the prison side'. The mean values were calculated from a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so'. In Chapter 7 this scale is the *Supports Prisons* scale, as Japan has multiple prisons.

<sup>61</sup> The Cronbach's alpha value for the *Supports Corrections Officers* scale was good in the ACT data set ( $\alpha = .857$ ), indicating internal consistency. The four items used to develop this scale asked if oversight activities were 'effective in': 'raising public awareness of the reality of corrections officers' working conditions'; 'raising corrections officer morale'; 'striving to increase efficiency and reduce the workload of corrections officers'; and 'valuable from corrections officers' perspective'. The mean values were calculated from a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so'.

<sup>62</sup> The Cronbach's alpha value for the *Oversight Workload* scale was good in the ACT data set ( $\alpha = .873$ ), indicating internal consistency. The six items used to develop this scale asked participants about the workload associated with: 'inspections inside the secure custodial area'; 'prisoner letters to overseers'; 'prisoner interviews with overseers'; 'notifying prisoners of overseer activities' and 'written opinions overseers send to wardens', as well as for the 'overall workload associated with overseers' activities'. The mean values were calculated from a scale of 1 to 5 with, with 1 being 'None / Not enough' and 5 being 'Too much'.

<sup>63</sup> The Cronbach's alpha value for the *Overseer Intrusion* scale was adequate in the ACT data set ( $\alpha = .727$ ), indicating internal consistency. The four items used to develop this scale asked about whether overseers gave opinions 'on matters': 'exceeding the prison's physical or human resources' or 'outside the prison's discretion'; 'that would impede discipline and order' and 'that would differ from those of victims and the public'. The mean values were calculated from a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so'.

<sup>64</sup> The Cronbach's alpha value for the *Overseer Bias & Respect* scale in the ACT data was adequate ( $\alpha = .738$ ), indicating internal consistency. The seven items used to develop this scale asked participants whether overseers 'give more weight to what [prisoners] say than to what corrections officers say'; 'give more weight to improving [prisoner] treatment than to corrections officers' working conditions'; 'should have more respect for the views of the prison'; 'should have more respect for the prison (including corrections officers activities and expertise)'; 'should take initiative to observe for themselves how [prisoners] are really treated (e.g. at meals, in medical appointments, in segregation) to accurately grasp actual conditions in the prison'; whether 'the prison side respects the overseers' views' (reversed); and 'the overseers respect the prison (including corrections officers' activities and expertise)' (reversed). The items in this scale used a scale of 1 to 5 with, with 1 being 'Don't think so at all' and 5 being 'Definitely think so'.

<sup>65</sup> The Cronbach's alpha value for the *Informs Public & Includes Prisoners* scale in the ACT data set was adequate ( $\alpha = .696$ ), indicating internal consistency. The three items used to develop this scale asked whether the overseers' activities were 'effective in raising public awareness of the reality of how [prisoners] are treated'; 'in effect help [prisoners] too to have a say in the running of prison'; and 'effective in letting the

**Table I** Japanese and ACT prisoner responses to scales - benefits for prisoners

| Scale                  |                                            | <i>N</i>      | <i>M</i> | <i>SD</i> | <i>N</i>           | <i>M</i> | <i>SD</i> | 2-tailed <i>t</i> -test                   |
|------------------------|--------------------------------------------|---------------|----------|-----------|--------------------|----------|-----------|-------------------------------------------|
|                        |                                            | ACT Prisoners |          |           | Japanese Prisoners |          |           |                                           |
| Benefits for Prisoners | <i>Protects Human Rights</i> <sup>66</sup> | 58            | 3.09     | .81       | 1327               | 2.95     | .83       | <i>t</i> (1383) = 1.287, not significant  |
|                        | <i>Benefits Prisoners</i> <sup>67</sup>    | 57            | 2.75     | .84       | 1337               | 2.92     | .84       | <i>t</i> (1392) = -1.496, not significant |

Only one of the representative sample of 21 staff who also answered the open-ended question raised whether the system supported the prison. He wrote ‘Certainly have benefits to the prison’.<sup>68</sup> No officer mentioned whether it supported them as staff.

ACT staff responses to an individual question asking if the system was ‘valuable from the perspective of the public as a whole’ were somewhat negative, as shown in Table J, which also shows that staff responses in Japan were somewhat positive.<sup>69</sup>

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public know about [prisoners’] concerns’. \*As in Japan, when the ACT staff answered concerning ‘the reality of how [prisoners] are treated’ they likely answered on the basis that the question asked if the public had become more aware of how *well* prisoners were treated. The items in this scale used a scale of 1 to 5, with 1 being ‘Don’t think so at all’ and 5 being ‘Definitely think so’.

<sup>66</sup> The Cronbach’s alpha value for the *Protects Human Rights* scale was adequate in the ACT data set ( $\alpha = .785$ ), indicating internal consistency. The four items used to develop this *Protects Human Rights* scale asked whether the oversight system had ‘help[ed] prevent human rights abuses’, ‘led to improvements in the running of the prison’, was ‘valuable for prisoners’ and gave ‘more weight to the views of prisoners or to corrections officers’. All four items used a scale of 1 to 5: for the first three items 1 was ‘Don’t think so at all’ and 5 was ‘Definitely think so’; however, for the final item, 1 was ‘Strongly favours corrections officers’ and 5 was ‘Strongly favours prisoners’.

<sup>67</sup> The Cronbach’s alpha value for the *Benefits Prisoners* scale was adequate in the ACT data set ( $\alpha = .696$ ) indicating internal consistency. The three items used to develop this scale asked whether the oversight system was ‘useful to inform the public regarding how prisoners are really treated’, ‘used by a wide range of prisoners, not just a particular minority’ and ‘allows prisoners too to participate in the running of the prison’. All three items used a scale of 1 to 5 with 1 being ‘Don’t think so at all’ and 5 being ‘Definitely think so’.

<sup>68</sup> Staff Survey C047A.

<sup>69</sup> The difference between the ACT results and those in Japan was substantial and reached statistical significance.

**Table J** Japanese and ACT staff responses to individual questions - benefits & unintended consequences

| Question                                                                                               | N  | M    | SD   | N              | M    | SD   | 2-tailed t-test                          |
|--------------------------------------------------------------------------------------------------------|----|------|------|----------------|------|------|------------------------------------------|
| ACT Staff                                                                                              |    |      |      | Japanese Staff |      |      |                                          |
| Benefits for prison / public / staff                                                                   |    |      |      |                |      |      |                                          |
| <i>‘valuable from the perspective of the public as a whole’</i>                                        | 77 | 2.77 | .90  | 857            | 3.31 | .99  | <i>t</i> (932) = -5.000, <i>p</i> < .001 |
| Unintended consequences for prison / public / staff                                                    |    |      |      |                |      |      |                                          |
| <i>‘some prisoners who have interviews with overseers are vexatious’</i>                               | 78 | 3.99 | .933 | 709            | 4.51 | .718 | <i>t</i> (785) = -4.769, <i>p</i> < .001 |
| <i>‘the oversight system makes prisoners feel frustrated or inappropriately entitled’<sup>70</sup></i> | 69 | 3.19 | .959 | 748            | 2.78 | 1.06 | <i>t</i> (815) = 3.463, <i>p</i> < .001  |
| <i>‘the oversight system is misused by prisoners to hamstring corrections officers’</i>                | 71 | 3.73 | .999 | 761            | 2.91 | 1.17 | <i>t</i> (830) = 6.512, <i>p</i> < .001  |
| Benefits for prisoners                                                                                 |    |      |      |                |      |      |                                          |
| <i>‘effective in raising public awareness of how prisoners are really treated’</i>                     | 70 | 2.54 | 1.03 | 777            | 3.38 | 1.06 | <i>t</i> (845) = -6.515, <i>p</i> < .001 |
| <i>‘effective in helping prisoners too to have a say in the running of the prison’</i>                 | 70 | 2.86 | 1.01 | 738            | 2.55 | 1.03 | <i>t</i> (806) = 2.450, <i>p</i> < .05   |
| <i>‘effective in letting the public know about prisoners’ concerns’</i>                                | 60 | 2.83 | 1.06 | 744            | 2.67 | 1.00 | <i>t</i> (802) = 1.129, not significant  |
| <i>‘prisoners who have interviews sometimes feel calmer’</i>                                           | 76 | 3.38 | .993 | 635            | 2.69 | .99  | <i>t</i> (709) = 5.877, <i>p</i> < .001  |
| <i>‘effective in calming prisoners’ emotions’</i>                                                      | 75 | 3.05 | 1.06 | 751            | 3.11 | .96  | <i>t</i> (824) = -0.471, not significant |
| <i>‘effective in providing relief for prisoners whose human rights have been abused’</i>               | 70 | 3.06 | .96  | 724            | 3.21 | .99  | <i>t</i> (792) = -1.245, not significant |
| <i>‘valuable in protecting prisoners’ human or other rights and interests’</i>                         | 81 | 2.69 | 1.15 | 856            | 3.49 | .94  | <i>t</i> (935) = 6.086, <i>p</i> < .001  |
| <i>‘valuable from prisoners’ perspective’</i>                                                          | 81 | 3.21 | 1.05 | 858            | 3.67 | .82  | <i>t</i> (937) = 3.852, <i>p</i> < .001  |

<sup>70</sup> In the Japanese surveys, the terms 'frustrated' and 'inappropriately entitled' were separated by the particle 'ya'. This meant they were examples in an incomplete list. Accordingly, they did not indicate competing concepts, but pointed to a single, if silent, subject – whether oversight had a counterproductive i.e. agitating effect on prisoners. This single common concept was stated expressly in the surveys for staff and overseers in the ACT. See Q. 6(14) in Appendices B2, B3, B6 and B7.

**Table K** Japanese and ACT prisoner responses to individual questions - benefits

| Question                                                                                   | N             | M    | SD   | N                  | M    | SD   | 2-tailed t-test                       |
|--------------------------------------------------------------------------------------------|---------------|------|------|--------------------|------|------|---------------------------------------|
|                                                                                            | ACT Prisoners |      |      | Japanese Prisoners |      |      |                                       |
| Benefits for public / staff                                                                |               |      |      |                    |      |      |                                       |
| 'valuable for corrections officers'                                                        | 45            | 3.11 | 1.39 | 1451               | 3.24 | 1.27 | $t(1494) = -0.619$<br>not significant |
| 'useful... to inform the public regarding corrections officers' actual working conditions' | 38            | 2.79 | 1.14 | 895                | 3.09 | 1.36 | $t(931) = -1.575$<br>not significant  |
| 'valuable for the public'                                                                  | 42            | 3.17 | 1.38 | 891                | 3.03 | 1.33 | $t(931) = 0.644$<br>not significant   |

None of the representative sample of ACT staff who also answered the open-ended question raised whether the mechanism had symbolic value. In contrast, in Japan, over 20% of staff who also answered open-ended question mentioned this issue, with sentiment clearly positive.

#### *Overseer views: many benefits*

The ACT overseers were somewhat more positive than ACT staff about prison and staff benefits.<sup>71</sup> However, this overseer optimism was more muted than in Japan. This was predictable, as ACT overseers spend far more time inside the prison and with prisoners and know more of the realities of prison operations, including staff working conditions.

Focusing on the four questions comprising the *Supports the Prison* scale, both overseers agreed that their activities were 'effective in improving the way the prison is run'. Putt confirmed this view at interview, citing a senior officer's response to her attending Delegates Meetings:

...he, I know, appreciates me being there. Not that I'm an active participant... but I'm like the... [chuckle] making everybody behaved better [laughter]. It feels like I'm a bit of the schoolmarm (Putt Interview, 18 June 2015)

One overseer felt that their activities 'were effective in helping the prison gain public support' and 'helping the way the prison is run reflect community common sense'. The other felt that their activities were 'effective in backing up legitimate positions taken by the prison side'. Both were neutral otherwise.

Turning the four questions comprising the *Supports Corrections Officers* scale, both overseers agreed that their activities were 'valuable from corrections officers' perspective'. One felt that they were

<sup>71</sup> The low number of overseers in the ACT meant it was not possible to test for statistical significance when their views differed from those of ACT staff, Japanese overseers or staff.

‘effective in raising corrections officers’ morale’. The other saw the system as ‘valuable from the general public’s perspective’. They were otherwise neutral.

*Prisoner views: equivocal*

ACT prisoners were, as a whole, ambivalent regarding benefits for staff or the public – which would indirectly benefit prisons. This mirrored Japanese prisoners’ views.<sup>72</sup> However, one prisoner believed – and another hoped – that the overseers held the prison accountable, including to the public:

I think the [oversight mechanism] is a great thing for people in [the prison] and in the communities (Prisoner D047A)

I hope [the overseers being in the prison, doing what they do, is important to the people of the ACT] (Prisoner Survey D039A)

*Unintended impacts: intrusiveness, misuse and disrespect*

As in Japan, the ACT staff and overseer data provided strong evidence of unintended consequences including increased work volume. However, when considered as a whole, ACT staff found the mechanism intrusive, while Japanese staff had not. Perceptions of a lack of overseer respect and prisoner misuse were particularly troubling for ACT staff.

*Workplace impacts: heavier workloads and physical intrusiveness*

These ACT results on workload burdens reflect the dramatic design differences between the two mechanisms. ACT staff felt the system increased their workloads, but not to the excessive level reported by Japanese staff. They were, however, critical of the system’s intrusiveness in their workplace. As the *Oversight Workload* and *Overseer Intrusion* scale results show,<sup>73</sup> ACT staff as a whole expressed weak agreement with the proposition that their oversight workload was excessive. Japanese staff had expressed slightly firmer agreement.<sup>74</sup> However, ACT staff as a whole felt that overseers were physically intrusive, while Japanese staff had not.<sup>75</sup> As we saw in Chapter 9, negative Japanese staff views on intrusiveness concerned procedural intrusiveness and were concentrated in those who had interacted with the mechanism.

Japan’s oversight system generates constant administrative paperwork, so the strength of the Japanese staff view that their oversight-related workload was excessive is understandable. Both the

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<sup>72</sup> See Table K Japanese and ACT prisoner responses to individual questions - benefits. There were no significant differences between the jurisdictions on any measure.

<sup>73</sup> See Table H Japanese and ACT staff responses to scales - benefits & unintended consequences.

<sup>74</sup> See Table H Japanese and ACT staff responses to scales - benefits & unintended consequences. The difference was observable and reached statistical significance.

<sup>75</sup> See Table H Japanese and ACT staff responses to scales - benefits & unintended consequences. The difference was large and reached statistical significance.

view of ACT staff as a whole (that overseers are intrusive) and the view of Japanese staff as a whole (that they were not) were also foreseeable. This is due to the fact that ACT overseers enter custodial areas often, at will, while Japan's oversight design minimizes physical intrusion, as Chapter 7 showed.

One ACT officer felt that overseers' procedural intrusion into prison problem-solving processes 'undermine[d]' staff authority.<sup>76</sup> However, when most ACT officers mentioned overseer intrusiveness their comments concerned physical intrusion into secure custodial areas, which staff saw as interfering with staff authority.<sup>77</sup> We saw above that ACT staff with strong negative feelings about the overseers' presence or performance often framed this in terms of excessive autonomy. Two felt overseers were a security threat, just as some Japanese staff had – as we saw in Chapter 9:<sup>78</sup>

In the past I have had [overseers] come into my area and not let anyone know that they were there. This is/can a security threat (Staff Survey C136A)

...Information shared by [overseers] needs to be regulated – possible sharing of intel alerts and other [confidential] information in the past (Staff Survey C069A)

None of the three overseers interviewed felt that the mechanism created excessive staff workloads. However, Putt noted a schism between views of 'senior policy people' who 'would be very supportive of having Official Visitors' and those of the prison leadership:

I suspect some of the senior management... [would] just say [the system's] a pain in the arse. I have the impression that [there's a view that] they're way too over-monitored.... And I think [they] actually have a point there (Putt Interview, 18 June 2015)

### *Psychological impacts: misuse and disrespect*

ACT staff experienced two of the three psychological impacts reported by Japanese staff – perceptions of prisoner misuse and overseer subversion. In the ACT, the staff focus was on perceptions of overseer disrespect. Overseers agreed that prisoner misuse was problematic but did not see themselves as disrespectful. No actor cohort felt that the prison obstructed the mechanism.

Turning firstly to prisoner misuse, ACT staff as a whole agreed with all three individual questions shown in Table J on prisoner misuse of the mechanism. They felt strongly that: some prisoners who spoke with overseers were vexatious;<sup>79</sup> the system let prisoners 'hamstring' staff; and it gave

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<sup>76</sup> Staff Survey C103A.

<sup>77</sup>  $n = 16$ .

<sup>78</sup> See Japanese Staff Surveys 83C86 and 84C85.

<sup>79</sup> In this study 'vexatious' (*kōsosei* in Japanese) refers to a staff and overseer perspective concerning prisoners who complain on multiple occasions using internal and external complaint mechanisms, whether formal or informal, in some cases concerning the same set of facts.

prisoners an ‘inappropriate sense of entitlement’. Japanese staff had agreed strongly with only the first question.<sup>80</sup>

One ACT corrections officer explained the staff objection to prisoners misusing the oversight system:

... It appears very common inside the AMC that a detainee will raise a concern or issue with yard officers (staff on the floor), the issue will be resolved. If the detainee does not like the outcome (even when the outcome is perfectly reasonable) they feel entitled and demand to see AMC official managers OR complain to bodys like visitors which result in complaints being delt with on multiple levels... (Staff Survey C103A)

The strongly negative ACT staff sentiment about prisoner misuse revealed a keen sense of injustice at prisoners’ easy access to a relatively powerful soft oversight system that staff saw as illegitimate. These sentiments map to the ‘resistance’ motivational posture.<sup>81</sup> Staff challenged the mechanism’s validity, seeing it as unfair. Their comments signal that they were unlikely to feel morally obliged to cooperate. The deeply negative staff sentiment in Japan on prisoner misuse that we saw in Chapter 9 – while narrower in scope – is notable in this context, showing that even workers subjected to a relatively inaccessible and weak mechanism can still see it as unjust.

We saw above that Putt and Whetnall were both aware of prisoner misuse, including through fabricated complaints. While the overseers felt that they differentiated correctly between misuse and genuine prisoner concerns in practice, it is clear that staff disagreed with this self-assessment.<sup>82</sup>

This brings us to the psychological impact on staff related to their perception of overseers as lacking respect. The *Overseer Bias & Respect* scale shows that ACT staff felt that overseers lacked neutrality and respectfulness. In contrast, negative views had been marginal among Japanese staff.<sup>83</sup>

Responses by the representative sample of 21 staff who also answered the open-ended question show that both ACT staff and better-informed Japanese staff felt that overseers were insufficiently respectful towards staff. In the ACT, staff comments matched the sentiments seen in the scale. One officer wrote just three terse words: ‘Respect corrections officers’.<sup>84</sup> Another felt that overseers should make more effort to see complaints in light of the surrounding circumstances – of which staff would be aware:

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<sup>80</sup> See Table J Japanese and ACT staff responses to individual questions - benefits. The substantial differences between the two jurisdictions reached statistical significance on all three measures. A fourth question was asked in Japan regarding the impact on prisoners of sending a letter to overseers.

<sup>81</sup> Valerie Braithwaite, ‘Defiance and Motivational Postures’ in David Weisburd and Gerben Bruinsma (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer Science & Business Media 2014) 916.

<sup>82</sup> See Table F Japan: Staff and overseer responses to individual questions - prisoner for example, Japanese Staff Survey 94C99.

<sup>83</sup> See Table H Japanese and ACT staff responses to scales - benefits & unintended consequences The difference was substantial and reached statistical significance.

<sup>84</sup> Staff Survey C122A.

...The [overseers] effectiveness would be increased by making themselves aware of the context of the issues at hand (Staff Survey C093A)

In Japan, those among the representative sample of staff who also answered the open-ended question who had interacted with overseers had strongly negative views on this issue. The marginal overall *Overseer Bias & Respect* scale results in Japan had initially obscured these views.<sup>85</sup> The much more negative view of ACT staff on this *Overseer Bias & Respect* scale likely reflects their greater exposure to overseers and the fact that ACT staff felt free to express negative views. In other words, the marginal agreement of Japanese staff as a whole is likely to reflect the general lack of interaction between Japanese overseers and staff that we noted in Chapter 7 as well as the Japanese tendency to adopt the cautious Middle Response Style when answering opinion questions, which is discussed in Chapter 6.

As we saw above, the ACT overseer participants expressed respect for staff and openly acknowledged the difficulty of corrections work. They believed that they showed respect and empathy in their work as overseers and received the same in return from staff. Yet staff had strong reservations about them. It is worth recalling here that the ACT oversight system was conceived as prisoner-facing, not staff-facing. Its design minimized input from and interaction with staff. We also saw above that overseers' selection criteria positioned them as people who helped prisoners complain about standards violations, not as people who helped staff comply with standards. Overseers had allocated their time accordingly.

The overseers focused exclusively on prisoners' needs – to the exclusion of staff needs. Yet it was clear even from the overseer participants' data that serious problems like overcrowding had a heavy negative impact on staff, as well as prisoners. It caused heavy workloads, exacerbated risks and reduced job satisfaction. Putt mentioned an initial vision that ACT staff would serve as more than guards. They were to be 'case officers', given rewarding roles that involved them developing individual rapport with a small number of prisoners, but this initiative had been stillborn:

It doesn't happen. Because again you got this problem with overcrowding. The place is... run just to get it through the day really quite frankly... [An officer] is just a gate opener... just sitting there, keeping an eye on things to make sure [there are no] nasty assaults (Putt Interview, 18 June 2015)

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<sup>85</sup> See Table H Japanese and ACT staff responses to scales - benefits & unintended consequences



### 10.2.2 Impact on prisoners

#### *Benefits for prisoners: narrow, broad or equivocal at best?*

As a whole, ACT staff expressed weak support for the system having abstract or symbolic value for prisoners and a calming effect in some cases. Yet pastoral care for prisoners was not a stated aim and the overseers lacked counselling training. Apart from these abstract or peripheral benefits, ACT staff as a whole were neutral or negative concerning prisoner benefits. Accordingly, it is fair to say that their views were more negative concerning benefits than the views of Japanese staff.

In sharp contrast, the ACT overseers were broadly optimistic, agreeing with most of the individual questions on benefits for prisoners, especially those concerning calming effects, human rights protections and symbolic value. While these views echo the pervasive optimism of Japanese overseers that we saw in Chapter 8, the ACT overseers' interview data shows that their idealism was actually somewhat tempered. This makes sense. The striking 'information asymmetry' that leaves Japanese overseers with little knowledge of prison operations is less acute in the ACT mechanism.<sup>86</sup>

ACT prisoners expressed belief in the system's symbolic potential to provide advocacy, accountability, rights protection, comfort and problem-solving benefits for prisoners. However, only two thought that any of these benefits had eventuated. Overall sentiment was negative, as in Japan.

#### *Staff views: narrow benefits*

The *Informs Public and Includes Prisoners* scale result shows slightly negative ACT staff views, mirroring those of Japanese staff.<sup>87</sup> Turning to the eight individual questions on prisoner benefits,<sup>88</sup> as entire cohorts, staff in both places had similarly negative views on oversight informing the public about prisoners' worries and similarly ambivalent views on calming or human rights benefits. Where there were significant differences in views, Japanese staff were more positive – with one exception. As a whole cohort, ACT staff felt that speaking with overseers calmed some prisoners.<sup>89</sup> However,

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<sup>86</sup> See Encyclopedia Britannica, 'George A Akerlof – American economist' (*Encyclopedia Britannica*, 2023) [www.britannica.com/biography/George-Akerlof#ref749262](https://www.britannica.com/biography/George-Akerlof#ref749262) accessed 2 April 2023.

<sup>87</sup> See Table H. It was not possible to develop the *Comforts Prisoners* scale in the ACT, because when the surveys were localized, a question about the impact on prisoners of writing letters to overseers that had been asked in Japan was not asked in the ACT.

<sup>88</sup> See Table J Japanese and ACT staff responses to individual questions - benefits & unintended consequences. These eight questions are five of the six individual questions used to build the two prisoner benefits scales, with three individual survey questions on potential benefits for prisoners that were not included in any scale. All eight questions adopted a scale of 1 to 5, with 1 being 'Don't think so at all' and 5 being 'Definitely think so'.

<sup>89</sup> See Table J Japanese and ACT staff responses to individual questions - benefits & unintended consequences. The differences between the Japanese and ACT staff views on these potential benefits reached statistical significance and ranged from substantial to large.

none of the representative sample of ACT staff who also answered the open-ended question mentioned any benefits for prisoners.

#### *Overseer views: broad benefits*

ACT overseers were strikingly optimistic about benefits for prisoners, as overseers had been in Japan.<sup>90</sup> Both agreed with five individual questions on this topic: two on whether the system had calming effects for prisoners; two on whether it had protected prisoners' human rights; and one on whether it was symbolically 'valuable' for prisoners.<sup>91</sup> Their views diverged otherwise.

We saw in Chapter 8 that confirmation bias may have bolstered Japanese overseers' optimism concerning the benefits of civil prison oversight.<sup>92</sup> It is possible that this bias may have also influenced ACT overseers to some degree, given that we have seen that the ACT overseers were much more optimistic about benefits than the better-informed staff and prisoners. Yet at the same time, the ACT overseers were not naïve:

It's very hard not to get despondent. It is a bloody depressing environment, and I don't know how some people who've worked [there] for a very long time don't... get infected by the pessimism and... negativity that so often characterises people who work with criminals (Putt Interview, 18 Jun 2015)

Nor did they demonise staff:

They're extremely friendly... We all run around with these expectations and stereotypes.... And it's quite the opposite. I'd say if there were 3 or 400 staff in there.... I've probably met three arseholes in my time.... I went in with the belief that it was probably half of them (Whetnall Interview, 2 November 2015)

Some of the officers are, I think, rude and hostile.... [t]o me personally. But the vast majority are not (Putt Interview, 18 June 2015)

Overseers also felt that the reasons for substandard conditions or treatment often lay beyond staff. Both highlighted the ACT prison's chronic budgetary, resourcing, staffing and overcrowding difficulties:

...so often what is stopping things being better is the big stuff, it's the overcrowding, the lack of staff (Putt Interview, 18 Jun 2015)

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<sup>90</sup> See Table C Japan: Overseer and staff responses to individual questions - benefits for prisoners. This part reports on the two serving ACT overseers' responses to the eight individual questions on benefits for prisoners, which were also answered by staff.

<sup>91</sup> Table C Japan: Overseer and staff responses to individual questions - benefits for prisoners includes these five questions.

<sup>92</sup> See Encyclopedia Britannica, 'Dictionary - confirmation bias' (*The Britannica Dictionary*, 2023) [www.britannica.com/science/confirmation-bias](https://www.britannica.com/science/confirmation-bias) accessed 2 April 2023.

*Prisoner views: equivocal at best*

Despite the stark design differences between the two oversight systems, the results of the *Protects Human Rights* and *Benefits Prisoners* scales show that ACT prisoners' views on prisoner benefits were neutral at best, as in the case of Japanese prisoners.<sup>93</sup> ACT prisoners, as a whole, did not feel that oversight benefitted prisoners and were equivocal as to any human rights protections.

Forty percent of the representative sample of 45 prisoners who also answered the open-ended question raised the *prospect* of the oversight system benefitting prisoners in various ways.<sup>94</sup> These were that the system might: solve problems; advocate for prisoners; give them a voice; protect their human rights; offer counsel or comfort; or hold the prison accountable, including to the public. Some believed in the symbolic potential of the system to provide a desired benefit, but almost none reported experiencing benefits. Just two of 15 who raised whether the system had solved problems had mildly positive views:

[There was a] positive change after talk with [an overseer] sometimes (Prisoner Survey D032A)

It is good if you had a problem we the system (Prisoner Survey D006A)

However, most reported that the mechanism failed to solve problems:

... I would have welcomed the [overseer] acting as a mediator... The [overseer] was made aware [of my problem] but seemed powerless to help in (any) way (Prisoner Survey D005A)

... There is a belief amongst inmates that [the] human rights [commission], ombudsman, and [overseer] do nothing. Inmates have had bad experiences with being stuffed around... (Prisoner Survey D042A)

The same prisoner acknowledged that the system theoretically held staff accountable:

I think it is important to have [the overseers] and human right's figures in the jail, if not just to keep the bastards honest (Prisoner Survey D042A)

A few addressed the issue of advocacy or 'voice' ( $n = 7$ ), but again articulated real-life limitations:

To just even be heard is okay and to have people be aware of certain things, I think it is quite meaningful. It enables detainees to have fair go / chance. LGBTQI++ rights need to be looked after. I personally think that our rights don't matter (Prisoner Survey D051A)

100% does not [mean prisoners get a say in how the prison is run]. I feel it is a great idea to have the official visitor (Prisoner Survey D032A)

... have never had help or a respectable outcome from any of them complaints. Things need to change. We [prisoners] need a voice... (Prisoner Survey D034A)

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<sup>93</sup> See Table I Japanese and ACT prisoner responses to scales - benefits for prisoners

<sup>94</sup>  $n = 18$ .

One prisoner felt that overseers offered comfort or counsel, noting that they 'have often mentioned being sounding boards'.<sup>95</sup> However, others disagreed or felt this did not translate into action:

If they actually listened to our problems and do something about our issues, not just note it down and walk away pretending to care (Prisoner Survey D004A)

They do listen to you, but nothing changes in the place. They sweep the thruth under the carpet, this is what go's on in [this prison] (Prisoner Survey D024A)

#### *Unintended impacts: disillusionment*

As in Japan, none of the representative sample of ACT staff who also answered the open-ended question considered whether the mechanism had psychological impacts on prisoners. However, as we saw above, one ACT overseer had considered the prospect of prisoner distrust due to the risk of retaliation if they used it.<sup>96</sup> In Japanese prisons, which retain a disciplinarian ethos, distrust had been the main psychological impact seen in prisoners' written comments, expressed as reluctance, vulnerability or fear. Nonetheless, just two of the representative sample of 45 ACT prisoners who also answered the open-ended question voiced distrust:

Most inmates just see them as officers. Interacting more will help inmates trust them more (Prisoner Survey D001A)

Further, just three ACT prisoners felt that defiant staff attitudes frustrated the mechanism. We saw in Chapter 9 that this view had been common among Japanese prisoners:

If the official visitor actually had the means or authority to actually help. Officers laugh when someone asked to see them. It's known that they have no jurisdiction or means... (Prisoner Survey D034A)

All three ACT overseer participants saw their work as preventing the other type of psychological impact that affected Japanese prisoners: disillusionment. They felt that they resolved small issues and helped prisoners understand prison decisions:

... most of the matters that are brought to me are housekeeping which may seem trivial to an outsider but it's actually very important for the people inside... 'The ping pong table's broken.'... 'Why has the cost of meat gone up by 10% in our buy out?' 'Why can't I get to see the dentist?' So, I see the role... as more an important line of communication (Putt Interview, 18 June 2015)

Boland: ...often it would be about... going back [to the prisoner], saying "You know what, this is why you can't have access to this." ...[O]ften there was a very clear operational reason why somebody couldn't... Lawson: It sounds like a really valuable internal stakeholder communication role? Boland: Yes, absolutely (Boland Interview, 18 June 2015)

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<sup>95</sup> Prisoner Survey D005A.

<sup>96</sup> Putt Interview (2015).

Nonetheless, the dominant psychological impact seen in the representative sample of ACT prisoners who also answered the open-ended question was still disillusionment, with 38% commenting that the system was opaque, unresponsive, or impotent ( $n = 17$ ):

I've been in [this prison] for 11 months, I don't know what they look like or ever had chance to introduce myself to [the overseers]... (Prisoner Survey D030A)

We are never advised of outcomes or when the [overseer] is coming and if a complaint/suggestion is made its usually... pointless as well as frustrating... (Prisoner Survey D043A)

Boland reported the same disillusionment in prisoners as early as 2010:

...the view of many of them was that 'You do nothing. You can't achieve anything for me' (Boland Interview, 18 June 2015)

### 10.2.3 Impact on overseers

While the ACT overseers gained various benefits from their role, they also experienced unintended impacts that had gone unaddressed.

#### *Benefits for overseers: status, income and fulfillment*

The ACT overseer role offers distinct benefits for personnel. Unlike in Japan where overseer appointments can be quasi-involuntary, being an Official Visitor in the ACT is a viable part-time job. It offers a steady income and the ability to directly influence corrections policy and practice, as well as respect in criminal justice circles. The overseers also reported personal satisfaction from contributing to society. Putt described her role as 'very important' for 'public accountability', while for Whetnall it was the final chapter in a lifetime of service to and advocacy for the Indigenous community. She modelled her contribution on the work done by pioneering Indigenous social worker and prison visitor, Mum Shirl (1921-1998) – whom she saw as a 'legend' who 'paved the way'.<sup>97</sup>

#### *Unintended impacts: overwork and stress*

Nonetheless, the ACT overseers also bore heavy workloads and experienced psychological impacts for which they received no support. As we have seen, all three participants had felt called to the role through a sense of personal mission and had poured themselves into their work, undertaking unpaid work outside hours. Although they were remunerated on a part-time basis, it was altruism and voluntarism that were central to their understanding of the mechanism. This heightened the risk that

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<sup>97</sup> Whetnall Interview (2015). See generally Shirley Perry with Bobbi Sykes, *Mum Shirl: An Autobiography* (Heinemann Publishers Australia 1981).

they would suffer the workload and psychological impacts experienced by penal voluntary sector workers described by Quinn, Tomczak and Buck in 2022.<sup>98</sup>

### *Workload burdens: overwork*

Turning firstly to workload burdens, both overseers reported an ever-increasing volume of work as overcrowding worsened, without additional oversight personnel.<sup>99</sup> By 2017, Putt noted that the need for at least one additional overseer.<sup>100</sup> However, they felt driven to complete their increasing workloads, despite having no control over the demands placed on them. One corrections officer commented that there was a 'definite need for load sharing' between the mainstream and Indigenous overseers as at that time Indigenous prisoners made up roughly a fifth of the prison population, but were allocated half of the oversight resources.<sup>101</sup> However, both overseers reported practicing informal load-sharing and it was clear from Whetnall's interview that their respective workloads were fairly similar due to the much higher needs of Indigenous prisoners.<sup>102</sup>

Putt described her role as 'more like a public duty than paid work', noting that she did not claim for time sending emails after a visit. She had continued working during a long convalescence from surgery, despite mobility issues.<sup>103</sup> In 2017 she noted that the prisoner population had 'exploded beyond belief' and reported chronic prisoner boredom and stress due to the prison's flawed layout, the lack of prison industries and paucity of educational and other programs.<sup>104</sup>

Meanwhile the pastoral care and community liaison aspects of Whetnall's informal 'Aunty' role for Indigenous prisoners had generated excessive work. She felt responsible for all the Indigenous prisoners' needs as well as those of their families. The Indigenous cohort rose from 41 to 95 prisoners across her six-year tenure.<sup>105</sup> She felt that when the staff member responsible for Indigenous prisoner welfare underperformed, she had no choice but to do their job too. She had also been the only overseer for the entire prison during gaps of up to four months between the appointments of mainstream overseers:<sup>106</sup>

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<sup>98</sup> Kaitlyn Quinn, Philippa Tomczak and Gillian Buck, "'How You Keep Going': Voluntary Sector Practitioners' Storylines as Emotion Work' (2022) *British Journal of Sociology* 00, 1-17.

<sup>99</sup> Putt Interview (2015); Whetnall Interview (2015).

<sup>100</sup> Putt Survey (2017).

<sup>101</sup> Staff Survey C069A.

<sup>102</sup> Putt Interview (2015); Whetnall Interview (2015).

<sup>103</sup> Putt Interview (2015).

<sup>104</sup> Putt Survey, 2017. The average daily prisoner population across 2016-2017 was 413: Steering Committee for the Review of Government Service Provision, *Report on Government Services 2018* (Productivity Commission 2018), Table 8A.4.

<sup>105</sup> 2011-2017. See 45170DO004\_2020 - *Prisoners in Australia 2020* (9 December 2021) [www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2021#data-downloads](http://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2021#data-downloads) accessed 2 April 2023, Table 40 Prisoners: Indigenous Status by Sex by State/Territory, 2006-2020.

<sup>106</sup> Whetnall Interview (2015)

They wouldn't be in there, you know, if they didn't come from dysfunctional families, you know. Or if there were more beds in rehabilitation services...

They can be demanding but if something is so easily fixed, I just do it on my own. I'm a really efficient and organised person and if I think 'Oh! That can be fixed with a five-minute phone call', you know 'Done!' you know. (Chuckles). That's just me. Just do it. Don't whinge about it...<sup>107</sup>

### *Psychological burdens: stress*

The psychological stresses of the oversight role ranged from prisoner mendacity and resentment to staff defiance, the complexities of negotiating in a hyper-masculinized prison environment and the lonely, thankless nature of the role. One officer felt that the overseers' duties put them in an invidious position:

Extremely difficult position. Would have a high level of 'burn out' and not a job that I would like to carry out (Staff Survey C048A)

Both overseers had experienced prisoner hostility:

They're very rude, some of them. They're not nice to you when... you speak to them... I don't find that as challenging or insulting as others might...

I'm not getting the sort of comments I used to get, which I take as a positive sign, which is [the] 'You do fuck all. Why are you here?' kind of stuff' (Putt Interview, 18 June 2015)

Putt also worried that prisoners who approached her might find that peers treated them as informants:

There's a reluctance... [if] you're seen to be talking to me, it may raise issues with the other [prisoners] that you're a snitch (Putt Interview, 18 June 2015)

The overseers' lack of corrections experience meant they lacked credibility with staff and – as we have seen – did not necessarily earn their trust. Both overseers commented on the challenge, as outsiders, of establishing rapport with staff steeped in the isolated, idiosyncratic prison culture.<sup>108</sup>

Putt noted the presence of traditional, disciplinarian views among senior male staff. Despite the growing presence of female staff,<sup>109</sup> she felt she had to 'speak boy' to fit in. Whetnall, who was herself a member of the chronically disadvantaged group she served, reported inadvertently laughing, in full view of staff, at the discomfort of trainee corrections officers when prisoners attempted to intimidate them with shows of defiance.<sup>110</sup>

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<sup>107</sup> *ibid.*

<sup>108</sup> Putt Interview (2015); Whetnall Interview (2015).

<sup>109</sup> At least 74 of the 81 ACT staff participants answered the demographic questions. Some 28% were female.

<sup>110</sup> Whetnall Interview (2015).

Given this mismatch between regulatee and regulator-side intermediary 'values, norms, beliefs and processes',<sup>111</sup> it was unsurprising that both overseers reported staff behaviours mapping to the defiant motivational postures.<sup>112</sup> A small minority of staff exhibited overt 'resistance'<sup>113</sup> by being 'suspicious'<sup>114</sup> or 'rude and hostile'.<sup>115</sup> Others signalled the 'game-playing'<sup>116</sup> motivational posture by delaying or obstructing overseers seeking access to prisoners in disciplinary segregation. Putt had ignored this behaviour, while Whetnall exerted her authority:

...sometimes there's little mind games that get played... for example, in the Management Unit... I can't talk to [the prisoners] until an officer opens the door... there's a particular officer I can think of who will make me wait (Putt Interview, 18 June 2015)

There was one or two I wanted to see, and I didn't get to see them, and they'd have to wait another week. And I thought, 'Shit', you know. But I should have stood up to the guard and said, 'I want to see him' and they can't [say] no. They have to go and open up... [N]ow when they say... '[H]e's locked up' and I say 'I need to see him'... they never deny me, not unless it's a really serious security breach (Whetnall Interview, 2 November 2015)

Finally, in addition to Putt's 'it's very hard not to get despondent, it's a bloody depressing environment' comment above, both overseers described their role as lonely – sometimes traumatizing – and unsupported:

It's a very lonely job... it does sometimes feel that you're on your own a lot and you can't talk about stuff with anyone in there. I can meet the Indigenous Official Visitor, but we rarely do. And she actually visits different people to me... so we can't discuss cases... (Putt Interview, 18 June 2018)

...I find that I have a greater expectation placed upon me by the [prisoners] than other Official Visitors would, because I am also Aboriginal. I do more for the [prisoners] than others... I have also never been offered supervision or counselling. I hear some horrible and upsetting things on a monthly basis and have never had anyone to debrief with (Whetnall Survey Response)

### 10.3 Conclusion

This chapter has depicted the dramatic differences between the ACT's flexible, expansive civil prison oversight design and Japan's rigid, restricted version. The ACT design has immense rhetorical appeal; a casual observer might even think it an exemplar. Yet analysis of data from those with lived experience of each system has revealed similar underlying flaws and negative outcomes.

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<sup>111</sup> Valerie Braithwaite (2017) 29.

<sup>112</sup> See generally, Valerie Braithwaite (2014).

<sup>113</sup> Valerie Braithwaite (2014) 916.

<sup>114</sup> Whetnall Interview (2015).

<sup>115</sup> Putt Interview (2015).

<sup>116</sup> Valerie Braithwaite (2014) 917.



The ACT system had outperformed the Japanese design in some ways. For example, if we turn to the regulatory theory discussed in Chapter 2, it is clear that the ACT system had considered the last three of the six foundational matters needed for ‘really responsive’ regulation that Black and Baldwin highlighted in 2008.<sup>117</sup> It had also partially addressed the many different levels of risk inside the ACT prison by appointing an Indigenous overseer from 2011,<sup>118</sup> while the Japanese design had addressed none. Yet the ACT mechanism had still overlooked the first three foundational matters: regulatees’ ‘compliance performance’, their ‘attitudinal settings’ and the ‘broader institutional environment’ around the regulator and regulatee.<sup>119</sup> Neither prison system showed any signs of having newly internalised the standards overseers sought to transmit – what Julia Black refers to as proceduralisation.<sup>120</sup>

Specifically, just as in Japan, the ACT system had been imposed without securing the prerequisites for persuasive regulatory success identified in Valerie Braithwaite’s Wheel of Social Alignments model.<sup>121</sup> This included ensuring that the regulatee prison staff would see the regulatory intermediaries sent to persuade them as legitimate – and oversight as beneficial, procedurally fair and morally deserving.<sup>122</sup>

Persuasive mechanisms like civil oversight ‘ru[n] on goodwill,’<sup>123</sup> which requires a low ‘relational distance’ between regulatory intermediaries and regulatees.<sup>124</sup> However, both the ACT and Japanese mechanisms use the high relational distance typical of coercive regulatory mechanisms at the enforcement pyramid’s apex. Neither jurisdiction invited staff to co-design a mechanism that they would embrace.<sup>125</sup> Instead, as Chapters 4 and 5 showed, both had tried to compel staff to cooperate, by imposing from on high what was, somewhat ironically, a purely persuasive design.<sup>126</sup>

These design features sent relational signals in the ‘judgment’ vein, which staff found grating.<sup>127</sup> The first was that staff working in a specialised and risk-laden ‘closed environment’ should accept

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<sup>117</sup> Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59, 61-62: whether regulatory mechanisms deployed together are compatible, how the regulatory regime performs over time, and any changes ‘in regulatory priorities, challenges and objectives’.

<sup>118</sup> Tracey Whetnall.

<sup>119</sup> Baldwin and Black (2008) 61.

<sup>120</sup> Julia Black, ‘Proceduralizing Regulation: Part I’ (2000) 20(4) *Oxford Journal of Legal Studies* 597; Julia Black, ‘Proceduralizing Regulation: Part II’ (2001) 21(1) *Oxford Journal of Legal Studies* 33.

<sup>121</sup> (2017) 31; see Figure D.

<sup>122</sup> *ibid.*

<sup>123</sup> Valerie Braithwaite (2017) 30.

<sup>124</sup> See Figure C.

<sup>125</sup> Martin Innes, Bethan Davies and Morag McDermont, ‘How Co-Production Regulates’ (2019) 28(3) *Social and Legal Studies* 370.

<sup>126</sup> In the ACT, this was seen in the addition of fines for any warden who failed to cooperate: Official Visitors Act 2012 (ACT) s 19. In Japan, it was seen in the insertion of Penal Institution Regulations 2006 art 6-2 imposing a soft duty on wardens to cooperate.

<sup>127</sup> Julien Etienne, ‘Ambiguity and Relational Signals in Regulator - Regulatee Relationships’ (2013) 7 *Regulation & Governance* 30, 36-41.

unsolicited advice from untrained citizens. The second was that staff incompetence or immorality would be so gross that even these lay regulator-side intermediaries could detect it and should be empowered to alert the competent Minister – bypassing due process.<sup>128</sup> As the post-2007 regulatory literature in Chapter 1 predicts, this confusion of advisory and policing functions precluded staff trust.<sup>129</sup> As Lodge and Hood predicted in 2010, neither claims of independence in Japan nor concrete steps to enhance it in the ACT earned staff cooperation.<sup>130</sup> Nor did ACT overseers' care in avoiding combining civil oversight with contrived randomness through unannounced inspections.<sup>131</sup>

Rather than securing an open, trust-based working relationship with regulatees, both jurisdictions built in features that would please external stakeholders. This was particularly notable in overseer selection, where both systems included overseers representing interests traditionally opposed to prisons – criminal defence attorneys in Japan and Indigenous overseers in the ACT. For the other overseers, people who were locally eminent and respectable were seen as pleasing in Japan, while in the ACT, advocates for vulnerable, criminal-justice involved people filled the bill. Ultimately, both oversight designs were oriented towards external legitimacy, not internal legitimacy where it mattered – with staff.

Having failed to earn staff trust, nothing could alter the regulatory outcome for this persuasive mechanism. There was no evidence of the human rights protection for prisoners and prison reform outcomes that are often claimed for these mechanisms, including – as we saw in Chapter 4 and 5 – by both Japan and Australia in their periodic reports under international treaties and conventions.<sup>132</sup> Putting symbolic benefits aside, neither staff perceptions of public relations benefits for prisons in

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<sup>128</sup> In the ACT, Corrections Management Act 2007 (ACT) ss 58(3); 60(2) (3) and (4) and Official Visitors Act 2012 (ACT) ss 16 and 17. In Japan, *Heisei 27-nen 8-gatsu 11-nichi Hōmushō kyōsei kyoku keiji shisetsu shisatsu i'inkai katsudō no tebiki* (Ministry of Justice Correction Bureau Guide for Penal Institution Visiting Committee Activities 27 August 2015) (Ministry Guide for Overseers) 5.

<sup>129</sup> See, for example James Downe and Steve J Martin, 'Regulation Inside Government: Processes and Impacts of Inspection of Local Public Services' (2007) 35(2) *Policy & Politics* 215, 216-217; Steve Martin, 'Knowledge from Inspection: External Oversight and Information to Improve Performance' in Kieran Walshe, Gill Harvey and Pauline Jas (eds), *Connecting Knowledge and Performance in Public Services: From Knowing to Doing* (Cambridge University Press 2010). See also Siobhan Kelly and Corrinne Rodden, 'From Watchdog to Guide Dog? The Evolving Role of the Accounts Commission for Scotland' (1998) Glasgow Caledonian University Faculty of Business Working Paper Vol 10, 1.

<sup>130</sup> Martin Lodge and Christopher Hood, 'Regulation Inside Government: Retro-Theory Vindicated or Outdated?' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010); Ministry Guide for Overseers 2015, 9; Official Visitors Act 2012 (ACT).

<sup>131</sup> *ibid.*

<sup>132</sup> Notably UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); and in the case of Australia, United Nations General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT).

Japan, nor staff perceptions of calming effects in the ACT made any difference. In Japan, we also saw that neither insulating staff from overseers using a triple intermediary model,<sup>133</sup> nor exceptional overseer diligence<sup>134</sup> helped in terms of securing these outcomes.

The data from staff and prisoners, who are the two participant cohorts with lived experience of soft civil prison oversight systems inside prisons, showed that these mechanisms do not ‘command support’ from regulatees, as required by Valerie Braithwaite’s theories of social alignments and motivational postures.<sup>135</sup> In both jurisdictions, it was only overseers – the least well-informed actors – who had faith in the mechanism.

Staff in both the ACT and Japan perceived few benefits of any kind and experienced the mechanisms as procedurally unjust and lacking merit. They saw it as against them, not for them. This perception led to defiant motivational postures: ‘resistance’, which challenges regulation; ‘disengagement’, which ignores it; and ‘game-playing’, which undermines it, while making a show of compliance.<sup>136</sup>

These findings raise the question of the cost of this regulatory failure. We have seen in Chapters 9 and 10 that the unintended consequences included excessive workloads for staff and overseers, along with psychological burdens for all three cohorts, which generated resentment. The mechanism seemed to be a source of division, with staff and prisoners expressing not only dissatisfaction, but antagonism towards one another, as well as towards overseers. This was especially the case in Japan’s authoritarian, industrial prison system, but also seen in the human-rights oriented ACT prison. Focusing on the perverse outcomes for staff and prisoners, in the language of Sieber’s taxonomy,<sup>137</sup> both Japanese and ACT staff reported functional disruption and provocation,<sup>138</sup> while Japanese staff and prisoners in both jurisdictions lamented soft civil oversight’s placating effect, which ruled out more effective relief from challenging working and prison conditions.<sup>139</sup>

Chapter 11 considers these findings in light of what we know about successful persuasive regulatory mechanisms. It outlines how this study contributes to the regulatory literature and examines its theoretical implications. It also considers the study’s practical applications, focusing on better regulatory options that are able to satisfy the public, elevate prisons and capitalise on the desire expressed by staff in both jurisdictions for dialogic regulation of human rights. The final chapter

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<sup>133</sup> See Figure G.

<sup>134</sup> See Table D Japan: Summary of correlations - Routine Oversight Activities measure & benefits scales; Table E Japan: Summary of correlations - Extended Oversight Activities measure & benefits scales.

<sup>135</sup> Valerie Braithwaite (2017) 34.

<sup>136</sup> *ibid* 33-37.

<sup>137</sup> Sieber (1981).

<sup>138</sup> *ibid* chs 3 and 6.

<sup>139</sup> *ibid* ch 9.

closes by offering a snapshot of subsequent developments in Japan and the ACT and suggestions for further research.

## Chapter 11 Conclusion: Soft Civil Oversight Meets Hard Reality<sup>1</sup>

We saw in Chapter 1 that civil prison oversight emerged as a regulatory idea in the late 18<sup>th</sup> century. While official reviews have queried its efficacy since the 19<sup>th</sup> century, the belief that it prevents human rights abuses and promotes reform has persisted. Towards the end of the 20<sup>th</sup> century, the shift towards regulatory state governance and accompanying ‘audit explosion’<sup>2</sup> saw this regulatory idea gain strength, advanced by dedicated ‘norm entrepreneurs’.<sup>3</sup> This led to the adoption of the UN Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 2002 (OPCAT).<sup>4</sup> OPCAT requires state parties to establish National Preventive Mechanisms (NPM), which in practice are loose networks cobbled together from both hard and soft civil prison oversight bodies.<sup>5</sup> The enduring appeal of the belief that civil prison oversight effectively regulates human rights risks in prisons is understandable given that these institutions are ‘closed environments’ where prisoners are vulnerable.<sup>6</sup>

However, Chapter 1 also traced the emergence of a slim but persistent literature that has sounded renewed warnings about civil prison oversight, particularly in the last 15 years. This sceptical literature has cautioned that we know very little about this mechanism empirically. Despite its 250-year history, there have been no accepted criteria for differentiating between its forms and understanding the relationships between them. Nor has there been an accepted knowledge base concerning how it functions from day to day in prisons, not to mention how it helps or hinders prisons, staff, prisoners and the public. Governments adopt it as an expression of faith – as we saw in the Australian Capital Territory (ACT) in Chapter 5, or in response to public demands after a prison crisis – as we saw in Japan in Chapter 4. Yet prudence requires this decision to be made based on evidence as to its ability to deliver desired benefits while avoiding unintended consequences.

### *Research questions*

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<sup>1</sup> Indigenous readers should be aware that this chapter contains the name and description of persons who have recently died.

<sup>2</sup> Michael Power, *The Audit Explosion* (Demos 1994). See also Michael Power, ‘Evaluating the Audit Explosion’ (2003) 25 *Law & Policy* 185.

<sup>3</sup> Cass R Sunstein, ‘Social Norms and Social Roles’ (1996) 96(4) *Columbia Law Review* 903, 909.

<sup>4</sup> UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT).

<sup>5</sup> See Chapter 1 at 1.2.1.

<sup>6</sup> The expression ‘closed environments’ is understood to mean ‘places where people are deprived of their liberty’ under OPCAT arts 1 and 4(2).

This study began by proposing a basic taxonomy for civil prison oversight designs: hard systems marked by intrusiveness, expertise and authority, including the ability to publish their findings; and soft systems, where overseers with less expertise and authority rely solely on persuasion and report internally to the prisons administration. The study then focused on this weaker, dialogic form of the mechanism and sought to address this gap in our knowledge. The gap is particularly acute where this soft form of civil prison oversight is concerned. Accordingly, the study posed two research questions:

What is the nature of soft civil prison oversight In Japan and the ACT?

What is the impact of soft civil prison oversight in Japan and the ACT?

The study has answered these questions empirically. Chapter 3 provides necessary background on Japan's unusual prison system, then Chapters 4 and 5 highlight the common European heritage yet dramatically different designs of these two mechanisms, while Chapters 7 through 10 assess their nature in prisons and impact in prisons in Japan and the ACT. These data chapters draw on mixed methods empirical data gathered from 2700 'voices from inside' prisons: staff; overseers; and prisoners with lived experience of soft civil prison oversight. They maintain a particular focus on prison staff, as they are the regulatees whose conduct this persuasive mechanism seeks to influence.

This concluding chapter reviews the study's findings in Japan and the ACT and draws comparative insights, then explores the theoretical and practical implications of these findings. Next, it reports on developments in Japan and the ACT since the study's completion. Finally, it addresses the effect of the study's limitations and highlights a number of questions for further research.

## **11.1 Findings on Nature and Impact: Voices from Inside**

The study found that while the Japanese and ACT civil oversight mechanisms use diverging designs, the former rigid and minimalistic while the latter is flexible and expansive, both mechanisms provide limited or no practical benefits and invite similar unintended consequences.

### **11.1.1 Findings from Japan on nature and impact**

Chapter 7 reveal a heavily restricted and regulated regulatory design, with the Japanese civil prison oversight mechanism carefully isolating overseers outside the secure custodial area of the prison. Yet we saw in Chapters 8 and 9 that it has still struggled to function – partly due to the influence of overseers aligned with a 'zealous' public interest group.<sup>7</sup> It does offer benefits, which are valuable,

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<sup>7</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 75.

but they are public relations benefits for prisons as institutions, unrelated to human rights protections and prison reforms – and come at a steep cost for the people inside prisons.

We saw that Japanese overseers meet in each prison's administrative block on just six afternoons annually. Their review is largely paper based; they read written prisoner complaints and receive explanations from a single mid-ranked prison liaison officer from the prison's *shomuka* (General Affairs Section). They rarely enter secure custodial areas and when they do, their tour is brief and closely supervised. They have almost no direct contact with prisoners and most staff.

This design is defensive. It uses the 'deck stacking' technique described in Chapter 2 to regulate the overseers, rather than allowing them to regulate prisons.<sup>8</sup> We saw in Chapter 7 that in practice, it controls Japan's overseers inside web of restraints. They lack expertise and authority, make infrequent visits, and have a short tenure, limited access, and minimal resources. When they do visit, they are distracted by processes and paperwork, meet outside the prison proper and have a vague remit. Overall, Japanese overseers know little of the prisons they oversee.

Yet even with overseers quarantined in this way, we saw in Chapter 9 that neither staff nor prisoners perceive Japan's overseers or the mechanism itself as benign. For staff, overseers are unqualified intruders pursuing an unreasonable agenda, whose vexing presence in the previously inviolate prison workplace generates onerous, pointless 'busywork' – in processes that are fundamentally unjust. Many find the combative stance of many of the criminal defence attorneys who lead most oversight committees disturbing. These attorney overseers' prior affiliation with the Japan Federation of Bar Associations' (JFBA) expansive view of human rights means that they personify the historical clash between that expansive JFBA view, and the far narrower interpretation taken by the Ministry of Justice (MoJ). This makes oversight committees a particularly unwelcome presence. Their very composition 'signals' a lack of belief in the professionalism of staff.<sup>9</sup> In the end, oversight interactions can devolve into cycles of disagreement between three regulatory intermediaries – attorney who usually chairs the oversight committee and the prison's liaison officer and warden, who both speak for the prison.<sup>10</sup> Even if overseers win small concessions concerning prisoner treatment, the concessions cover only that prison and expire at the end of the warden's short tenure.<sup>11</sup>

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<sup>8</sup> Mathew D McCubbins, Roger G Noll and Barry R Weingast, 'Administrative Procedures as Instruments of Political Control' (1987) 3(2) *Journal of Law, Economics and Organization* 247, 255.

<sup>9</sup> Julien Etienne, 'Ambiguity and Relational Signals in Regulator - Regulatee Relationships' (2013) 7 *Regulation & Governance* 30, 37.

<sup>10</sup> See Figure G.

<sup>11</sup> See, for example, Japanese Prisoner Survey 64P94.

Unsurprisingly, the views of staff and overseers on the mechanism's proper 'values, norms, beliefs and processes'<sup>12</sup> emerge as starkly misaligned, even diametrically opposed. Staff believed overseers' proper role to be advocating for staff working conditions and elevating the prison's standing in the community, while resolutely rejecting prisoner complaints as showing a lack of remorse. Overseers saw their proper role as challenging staff concerning prisoners' human rights. This fundamental mismatch led to both staff and prisoners voicing strong feelings of dissatisfaction and frustration. Both staff and prisoners had expected overseers to champion their cause but experienced them as either biased or disengaged and struggled with the realisation that the decision to introduce the oversight mechanism had taken substantive improvements to working and prison conditions off the agenda. Meanwhile, overseers were largely oblivious to this negative staff and prisoner sentiment.

In Chapter 8, we saw that in Japan, neither staff nor prisoners saw the mechanism as having produced any practical benefits for their cohort inside the prison. It did not 'enhance' their 'wellbeing'.<sup>13</sup> Instead, staff and prisoners each believed that oversight had benefitted the other cohort in abstract ways. Staff felt that it was symbolically meaningful for prisoners and – in theory – protected prisoners' rights, while prisoners felt it was symbolically meaningful for staff. Each of these cohorts also believed overseers to be biased against their own cohort, while favouring the other.

Staff also ruled out operational benefits, noting that the mechanism imposed onerous workloads and stress, but saw it as a successful public relations tool and symbolically meaningful in a general sense. In contrast, overseers – who were at a severe disadvantage due to the 'information asymmetry' inherent in sending novices to monitor a specialised field – were upbeat. They perceived a range of benefits for staff, prisoners, the prison, and the public, raising the possibility of confirmation bias.<sup>14</sup> No result relating to benefits changed depending on whether overseers in a given prison engaged in measurably more or fewer oversight activities. This finding was the same for both routine and extended oversight activities.<sup>15</sup> No amount of overseer diligence made any difference.

Ultimately, staff doubted overseers' credentials and found the mechanism unfair and unworthy of their cooperation. The public relations benefits they did see satisfied just one of the criteria for persuasive regulatory success in Valerie Braithwaite's Wheel of Social Alignments model.<sup>16</sup> The absence of 'social alignment' between the regulatory intermediary overseers and regulatee staff

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<sup>12</sup> Valerie Braithwaite, 'Closing the Gap Between Regulation and the Community' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 29.

<sup>13</sup> Valerie Braithwaite (2017) 25.

<sup>14</sup> See Encyclopedia Britannica, 'George A Akerlof – American economist' (*Encyclopedia Britannica*, 2023) [www.britannica.com/biography/George-Akerlof#ref749262](https://www.britannica.com/biography/George-Akerlof#ref749262) accessed 2 April 2023.

<sup>15</sup> See Table D Japan: Summary of correlations - Routine Oversight Activities measure & benefits scales and Table E Japan: Summary of correlations - Extended Oversight Activities measure & benefits scales.

<sup>16</sup> (2017) 31. See Figure D.



ruled out voluntary cooperation and staff expressed defiant ‘motivational postures.’<sup>17</sup> Focusing on the perspective of the regulatee staff in light of Sieber’s taxonomy of unintended consequences, oversight had been functionally disruptive, provoking and futile – an exercise in placation.<sup>18</sup>

### 11.1.2 Findings from the ACT on nature and impact

We saw in Chapter 5 that the ACT civil prison oversight system emerged into a quite different ‘regulatory space,’<sup>19</sup> one dominated by idealism. Its design is overtly human rights-oriented, malleable and generous. Its features meet many normative expectations for civil prison oversight mechanisms. Overseers’ appointments are on merit, and they typically have some prior familiarity with prisoners and their needs, if not with prisons. They are routinely present in the secure area of the prison, for hours at a time and may access any area – unaccompanied – and speak to any prisoner or corrections officer. Overseers are asked to apply international human rights standards and collaborate with several other monitoring bodies to ensure no incident escapes notice, while prison leaders who obstruct them risk financial penalties. Prioritising prisoner welfare, the design seeks to address the higher risk of harm to Indigenous prisoners by appointing an Indigenous overseer and has been made increasingly independent of the prisons administration.

It is difficult to not find this design appealing and hypothesise that it would resonate with the regulatee staff, who would be socially aligned with the mechanism’s ‘values, norms, beliefs and processes.’<sup>20</sup> Surely in a jurisdiction like the ACT, where a broad interpretation of international human rights standards is implicit, soft civil prison oversight would live up to its reputation.

Yet Chapter 10 showed that the ACT participant cohorts’ views mirrored those in Japan. Staff did not recognise the overseers as having corrections credentials and experienced oversight as disrespectful, generating needless busywork and procedurally unfair. One overseer’s alignment with a ‘zealous’ public interest group historically in conflict with criminal justice institutions was once more a particular sore point.<sup>21</sup> For staff, her appointment was a ‘relational signal’ that they were judged incapable of treating Indigenous prisoners well.<sup>22</sup> Meanwhile, prisoners believed that overseers were meant to serve their needs and were disillusioned by their apparent disengagement and impotence.

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<sup>17</sup> Valerie Braithwaite (2017) 30-35.

<sup>18</sup> Sam D Sieber, *Fatal Remedies: The Ironies of Social Intervention* (Springer International Publishing 1981) chs 3, 6 and 9.

<sup>19</sup> Leigh Hancher and Michael Moran, ‘Organising Regulatory Space’ in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press 1989).

<sup>20</sup> Valerie Braithwaite (2017) 29.

<sup>21</sup> Ayres and Braithwaite (1992) 75.

<sup>22</sup> Etienne (2013) 37.

Yet overseers assessed their own performance positively, believing that they assisted the Minister, prisoners and external stakeholders by challenging staff to improve their human rights compliance.

Staff saw no personal or professional benefits from the mechanism, although they found it symbolic and calming for some prisoners. Prisoners expressed faith in the system's potential to provide them with benefits but gave no specific examples of this faith coming to fruition. Finally, overseers were again optimistic concerning benefits, although this was somewhat muted, possibly because their access to the prison reduced the information asymmetry that had affected Japanese overseers.

Overall, the regulatee staff doubted overseers' legitimacy and experienced the mechanism as lacking benefits, fairness and moral resonance. If anything, the negative staff sentiment in the ACT was more intense than in Japan. Viewed through Sieber's taxonomy of perverse outcomes,<sup>23</sup> staff ire in the ACT centred on the provocative nature of the mechanism, although functional disruption was also a concern, as was placation – as the adoption of the ACT's prisoner-centric model meant there was no impetus toward a mechanism that would value staff perspectives. Once more the lack of 'social alignment' between the regulatory intermediary overseers and regulatee staff meant there was no prospect of voluntary cooperation and staff expressed defiant 'motivational postures.'<sup>24</sup> Even in the receptive ACT environment, soft civil prison oversight seemed again to have deepened divisions. It seems that even an apparently exemplary soft civil oversight design can fail to deliver as promised.

### **11.1.3 Comparative insights from Japan and the ACT**

This study has shown that the soft civil prison oversight mechanisms introduced some 15 years ago in Japan and the ACT had strikingly different features. Yet it also found that they shared the same structural defects and produced similar unintended consequences. There is value in briefly reviewing these commonalities, which are found in Chapters 4 and 7 through 9 for Japan; and Chapters 5 and 10 for the ACT. The clarity with which they emerged is the primary reason for using a Most-Different-Systems research design and they neatly illustrate the regulatory theory introduced in Chapter 2.

In both Japan and the ACT, these mechanisms gained their impetus from their rhetorical appeal rather than evidence of effectiveness in regulating staff conduct. This highlighted how regulation often emerges through the power of a morally seductive idea.<sup>25</sup> In Japan, references to oversight's morality eroded after the policymaking stage, but we saw this discourse permeate the ACT's legislative and implementation stages, indicating persistent faith in civil oversight as an idea.

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<sup>23</sup> Sieber (1981) chs 3, 6 and 9.

<sup>24</sup> Valerie Braithwaite (2017) 30-35.

<sup>25</sup> Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2<sup>nd</sup> edn, Oxford University Press 2012) 49-53.

In both cases, the powerful regulatory idea was then tailored to suit existing institutional agendas inside the prisons administration and please external stakeholders.<sup>26</sup> In Japan the prisons administration prioritised protecting staff from disruption, while harnessing oversight's rhetorical appeal to achieve external gains. In the ACT, the prisons administration benefitted from positioning the overseers as experts on the prison and including them in public consultation and policymaking processes as a demonstration of its commitment to human rights standards in the prison.

Both the ACT and Japanese mechanisms took shape at a high relational distance from the staff whom overseers were to persuade.<sup>27</sup> Instead, policymakers and bureaucrats invited input from well-meaning external stakeholders and critics. The regulator-side intermediaries regarded as suitable differed: respected local citizens in Japan and altruistic individuals in the ACT. Yet the result was the same: a jarring misalignment between the 'values, norms, beliefs and processes' of the overseers and those of staff.<sup>28</sup> In both Japan and the ACT staff saw most overseers as unqualified to offer advice and some – who were affiliated with 'zealous' public interest groups – as objectionable.<sup>29</sup>

We saw both jurisdictions overlook the need for co-design, which would have accessed deep wells of staff expertise concerning how to achieve the regulatory goals. In both cases, the regulator-side intermediaries were instead asked to gather information from prisoners that could be used against staff. We also saw that tensions associated with rank asymmetry factored into the strong dissatisfaction that this generated among staff in the hierarchical prison environment.

Finally, in both Japan and the ACT it seemed that some regulatory insiders belatedly sensed the destructive potential in an ostensibly persuasive mechanism sending untrained strangers into specialised workplaces to catch staff in wrongdoing and expose them to their superiors. We saw belated attempts, by regulators in Japan and regulator-side intermediaries in the ACT, to moderate the mechanism's incoherent mix of persuasive and coercive features, build trust and reduce the relational distance between overseers and staff. In Japan, senior bureaucrats were sent to all prisons nationwide just before the mechanism's launch; in part to allay their fears about civil oversight. In the ACT, the early overseers made their visits predictable, at hours convenient for staff.

Overall, we saw both jurisdictions visualising civil oversight as moral guidance but imposing it on staff in a manner suggesting that it was, in fact, moral policing.<sup>30</sup> From this, we can see that that even if

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<sup>26</sup> *ibid* 53-65.

<sup>27</sup> Donald Black, *The Behaviour of Law* (Academic Press 1976) 40-41.

<sup>28</sup> Valerie Braithwaite (2017) 29.

<sup>29</sup> Ayres and Braithwaite (1992) 75.

<sup>30</sup> Siobhan Kelly and Corrinne Rodden, 'From Watchdog to Guide Dog? The Evolving Role of the Accounts Commission for Scotland' (1998) Glasgow Caledonian University Faculty of Business Working Paper Vol 10, 1

regulatees saw some benefits from the mechanism, the questionable credentials of the regulator-side intermediaries, lack of procedural fairness and uninspiring nature made defiance likely.<sup>31</sup>

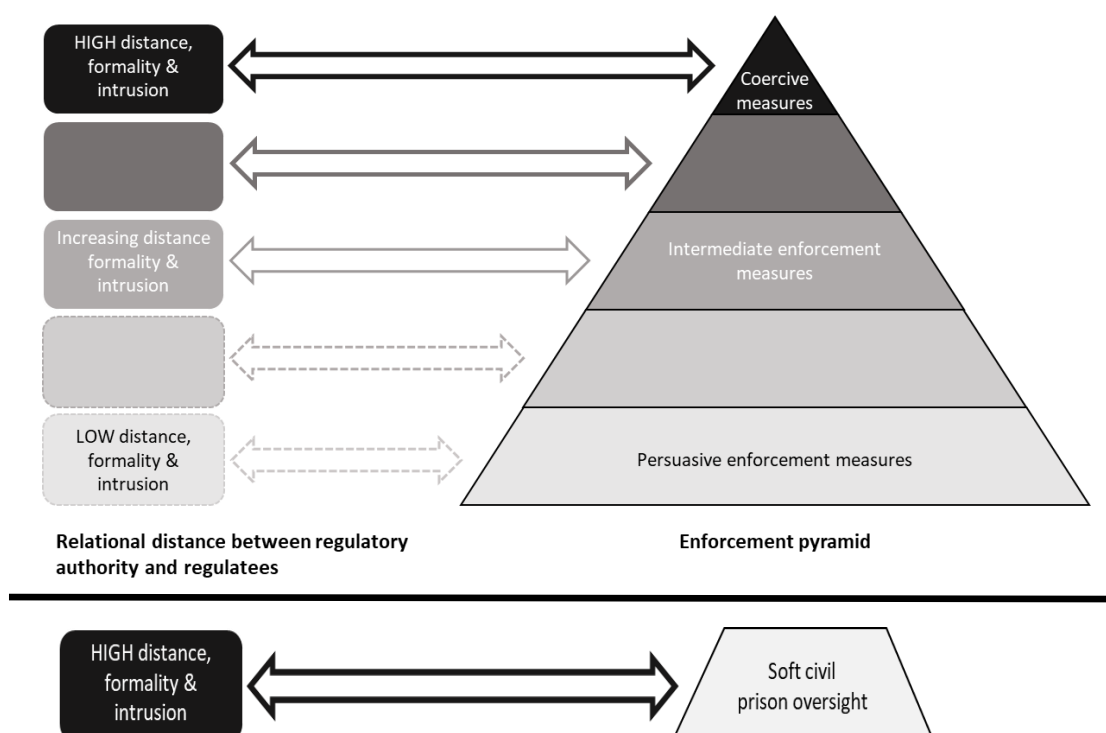
## 11.2 Theoretical and Practical Implications

Two sets of implications flow from this study. The first consists of contributions to regulatory theory. The second suggests some alternatives to soft civil prison oversight.

### *Understanding the findings: responsiveness and pyramids*

As a precursor to discussion of the study's theoretical contributions, it is useful to clarify the place of soft civil prison oversight in pyramidal regulatory theory. While soft civil oversight may appear to fit among the persuasive, voluntary, co-regulatory mechanisms that occupy the base of the enforcement pyramid in Chapter 2, this study reveals it to be an orphan, detached and below the pyramid, as shown in Figure I. This is for two reasons: firstly, there is no credible prospect of non-compliance prompting escalation to coercive measures; and secondly the high relational distance between the regulatory authority and the regulatees is inconsistent with persuasive regulation.

**Figure I** Soft civil oversight: Internally incoherent and orphaned outside the regulatory pyramid



<sup>31</sup> Valerie Braithwaite, 'Defiance and Motivational Postures' in David Weisburd and Gerben Bruinsma (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer Science & Business Media 2014).

### 11.2.1 Implications for regulatory theory

This study contributes new applications of regulatory intermediaries theory, which shed light on regulatory state governance in Japan and the perils of including ‘zealous’ public interest groups in regulatory state mechanisms. It also offers new insights into social alignments and motivational postures theory, including refinements to our understanding of social alignments, particularly in hierarchical or authoritarian environments.

#### *Regulatory state: rafting vs rowing*

Much of what we know about how the regulatory state, including the literature introduced in Chapter 2, comes from studies of western jurisdictions. We know less about regulatory state governance in Japan and how well Western regulatory models ‘translate’ to this context. This study contributes to the existing discussion by investigating civil prison oversight as an example of Japanese regulatory state governance.

Specifically, intermediary theory suggests that regulators can either ‘insulate’ their intermediaries from regulatee capture through expert design,<sup>32</sup> or impede their own intermediaries ‘to create the illusion of action’.<sup>33</sup> In this study, we gain insights into a Japanese regulator’s use of impediments to reduce its own intermediaries’ regulatory activities to ritual – with a twist.

Western regulatory state theorists envisage a collaborative river rafting model, where state and citizens board a flexible craft, take position alongside one another – all facing downstream – and tackle an unpredictable challenge together. In that model, all actors exercise discretion and initiative, just as in the law and practice we saw in the ACT in Chapter 10. When the ACT outsourced prison oversight to private actors, it gave them almost unfettered discretion. The prisons administration kept only a watching brief and over time did its best to relinquish what control it did have. This ‘river rafting’ regulatory state governance model is a familiar intermediate step towards post-regulatory state governance, where state involvement vanishes.

The Japanese model that this study depicts is quite different. It involves a regulatory state mechanism that functions as a distinctive form of welfare state governance. Certainly, civilian participants are invited to row, but the rowers board a rigid craft, where they take assigned seats, facing upstream, as in Olympic rowing. The state serves a coxswain and – as only the state can see the finishing line – not only steers, but controls the stroke rhythm, pace, and form. From a distance, the coxswain may seem small and passive, but they are in command.

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<sup>32</sup> Kenneth W Abbott, David Levi-Faur and Duncan Snidal, ‘Theorising Regulatory Intermediaries: The RIT Model’ (2017) 670 *The Annals of the American Academy of Political and Social Science* 14, 29.

<sup>33</sup> *ibid* 31.

This model fits the law and practice that we saw in Chapter 7, where the prisons administration harnessed the overseers within ‘intricate meshes’ of bureaucratic influence,<sup>34</sup> made possible by a vague legislative framework. We saw that Japanese overseers have elite status, but no decision-making discretion. Committees exist in isolation from each other, while the very prisons that they oversee vet their appointments. These strategies are a form of capture. They reduce the risk that overseers will act in ways that unbalance the boat – and ensure that they will row in the direction that the state desires.

Quite incidentally, this insight makes it possible to better grasp the argument by John O Haley in 1991 to the effect that while Japanese law may bestow ‘authority’, it comes ‘without’ the ability to formally exercise ‘power’<sup>35</sup> in light of pyramidal regulatory theory. We know that Haley argued that Japan makes heavy use of informal, persuasive regulatory mechanisms that allow elite bureaucrats to adjust rules, norms and compliance with them as they see fit, using sublegal levers.<sup>36</sup> We now see that this informalism does not imply pyramidal enforcement. Haley noted that it was actually the inability to escalate to formal legal processes, which must be pursued in the public domain and are unpredictable, that gives bureaucrats more flexibility in how they govern – behind the scenes, preferencing continuity as a rule and permitting change only when desired.<sup>37</sup>

Returning to the Japanese regulatory design, multiple details, including the use of a triple rather than dual intermediary structure,<sup>38</sup> ensured that it sidestepped the ‘river rafting’ regulatory state mode of civil participation. These included increasing the relational distance between its own regulatory intermediaries and the regulatee staff, by means of the ‘Dejima strategy’, a traditional threat management technique. Dejima was a peninsula in Nagasaki Bay which was separated from the Kyushu mainland in 1636 to form a secure fan-shaped island ghetto as part of the Tokugawa era *sakoku* (closed country) policy.<sup>39</sup> The Dutch and other European traders were permitted to live and do business in this open prison and permission to cross the bridge to Japan proper came with heavy conditions and supervision.<sup>40</sup> Ironically, these restrictions were applied to Japan’s civil overseers when they wished to enter rather than leave a prison.

Ultimately, the twist in the story is that the regulator’s motive was good governance, not bad. The prisons administration sought to prevent a questionable reform mechanism disrupting the fragile

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<sup>34</sup> Rokurō Hidaka, ‘Personal Retrospective’ in Gavan McCormack and Yoshio Sugimoto (eds), *Democracy in Contemporary Japan* (ME Sharpe 1986) 228, 245.

<sup>35</sup> John O Haley, *Authority Without Power: Law and the Japanese Paradox* (Oxford University Press 1991).

<sup>36</sup> *ibid* 13-14.

<sup>37</sup> *Ibid* 13-14, 160-166.

<sup>38</sup> See Figure G. See also Abbott, Levi-Faur and Snidal (2017) 25.

<sup>39</sup> Richard HP Mason and John G Caiger, *A History of Japan* (Rev edn, Tuttle Publishing 1997) 202-208.

<sup>40</sup> *ibid*.

equilibrium of Japanese prisons after the Nagoya Prison Scandal, while leveraging its rhetorical appeal to mollify public outrage and restore trust. As outlined below, this secured a significant period in which to stabilize prisons, then re-tool and slowly implement long-frustrated reforms. Accordingly, if we put the unintended consequences that arose to one side, the rigidity and minimalism of Japan's mechanism appears as a sign of regulatory success, rather than failure.

#### *Intermediary zealotry prevents persuasion*

Both the Japanese and ACT soft civil prison oversight systems shared a further intermediation feature. The prisons administration invited civilians affiliated with zealous public interest groups traditionally opposed to criminal justice institutions to be overseers. Inclusive gestures like this can play well in the public domain, legitimizing a policy or oversight body while quelling public concern about ritualism. We saw that both prisons administrations had previously publicly invited their critics to participate in the policymaking processes that led to the adoption of civil prison oversight.

However, this study shows that intermediaries who have prior affiliations with zealous public interest groups come with existing 'norms, values, beliefs and processes' – in other words 'social alignments'<sup>41</sup> – that clash with those of regulatees and may well shape their involvement to serve those existing agendas,<sup>42</sup> generating antagonism and unintended consequences.

In Japan, when zealous human rights advocate attorneys dominated civil prison oversight committees, it produced the divisive impact that the prisons administration had tried to prevent. Staff who experienced this intermediary capture of the regulatory agenda expressed strong negative sentiments, reporting heavy workloads and stress. In the ACT, the same phenomenon had mixed results. When the Indigenous overseer interpreted the regulatory agenda as an invitation to fulfil the traditional Indigenous community welfare role of 'Auntie', the regulatory authority acquiesced and both prisoners and the prison benefitted. However, when she interacted with staff, they saw her as disrespectful, expressing negative sentiments similar to those expressed by Japanese staff.

Figure J below illustrates the result when a regulatory-side intermediary from a zealous public interest group captures a regulatory agenda. Unlike the dual intermediary model in Chapter 2,<sup>43</sup> the original regulatory agenda can terminate in the hands of the zealous intermediary.

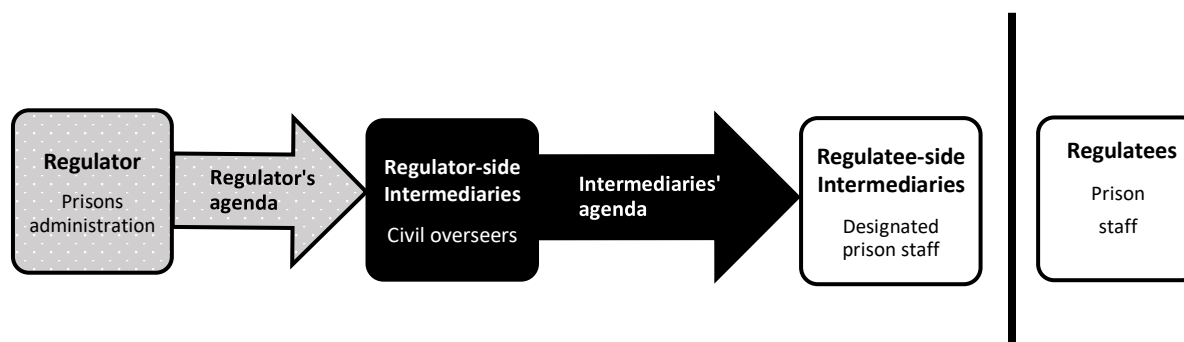
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<sup>41</sup> Valerie Braithwaite 2017: 29.

<sup>42</sup> Abbott, Levi-Faur and Snidal (2017) 29-30.

<sup>43</sup> See Figure B.

**Figure J** ‘Zealous’ public interest group intermediaries in Japan and the ACT: Impact



### *Social alignments reimagined: rank matters*

This study shows that the questions of who designs and implements persuasive regulation and the question of their rank relative to other actors both matter. These questions of identity and rank influence whether regulator-side intermediaries are legitimate appointees in regulatees’ eyes as well as the prospects for productive collaborations along the chain of relationships between regulator and regulatees. It is possible that they are particularly influential in closed, authoritarian environments where governance relies on rigid hierarchies.

Firstly, statements by more junior staff in each jurisdiction that they knew nothing of the oversight mechanism at their prison point to a disjuncture in the regulatee cohort, which Figure J above also illustrates. Soft civil oversight assumes that the corrections officers who are designated as regulatee-side intermediaries – wardens and their surrogates as well as the *shomu kachō* liaison officers in Japan – pass on the input they receive from overseers to staff as a whole. But it seemed that these designated staff felt a responsibility to act as shields, not conduits. Meanwhile, junior staff resented being excluded from the regulatory dialogue.

Secondly, the staff in both jurisdictions who had interacted with overseers saw themselves as professionals with a rightful monopoly on corrections knowhow<sup>44</sup> and overseers as firmly outside this category. This categorical thinking would have been particularly acute in the case of Japanese wardens, who are highly-ranked staff with deep industry experience and expertise. Their data tended to reflect official traditional prisons policy, an alignment that would have assisted their career success.

<sup>44</sup> Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 1988) 91.



A third such dimension in Japan was the profound difference in social rank between the overseers who were legal and medical professionals and those who were laypersons and instinctively deferred to these lawyers and doctors. This deference was the factor that allowed the legal and medical professionals to capture Japan's civil prison oversight committees and impose their own agendas.

A fourth matter of rank and identity that would have mattered in Japan was the significant difference in rank between each prison's initial regulatee-side intermediary, the mid-ranked *shomu kachō* liaison officer and the second, the warden. The liaison officer would have felt pressure to deflect and defuse as many issues as possible during committee meetings, to reduce the risk of their warden having to respond to a barrage of written opinion letters authored by the attorney overseers.

The brief, superficial and mandatory nature of the overseers' interactions with staff and each other does not accommodate these complexities. For example, if not compelled, it is unlikely that wardens would listen to the overseers' advice on how to do their jobs, and we know that the views of alternative authorities, such as the warden in a prison and the peak industry bodies to which they belong, exert a strong, even decisive influence in regulatee communities.<sup>45</sup>

These questions – of whether regulators send credible regulator-side intermediaries who form constructive trust-based relationships with regulatees – and of with whom these intermediaries engage on the regulatee side, are present in Valerie Braithwaite's theory of social alignments. but not shown in her original Wheel of Social Alignments model.<sup>46</sup> Accordingly, Figure K reimagines the Wheel as a bicycle wheel, adding these issues in the form of a 'How and By Whom the Regulatory System is Designed and Administered' label on the tyre.

The merit of depicting a working wheel is that it suggests the balancing of opposing influences, a concept that is central to social alignments theory. The grey spokes are the alternative authorities who influence regulatees, exerting centrifugal force on the rim, pushing it outwards away from the hub. The black spokes represent the benefits, procedural fairness, and sense of moral obligation that regulatees perceive, which exert an opposing centripetal force, pulling the rim inwards, towards the hub. The wheel stays structurally stable, with neither source of influence dominating, enabling robust dialogue in the contested space between the rim and the hub, which is where each regulatee chooses their motivational posture - whether they will cooperate with or defy the regulatory goal.<sup>47</sup>

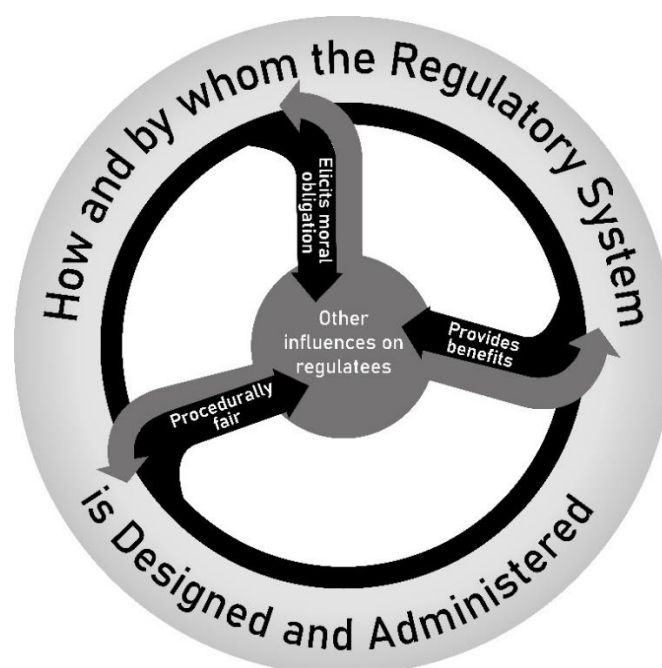
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<sup>45</sup> Valerie Braithwaite (2017) 29.

<sup>46</sup> *ibid* 29-30. See Figure D.

<sup>47</sup> *ibid* 31-32.

**Figure K** Wheel of Social Alignments model – reimagined



### 11.2.2 Prospects for soft dialogue in hard places

This study has shown that soft civil prison oversight may be an idea whose time has passed.<sup>48</sup> OPCAT, which accepts soft mechanisms as part of the National Preventive Mechanisms that state parties must establish,<sup>49</sup> emerged in 2002. This was when the late 20<sup>th</sup> century ‘audit explosion’ was at its zenith – and came into effect in 2006, but increasingly sceptical studies began to emerge in 2007. They confirm concerns in earlier works that external oversight is a costly, weak, and ineffective way to assure quality in government services. This is due to factors including intractable ‘information asymmetry’, the isolation of civil oversight mechanisms outside existing administrative controls and the risk of various types of capture.<sup>50</sup> In the prisons context, there has never been an empirical study that found soft civil oversight delivered as advertised – preventing human rights abuses and promoting prison reform. As we saw in Chapter 1, most have identified disturbing unintended consequences, including functional disruption, provocation, and placation effects<sup>51</sup> and this study is

<sup>48</sup> cf. An ‘idea whose time has come’, an expression paraphrased from Victor Hugo’s 1877 classic, *Histoire d'un Crime* (The History of a Crime) (Arthur Locker tr, Aegypan 2007).

<sup>49</sup> See Chapter 1 at 1.2.1.

<sup>50</sup> See, for example, Martin Lodge and Christopher Hood, ‘Regulation Inside Government: Retro-Theory Vindicated or Outdated?’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010).

<sup>51</sup> See, for example, Carol Martin and David Godfrey, ‘Prisoners’ Views of Boards of Visitors: A Question of Credibility’ [1994] 34 *British Journal of Criminology* 358; Peter Lloyd, *Review of the Boards of Visitors: A Report*

no different. In fact, it goes further, by showing not only how and for whom soft civil oversight fails to deliver but also why. The internal incoherence of soft civil oversight as a mishmash of coercive and persuasive features, orphaned outside the regulatory pyramid, makes regulatory failure – and unintended consequences – inevitable.

These findings confound our expectations. They have been discomfiting as a researcher and may dismay the prisons administrations, prisons and individuals who made this study possible. They may also sit uneasily with the public interest groups who have tirelessly advocated for soft civil oversight of prisons in the sincere belief that it protects prisoners' human rights. My hope is that even these sobering results will inform future regulatory policy in ways that are useful for staff and prisoners. Wherever possible, the discussion of the study's implications and recommendations below prioritises their voices – the 'voices from inside' that have been largely unheard until now.

### *Three practical implications*

The first practical implication of this study affirms an insight shared by an ACT overseer – that no amount of persuasive regulation of staff conduct can cure serious prison dysfunction caused by factors like overcrowding, understaffing and poor design.<sup>52</sup> Adding layers of oversight to prisons that are intolerably stressed due to these chronic, pernicious problems, as seen in the ACT can backfire. It can place unreasonable expectations on overseers to take on heroic levels of responsibility; aggravate staff and reduce public support by signalling that staff misconduct is the root cause of problems over which they actually have no control; and is unlikely to prevent calamity. In this situation, 'deck stacking' strategies,<sup>53</sup> the most cost effective being systematic decarceration, are a more rational place to start. As we will see below, this is the route Japan has taken since 2007 through enhanced diversion and reintegration programs.

The second practical implication for prisons administrations is that using persuasive regulation to embed human rights standards in a way that also secures public relations benefits is also a valid regulatory choice in the deck stacking genre. We saw in Japan that staff valued the use of civil oversight to restore public goodwill towards their scandalised workplaces. Re-legitimising prisons

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*of the Working Group Chaired by Rt Hon Sir Peter Lloyd MP* (Home Office 2001); Ben Crewe, *The Prisoner Society: Power, Adaptation, and Social Life in an English Prison* (Oxford University Press 2009); Bronwen Naylor, 'Human Rights and Respect in Prisons: The Prisoners' Perspective' (2014) 31 *Law in Context* 84; Jamie Bennett, *The Working Lives of Prison Managers: Global Change, Local Culture and Individual Agency in the Late Modern Prison* (Palgrave Macmillan 2016a); Sophie van der Valk and Mary Rogan, 'Experiencing Human Rights Protections in Prisons: The Case of Prison Monitoring in Ireland' (2021) 18(1) *European Journal of Criminology* 101;

<sup>52</sup> See generally UN General Assembly, 'Human Rights Implications of Overincarceration and Overcrowding' Report of the United Nations High Commissioner for Human Rights (10 August 2015) UN Doc A/HRC/30/19.

<sup>53</sup> McCubbins, Noll and Weingast (1987).

strengthens the community, business, criminal justice, and public welfare partnerships that they need to function well.

The third implication is that whatever intervention is chosen, it should be evidence-based. A regulatory authority should be certain that a proposed initiative will have a benign impact on prisons and the people who work and are held in these fragile, risk-laden institutions. The data contributed by staff and prisoners show that both communities inside prison have genuine, unmet needs. Similarly, it was clear that regulator-side intermediaries asked to work with prisons should have corrections experience and be supported by robust occupational health and safety measures.

### *Desire for dialogue*

No staff participant in either jurisdiction wanted their soft civil prison oversight system abolished. Instead, there was a broad understanding of the potential of dialogic regulation. As we saw across Chapters 7 through 10 staff – particularly those in Japan – took up the invitation in the open-ended survey question to help design a better mechanism with alacrity.<sup>54</sup> While many expressed negative sentiments – and some wanted further controls or restrictions on oversight committees – others made suggestions that fit with what we know theoretically about successful persuasive regulation. These prison staff knew that prisons could do better. They wanted to be consulted and envisioned contributing their knowledge and ideas to achieve this goal.<sup>55</sup> Others wrote about the importance of ensuring that regulator-side intermediaries sent in to help prisons do better had formal corrections training and experience.<sup>56</sup> Many highlighted the importance of regulator-side intermediaries being prepared to collaborate respectfully with staff:

I think oversight committees would be even more meaningful if they didn't act like hostile stakeholders or pressure groups, but worked with prisons to improve operations (Japanese Staff Survey 73C90)

Some officers focused on the need for enhanced receptiveness, respect and inclusiveness among staff towards prisoners and overseers, which would lead to benefits for both staff and prisoners:<sup>57</sup>

What is urgent is to train corrections officers who treat prisoners as people, and genuinely want to rehabilitate them, as well as training senior corrections officers who respect the humanity and individuality of junior ranks. Cultivating high-calibre corrections officers should lead to goodwill

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<sup>54</sup> The open-ended questions in the staff and overseer surveys both asked: 'Please write any additional thoughts or views you may have about the [oversight system in your jurisdiction or its] activities – especially how to improve [it]. The open-ended question in the prisoner surveys asked: 'Please write any thoughts you have about the [oversight system where you are] – especially how [it] could be made better'. See Appendix B Phase 2: Main Data Collection.

<sup>55</sup> See, for example, ACT Staff Survey C105A; Japanese Staff Surveys 90C83 and 65C93.

<sup>56</sup> See, for example, Japanese Staff Surveys 93C94, 63C96 and 70C94.

<sup>57</sup> See also Japanese Staff Surveys 54C93 and 01C04.

between prisoners and corrections officers and a mutual decline in complaints. ([I have] decades of experience) (Japanese Staff Survey 55C85)

Even some Japanese prisoners highlighted the importance of this staff desire to engage in a co-regulatory effort<sup>58</sup> and many prisoners wanted to contribute themselves – if they could do so collectively, avoiding the risk-laden individual whistleblower role.<sup>59</sup> One wrote about the importance of fairness, justice and the normalisation of the prison environment:

Given that both the corrections officers and we prisoners are fundamentally just human beings, I'd like to see the principles of fairness and justice in action... [T]he community outside the prison and the community inside are both part of the same world. I'd like to see it run like a democracy (Japanese Prisoner Survey 60P92)

In both jurisdictions, it seemed that staff and prisoners had had enough of an intrusive exercise in moral policing that waited for harms to occur, then sent in novice regulator-side intermediaries who inadvertently pitted them against one another in fruitless cycles of accusation and denial.<sup>60</sup>

#### *Potential for persuasion*

This approach should be tantalising for a regulator:  
a regulatory system that runs essentially on goodwill  
with regulatory effort dedicated to the recalcitrant few<sup>61</sup>

This brings us to the attributes of internally coherent persuasive mechanisms that belong among the enforcement measures at the base of the regulatory pyramid. The lack of cooperative motivational postures in staff seen in this study does not support a wholesale move to more intrusive measures, even though we will see below that the ACT has now escalated its regulatory action by creating a hard civil prison oversight body above its Official Visitor system.<sup>62</sup> The rationale for persuasive regulation of human rights is its cost efficiency and efficacy – and that potential remains untapped in prisons. As the pull quote above this paragraph notes, responsive regulation holds resource-intensive escalation to more intrusive and coercive measures firmly in reserve – for 'the recalcitrant few'.

The business case for transitioning from soft civil oversight to genuinely persuasive regulation is that it offers fresh public relations gains and continues to satisfy the demands of zealous public interest groups yet avoids the heavy unintended consequences of soft civil oversight. As this study shows, these frustrate prisons, staff and prisoners alike: functional disruption, provocation and placation.<sup>63</sup>

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<sup>58</sup> See, for example, Japanese Prisoner Survey 81P88.

<sup>59</sup> See, for example, Japanese Prisoner Surveys 58P68, 68P69, 78P92.

<sup>60</sup> See, for example, Japanese Prisoner Survey 58P95.

<sup>61</sup> Valerie Braithwaite (2007) 30.

<sup>62</sup> As illustrated by Figure E.

<sup>63</sup> Sieber (1981) chs 3, 6 and 9.

Happily, the groundwork is already laid for the genuinely dialogic and heterarchical, 'social garden[ing]' interactions that Julia Black recommends for persuasive regulatory success in autopoietic (self-referential) environments.<sup>64</sup> This study has shown that many staff would welcome the opportunity to contribute their expertise to voluntary processes that aimed to drive up standards and compliance. This approach would also satisfy the logic of socially-aligned persuasion: 'governing in accordance with the grain of things', along the path of least resistance.<sup>65</sup> What is more, it would not depend on abuses having already taken place, or the prison being in crisis. Most importantly, it would leverage existing corporate knowledge and new flows of goodwill – not demand a major new capital investment.

The first step would be to form a co-regulatory community of learning and practice, including the regulatory authority, corrections industry peak bodies – both national and international, zealous public interest groups, the penal voluntary sector, and the academic community. A diverse, expert epistemic community of this nature would provide a natural accountability structure for public interest group representatives. Those who have been prone to adopting the hostile 'knight on a white charger' persona<sup>66</sup> in private regulatory interactions with staff would have the opportunity to learn the fundamentals of regulatory theory and bound by the community's code of conduct.

Following clarification of the agreed human rights standards, mixed methods empirical research would identify factors that correlate with areas of compliance and non-compliance.<sup>67</sup> The need to close any gaps in compliance would then be co-defined with staff of all ranks, including trainees. Staff would then work closely with regulators to co-design and co-deliver regulatory solutions,<sup>68</sup> There would be no predetermined regulatee-side intermediaries: all staff would be involved in the co-delivery of the mechanism at all stages of their careers, as part of their professional development.

If well-publicised, a co-regulatory approach of this kind could occupy a new moral and ethical high ground and generate sustained goodwill – the soft power in the prisons space that both Japan and the ACT value. It is a story of prisons governance coming of age, of policymakers listening to previously marginalised 'voices from inside' prisons. It celebrates scientific, evidence-based policy,

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<sup>64</sup> Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20(4) *Oxford Journal of Legal Studies* 597, 603.

<sup>65</sup> Graham Burchell, 'Peculiar Interests: Civil Society and Governing 'The System of Natural Liberty' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester-Wheatsheaf 1991) 119, 127.

<sup>66</sup> Ayres and Braithwaite (1992) 75.

<sup>67</sup> Christopher Hood, 'Conclusion: Making Sense of Controls Over Government' in Christopher Hood and others, (eds), *Controlling Modern Government: Variety, Commonality and Change* (Edward Elgar 2004).

<sup>68</sup> Martin Innes, Bethan Davies and Morag McDermont, 'How Co-Production Regulates' (2019) 28(3) *Social and Legal Studies* 370.

re-orientates a penal system towards normalisation and much-admired Scandinavian exceptionalism.<sup>69</sup> It is about reconciliation with and elevation of a stigmatised workforce that performs thankless work under difficult conditions. It speaks of inclusion, partnership and finding common ground in respectful, constructive processes.

This co-regulatory model would also leverage the regulatory enforcement and compliance support pyramids<sup>70</sup> and adopt 'smart' regulatory techniques.<sup>71</sup> Enforcement escalation, for example, would involve two credible threats, which involve enforcement processes on multiple faces of a three-dimensional pyramid. The first would be referral to a hard civil oversight body for investigation and follow up, potentially leading to 'naming and shaming' and the public release of expert evidence that could be used in a prisoner's human rights complaint or civil lawsuit. The second would be referral to existing staff performance management and disciplinary proceedings, potentially leading to dismissal and criminal charges. Supports would also escalate through opportunities to receive informal and formal praise, recognition and rewards provided by bodies on different faces of the enforcement pyramid. This would go beyond existing prison hierarchies and performance management systems, to include zealous public interest groups and corrections industry peak bodies.

The regulator's invitation to staff to cooperate in this co-regulatory endeavour would be 'really responsive' to the level of compliance achieved.<sup>72</sup> This means it would be subject to periodic systematic review and escalated or de-escalated according to the findings. The details of the persuasive mechanism would also be sensitive to risk, meaning that it would be tailored to the actual risk of violations in each prison or wing, as well as to the rank and duties of different staff cohorts. As Whitty has pointed out, risk management is fundamental to prison governance, so a risk-based approach to improving human rights compliance is likely to resonate with prison leaders.<sup>73</sup>

The regulator-side intermediaries would be comprised of interdisciplinary teams selected on the basis of their ability and experience against clear criteria. They would need expertise in three fields: the corrections industry; regulatory theory, ethics and practice; and the relevant technical standards – centring on international human rights norms. It may be necessary to source some members from the private sector or academia to access the full suite of skills required. Members with lived experience of working in or being held in prisons would be essential, with two provisos. The first is

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<sup>69</sup> See generally, John Pratt and Anna Eriksson, *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic Exceptionalism* (Routledge 2013).

<sup>70</sup> See Figure A.

<sup>71</sup> Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press 1998).

<sup>72</sup> Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59.

<sup>73</sup> Noel Whitty, 'Human Rights As Risk: UK Prisons and the Management of Risk and Rights' (2011) 13(2) *Punishment & Society* 123.

that former corrections officers should have a range of different ranks, to reduce the risks of rank asymmetry impeding collaboration with regulatees. The second is that the former prisoners should be people whose convictions are now formally spent, whose successful reintegration into the community generates respect and goodwill among corrections officers.

As persuasive regulation requires low relational distance, these teams would be embedded inside the prisons administration, not in an independent structure.<sup>74</sup> These regulator-side intermediary teams would primarily report internally to the prisons administration and the epistemic community. However, they would also be able to report publicly at will, with an educational focus, highlighting the benefits of the co-regulatory process and constructive, innovative contributions by staff and other members of the community of learning and practice. The regulator-side intermediary teams' role would focus on monitoring gaps in compliance, co-ordinating, encouraging, educating, and persuading. Detection, reporting, 'naming and shaming' and other intrusive, policing-style functions would be reserved for mechanisms at higher levels of the enforcement pyramid, as needed.

### **11.3 Significance and Further Research**

The section considers the study's significance and limitations, discusses subsequent developments in Japan and the ACT and poses questions for further research.

#### **11.3.1 Significance and limitations**

This study is significant due to its rarity in several dimensions and the distinctive features of its research design – both of which are addressed in Chapter 6. It also makes several novel intellectual contributions.

It develops a basic taxonomy of civil prison oversight mechanisms and identifies the root cause of the failure of the soft form of the mechanism, a phenomenon first observed in 1895. The study also advances what we know about the regulatory state mode of governance in Japan and the nascent field of regulatory intermediaries theory, particularly in the context of tripartite regulation involving public interest groups. Further, it offers refinements to the integrated theories of social alignments and motivational postures, particularly with respect to the importance of the identity and rank of regulatory actors on both sides of a regulatory interaction in closed, hierarchical or authoritarian environments.

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<sup>74</sup> See Figure C.



## Limitations

However, this study also has subject matter and methodological limitations. Firstly, addressing its subject matter, the study did not address questions around the nature or extent of prisoners' human rights, particularly in Japan. These include debates around which of prisoners' human rights may be limited beyond freedom of movement<sup>75</sup> and the related 'Asian values' question of whether human rights norms are universally applicable or regionally diverse.<sup>76</sup> One reason for this limitation on its scope was the level of sensitivity concerning these issues in Japan's prison system. I chose to prioritise allocating resources to achieving the study's main aim: interrogating soft civil prison oversight through the lens of responsive regulatory theory. A future study wishing to explore these human rights related questions in Japanese prisons should prepare robust hypotheses and statistical rationales for all design and methodological choices and bring a flexible mindset to negotiating access, a process which is likely to take considerable time.

Turning to methodology, the study did not involve direct contact with prisoners. This limitation was due to the institutional culture in Japanese prisons. I was aware of the Bureau's conservatism on this front and did not seek direct access to Japanese prisoners. As face-to-face contact was not an option in Japan, I did not include it in the corresponding data collection in the ACT, where it would have been possible. However, I did partially remedy this gap in data collection methods. Firstly, I included an open-ended question in the prisoner survey so that prisoners would be able to voice their views. Secondly, I ensured that the survey was administered immediately prior to their release. Nearly 350 prisoners responded to this question.

A second methodological limitation related to the demographics of the samples targeted. The study did not address the experiences of female corrections officers or female adult mainstream prisoners in either Japan or the ACT. This was due to the small numbers of senior female corrections officers in Japan and even smaller numbers of female prisoners in the ACT. Omitting female participants is a common failing in prison studies, which contributes to female prisoners being overlooked in policy agendas, despite having distinctive needs,<sup>77</sup> and taking up an increasing share of the global prison

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<sup>75</sup> See generally Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011).

<sup>76</sup> See generally Amartya Sen, 'Human Rights and Asian Values' *Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy* (New York, Carnegie Council on Ethics and International Affairs 25 May 1997).

<sup>77</sup> See generally UN General Assembly, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (adopted 21 December 2010) UN Doc A/C3/65/L5.

population.<sup>78</sup> Future projects in both jurisdictions should balance samples from all genders to better understand their diverse needs.

### 11.3.2 Subsequent developments in Japan and the ACT

We have seen that there is no prospect of the soft civil oversight designs adopted in Japan and the ACT performing as advertised – protecting human rights or promoting prison reform. However, neither jurisdiction has waited for soft civil oversight to succeed. Both have moved ahead with other criminal justice reforms that have benefitted prisons.

#### *Japan's reform pathway*

Soft civil prison oversight was not central to Japan's substantive prison reform agenda. Its role has been to satiate public demands for radical intervention in the prisons domain and help to rehabilitate and re-legitimise prisons in the public imagination. Japan's civil prison oversight mechanism has contributed to providing a stable 15-year breathing space in which the Correction Bureau has finally been able to implement incremental changes according to longstanding internal priorities. When aggregated, these changes are slowly shifting the internal logic of Japanese prisons away from the archaic prison models of the 19<sup>th</sup> century and the retributive policies of Japan's *genbatsuka* (get tough on crime) era, which are both discussed in Chapter 3, towards contemporary correctional practice.

While no single reform has addressed human rights in prisons and most have taken place in other parts of the criminal justice system, outside prisons, all have contributed to de-stressing the prison system and have been facilitated by allowing passionate, veteran Correction Bureau and Rehabilitation Bureau personnel to rise to leadership of their own organisation for the first time.<sup>79</sup>

The first broad area of reforms involves a raft of diversionary *iriguchi shien* (entry support) measures affecting policing, prosecution and sentencing.<sup>80</sup> These have been complemented by a new national network of reintegration *deguchi shien* (exit support) partnerships with local government, private landlords, employers, welfare agencies and a newly created workforce of forensic social workers that proactively settle older and disabled offenders in local communities to help prevent them reoffending.<sup>81</sup> As of end 2021, Japanese prisons held just 44,545 prisoners, down from 81,255 at the

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<sup>78</sup> Institute for Crime and Justice Policy Research, 'World Female Prison Population up by 60% since 2000' Institute for Crime & Justice Policy Research News (*University of London Birkbeck*, 20 October 2022) <https://idpc.net/news/2022/10/world-female-prison-population-up-by-60-since-2000> accessed 2 April 2023.

<sup>79</sup> Carol Lawson, 'Japan: Satoshi Tomiyama, Director General of the Correction Bureau' in Dilip K Das and Philip Birch (eds), *Trends in Corrections: Interviews with Corrections Leaders Around the World* (Routledge 2020).

<sup>80</sup> Carol Lawson, 'Subverting the Prison: The Incarceration of Stigmatised Older Japanese (2021) 17

*International Journal of Law in Context* 336.

<sup>81</sup> *ibid.*

end of 2006 – an extraordinary achievement in managed decarceration that has seen the prison population drop to just 50.5% of capacity.<sup>82</sup>

This resettlement effort has been facilitated by a second extraordinary change: the unprecedented integration of the criminal justice system with the welfare system. While theoretically eligible in the past, very few ex-prisoners were successful in applying for social welfare payments due to labyrinthine procedures, bureaucratic roadblocks, and stigma.<sup>83</sup>

The third area of major transformation has begun unfolding inside the corrections system, involving enhanced and diversified staffing, staff training and rehabilitative programs which is further evidence of Japan's incipient transition away from the disciplinarian, industrial prison model towards a contemporary correctional ethos.<sup>84</sup> However, that said, many of the prison conditions flagged by international human rights advocates before the 2002-2003 Nagoya Prison Scandal are unchanged and medical care remains particularly problematic.<sup>85</sup> Meanwhile the rapid greying of the prison population and persistently high share of new admissions who are recidivists, at just under 60%, both pose new challenges.<sup>86</sup>

However, signs of change are pervasive, and it appears that a critical mass of preliminary measures has now been achieved, as the June 2022 passage of amendments to the 1907 *Penal Code* has in effect abolished the sentence of imprisonment 'with work', effective as of 2025.<sup>87</sup> This reform heralds the phasing out of the industrial prison system. While some factories will remain for vocational programs and those still serving sentences 'with work', it will become possible to allocate space and staff and prisoner time, as well as facilities to therapeutic, educational, and other rehabilitative programs in ways that have been impossible until now.

There was an unprecedented drop in 2017 of roughly 20% in the annual number of written opinions sent by Penal Institution Visiting Committees to wardens, from just under 600 annually to just under 500 annually, which was sustained until 2021 when the number dropped again, once more by

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<sup>82</sup> MoJ, *Reiwa 4-nen hanzai hakusho* (2022 White Paper on Crime)

<https://hakusyo1.moj.go.jp/jp/69/nfm/mokuji.html> accessed 2 April 2023, Tables 2-4-2-1 and 2-4-2-2.

<sup>83</sup> Lawson (2021). See further Keiji Rippō Kenkyūkai (ed), '*Shihō to fukushi no renkei*' no tenkai to kadai ('Linking Criminal Justice and Welfare': Development and Issues) (Gendai Jinbunsha 2018)

<sup>84</sup> Lawson (2020).

<sup>85</sup> Human Rights Watch Asia, *Prison Conditions in Japan* (Human Rights Watch Asia 1995)

[www.hrw.org/sites/default/files/reports/JAPAN953.PDF](http://www.hrw.org/sites/default/files/reports/JAPAN953.PDF) accessed 2 April 2023; 'Behind Bars in Japan: Fighting to Improve Prison Conditions and Inmate Treatment' (*Nippon.com*, 22 January 2020)

[www.nippon.com/en/japan-topics/c05404/behind-bars-in-japan-fighting-to-improve-prison-conditions-and-inmate-treatment.html](http://www.nippon.com/en/japan-topics/c05404/behind-bars-in-japan-fighting-to-improve-prison-conditions-and-inmate-treatment.html) accessed 2 April 2023.

<sup>86</sup> Lawson (2021); MoJ, 2022 White Paper on Crime, Figure 5-2-3-1.

<sup>87</sup> Yuri Ishihama, 'Revised Penal Code Shifts Focus to Rehabilitation' *The Japan News* (Tokyo, 17 June 2022) <https://japannews.yomiuri.co.jp/society/general-news/20220617-38443/> accessed 2 April 2023.

roughly 20%, to around 400 annually.<sup>88</sup> As the drop in the prison population has been steady and incremental since 2007 and only a small handful of Japanese penal institutions have closed, these drops are unexplained. It is possible that the system is being progressively curtailed at an administrative level to reduce staff workloads and stress.

Overall, Japan's prisons have emerged as influential and innovative in their own right – and no longer subordinated to the interests of the other branches of the criminal justice system. Their branding in the popular imagination has also softened; they are less fearsome and feared.

It is in this environment that news broke on 9 December 2022 of an internal Correction Bureau investigation into the conduct of 22 staff at Nagoya Prison who were implicated in hundreds of instances of physical and verbal abuse of three older prisoners, some of whom had intellectual disabilities, over a ten-month period.<sup>89</sup> Media articles have noted that the Nagoya Prison Penal Institution Visiting Committee had raised questions about staff conduct earlier in 2022 and questioned the veracity of the prison's responses at that time,<sup>90</sup> although there is no suggestion that it was the Visiting Committee that uncovered the pattern of abuse. Thirteen officers were referred to prosecutors in April 2023.<sup>91</sup>

The final report of the committee of prominent citizens appointed to suggest improvements in how staff treat prisoners was delivered in June 2023. It made recommendations that generally accord with contemporary expectations for corrections officers outside Japan. These include enhanced human rights training, the introduction of body worn cameras to keep custodial staff accountable, particularly when on duty alone, and that staff be required to address prisoners using respectful language.<sup>92</sup>

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<sup>88</sup> Ministry of Justice, 'Keiji shisetsu shisatsu i'inkai no katsudō jōkyō (Report on Activities of Penal Institution Visiting Committees) (Ministry of Justice, nd) [www.moj.go.jp/shingi1/kyousei\\_katsudou\\_index.html](http://www.moj.go.jp/shingi1/kyousei_katsudou_index.html) accessed 2 April 2023.

<sup>89</sup> '22 Officers at Central Japan Prison Found to have Abused Inmates' *Kyodo News* (Tokyo 9 December 2022) <https://english.kyodonews.net/news/2022/12/81c3a16595a4-22-officers-at-central-japan-prison-found-to-have-abused-inmates.html?phrase=Job%20hunting&words> accessed 2 April 2023.

<sup>90</sup> Editorial, 'Why were Lessons from the Past not Utilized at Nagoya Prison?' *The Japan News* (Tokyo, 18 December 2022) <https://japannews.yomiuri.co.jp/editorial/yomiuri-editorial/20221218-78224/> accessed 2 April 2023.

<sup>91</sup> '13 Nagoya Prison Officers Referred to Prosecutors Over Assaults' *The Japan Times* (Tokyo, 28 April 2023) [www.japantimes.co.jp/news/2023/04/28/national/crime-legal/nagoya-prison-guards-prosecutors/](http://www.japantimes.co.jp/news/2023/04/28/national/crime-legal/nagoya-prison-guards-prosecutors/) accessed 2 April 2023.

<sup>92</sup> Nagoya Keimusho Shokuin ni Yoru Bōkō • Futekisei Shōgū Jian ni kakaru Daisansha I'inkai [Third Party Committee on Cases of Violence and Inappropriate Treatment [of Prisoners] by Nagoya Prison Staff], *Teigensho: Kinkokei jidai ni okeru aratana shōgū no jitsugen ni mukete* [Recommendations: Towards Realising New Standards for Prisoner Treatment Fit for the Era of Imprisonment without Work] (21 June 2023) [www.moj.go.jp/content/001398333.pdf](http://www.moj.go.jp/content/001398333.pdf) accessed 21 February 2024.

The extent to which these external recommendations will influence Japan's traditionally authoritarian and disciplinarian prison culture is yet to be seen. These developments were followed, in November 2023, by Human Rights Watch publishing a highly critical report on the treatment of women in Japanese prisons.<sup>93</sup> However, Japanese prisons are clearly in a far better position to weather and learn from this further prisoner abuse scandal at Nagoya Prison than they were two decades ago, in the winter of 2002-2003.

### *ACT reform pathway*

In the ACT, the decade since 2013 has seen the initial faith in the prison's ability to serve as a national model weaken, then collapse as overcrowding worsened amid a seemingly never-ending series of crises. These ignominious scandals which have drawn a steady stream of criticism in the public domain, have concerned contraband, mismanagement, prisoner-on-prisoner violence and serious security breaches, including escapes, riots, fires, hostage-taking and deaths in custody.<sup>94</sup>

While the prison has not yielded to a culture of staff brutality or abandoned its legislative and ideological commitment to prisoners' rights, the May 2016 death in custody of a vulnerable young Indigenous remandee, Steven Freeman, in circumstances that were wholly avoidable,<sup>95</sup> proved a turning point. The ACT abandoned what had been efforts to expand the prison and announced a 'justice reinvestment' strategy entitled 'Building Communities Not Prisons'.<sup>96</sup> This included a raft of 'deck stacking' decarceration and recidivism reduction measures,<sup>97</sup> many of which echo Japan's entry support and exit support initiatives.<sup>98</sup> While there was a drop in the daily average prison population

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<sup>93</sup> Human Rights Watch, *"They Don't Treat Us Like Human Beings": Abuse of Imprisoned Women in Japan* (Human Rights Watch, November 2023) [www.hrw.org/sites/default/files/media\\_2024/01/japan1123web.pdf](https://www.hrw.org/sites/default/files/media_2024/01/japan1123web.pdf) accessed 21 February 2024.

<sup>94</sup> For details of incidents since 2015, see ACT Justice and Community Safety Directorate (JACS), 'Annual Reports' (ACT Justice and Community Safety Directorate, nd) [www.justice.act.gov.au/about-us/annual-reports](https://www.justice.act.gov.au/about-us/annual-reports) accessed 2 April 2023. For critical incident reports from late 2018 onwards, see ACT Inspector of Correctional Services (ICS), 'Critical Incident Reviews' (ACT Inspector of Correctional Services, 2018) [www.ics.act.gov.au/reports-and-publications/critical-incident-reviews](https://www.ics.act.gov.au/reports-and-publications/critical-incident-reviews) accessed 2 April 2023.

<sup>95</sup> Philip Moss, *"So Much Sadness in our Lives": Independent Inquiry into the Treatment in Custody of Steven Freeman* (ACT Government 7 November 2016) [www.ics.act.gov.au/\\_data/assets/pdf\\_file/0019/1304353/Moss-report.pdf](https://www.ics.act.gov.au/_data/assets/pdf_file/0019/1304353/Moss-report.pdf) accessed 2 April 2023.

<sup>96</sup> ACT JACS, 'Building Communities Not Prisons' (ACT Justice and Community Safety Directorate, nd) [www.justice.act.gov.au/justice-programs-and-initiatives/reducing-recidivism/building-communities-not-prisons](https://www.justice.act.gov.au/justice-programs-and-initiatives/reducing-recidivism/building-communities-not-prisons) accessed 2 April 2023.

<sup>97</sup> McCubbins, Noll and Weingast (1987); Carol Lawson, 'Ösutoraria shuto tokubetsu ku ni okeru chiryōteki shihō: posuto koronaki ni okeru kōsatsu' (Therapeutic Justice Initiatives in the Australian Capital Territory: A Post-COVID Update) (2023) 6 *Chiryōteki Shihō Ja-naru* 2 [www.seijo.ac.jp/research/rctj/publications/journal/jtmo42000000I5hu-att/a1679019571665.pdf](https://www.seijo.ac.jp/research/rctj/publications/journal/jtmo42000000I5hu-att/a1679019571665.pdf) accessed 2 April 2023.

<sup>98</sup> Lawson (2023).

from a peak of 484 in fiscal 2018-2019 to 389 in fiscal 2021-2022<sup>99</sup> which resolved overcrowding in theory, this was not the case in reality as prison beds remain closed due to unremedied damage from serious security incidents.

The official inquiry into Steven Freeman's death recommended enhanced oversight<sup>100</sup> and this coincided with a federal government decision to ratify OPCAT,<sup>101</sup> which would require the ACT to participate in a National Preventive Mechanism (NPM). While NPMs are typically patchwork arrangements including both soft and hard mechanisms, there was no attempt to suggest that the Official Visitor system was suitable. Instead, in late 2017, the ACT government established a more powerful and expert hard civil prison oversight body, the ACT Inspectorate of Custodial Services (ICS).<sup>102</sup> This initiative can be seen as a clear downgrading of expectations of the soft civil prison oversight mechanism. When interviewed in mid-2019, Sean Costello, a senior ACT prisons administration official who had been a pivotal figure in ACT civil prison oversight policymaking and implementation for much of the previous decade, described the Official Visitor system at the prison as no more than an information gathering mechanism.<sup>103</sup>

Meanwhile there were modest reforms to the ACT's Official Visitor Scheme as a whole. These reforms introduce changes contemplated by the internal JACS Review of the Official Visitor Scheme 2017 carried out by Pamela Jenkins, which incorporated this study's ACT data and is discussed in Chapter 6. The amendments involved new Official Visitor (Corrections Management) Visit and Complaint Guidelines 2018 (ACT),<sup>104</sup> changes to the Official Visitor Act 2012 (ACT) passed in 2019,<sup>105</sup> a new Corrections Management (Official Visitor) Policy 2019 (ACT) and finally further new Official Visitor Guidelines 2020 (ACT).<sup>106</sup>

Broadly speaking, these changes increased the independence of Official Visitors in the ACT, brought all five types of Official Visitor together administratively and clarified Official Visitors' rights and duties, while increasing transparency around their activities. For the purposes of this study, the key

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<sup>99</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2023* (Productivity Commission 2023) Table 8A.4.

<sup>100</sup> Moss (2016).

<sup>101</sup> See generally Australian Human Rights Commission, *Road Map to OPCAT Compliance* (Australian Human Rights Commission, 17 October 2022) [https://humanrights.gov.au/sites/default/files/opcat\\_road\\_map\\_0.pdf](https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf) accessed 2 April 2023.

<sup>102</sup> Inspector of Correctional Services Bill 2017 (ACT) Explanatory Statement; Inspector of Correctional Services Act 2017 (ACT).

<sup>103</sup> Interview with Sean Costello, Former ACT Justice and Community Safety Director Official (Canberra, 24 July 2019).

<sup>104</sup> See Official Visitor (Corrections Management) Visit and Complaint Guidelines 2018 (ACT) Explanatory Statement.

<sup>105</sup> See Official Visitor Amendment Bill 2019 (ACT) Revised Explanatory Statement; Official Visitor Amendment Act 2019 (ACT).

<sup>106</sup> See Official Visitor Guidelines 2020 (ACT) Explanatory Statement.

reforms include a requirement that all overseers firstly approach the leadership of the facility they are overseeing before they send a report to the competent Minister – an apparent effort to increase procedural fairness for staff in closed environments and possible also to reduce Ministerial workloads. They also require Official Visitors to make referrals to investigative bodies concerning issues that require further action.

The annual reports made by all ACT Official Visitors are now collated as a single ACT Official Visitors Scheme Annual Report published by the Official Visitors Board. The first two reports produced under these arrangements summarise over 1500 hrs of work by the four overseers currently at the ACT prison in just four A4 pages.<sup>107</sup> In 2021-2022, the Official Visitors appointed to the prison made 116 visits, received 1245 complaints, referred 10 of that number to investigative entities and inspected no client records.<sup>108</sup> It is clear from these reports that, in general, the nature of the Official Visitors' role remains as described by Judy Putt and Tracey Whetnall in Chapter 10.

Chapter 1 noted that the powerful 'smart' regulatory networks in the European Union (EU) have created robust regulatory machinery, which fulfils the role of a 'reverse Panopticon'.<sup>109</sup> As a former ACT politician noted in mid-2022, the ACT prisons administration is now facing a 'growing barrage' of prisoner lawsuits alleging human rights breaches, some of which have been successful.<sup>110</sup>

This raises the question of whether a powerful regulatory network of the kind seen in the EU over the last 15 years might emerge in the ACT. The hard civil prison oversight body is proactive,<sup>111</sup> and its *Healthy Prison Review* reports are expert, mixed methods empirical evaluations of all aspects of prison operations, which run to 250 pages and make grim reading.<sup>112</sup> It is also engaging in rigorous local standard setting.<sup>113</sup>

It is possible that the ACT Supreme Court could admit ICS reports as evidence and make binding rulings based on them. The Human Rights Act 2004 (ACT) (HRA 2004) was expanded as of August 2012 to include a single economic, social and cultural right, the right to education. The amendments also introduced a duty on public authorities to comply with international human rights norms, and a

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<sup>107</sup> Two of the four are Indigenous overseers.

<sup>108</sup> Official Visitor Scheme Annual Report 2020-21 (ACT Government 2021) <https://ovs.act.gov.au/images/ovs-ar-2021-22.pdf> accessed 2 April 2023, 12, 17.

<sup>109</sup> Gaëtan Cliquenois and Sonja Snacken, 'European and United Nations Monitoring of Penal and Prison Policies as a Source of an Inverted Panopticon?' (2018) 70 *Crime Law and Social Change* 1.

<sup>110</sup> Jon Stanhope, 'There's Something Rotten in the State of Our Prison' *CBR City News*, 8 June, <https://citynews.com.au/2022/theres-something-rotten-in-the-state-of-our-prison-2/> accessed 2 April 2023.

<sup>111</sup> See generally ACT ICS, 'Reports and Publications' (ACT Inspector of Correctional Services 2018) [www.ics.act.gov.au/reports-and-publications](http://www.ics.act.gov.au/reports-and-publications) accessed 2 April 2023.

<sup>112</sup> *ibid.*

<sup>113</sup> ACT ICS, ACT Standards for Adult Correctional Services (2019) [www.ics.act.gov.au/\\_data/assets/pdf\\_file/0016/1335013/ACT-ICS-ACT-Standards-for-Adult-Correctional-Services\\_final\\_web.pdf](http://www.ics.act.gov.au/_data/assets/pdf_file/0016/1335013/ACT-ICS-ACT-Standards-for-Adult-Correctional-Services_final_web.pdf) accessed 2 April 2023.



direct right of action regarding breaches, although no right to damages, only to declaratory relief. This has led to a trickle of suits filed by prisoners seeking declaratory relief for alleged violations of the HRA 2004 by corrections officers. However, the ACT Human Rights Commission has begun a campaign to shift human rights suits out of the unwieldy, expensive Supreme Court and into the timely, fee-free conciliation service that the Commission provides.<sup>114</sup> This would see the details of settlements kept confidential and prevent any binding rulings being issued.

The first visit of the UN Subcommittee on the Prevention of Torture (SPT) to Australia was suspended in October 2022 after the SPT was denied entry to some places of detention.<sup>115</sup> As of February 2024, Australia's deadline for establishing an NPM in accordance with its ratification of OPCAT has passed, but its NPM remains incomplete.<sup>116</sup>

### 11.3.3 Questions for further research

It would be encouraging in future to find that this study's conclusions are anomalous in a landscape of respectful, effective co-regulatory soft civil prison oversight models. In Australia, further studies in Victoria and Queensland may offer useful insights as both now also have state-level human rights legislation and soft versions of civil oversight.<sup>117</sup>

It would also be worthwhile to investigate how the staff desire for dialogic human rights regulation observed in this study might translate into effective co-regulatory persuasive regulatory designs, with the aim of building a taxonomy of persuasive regulatory designs that are empirically proven to be high in legitimacy, benefits, fairness and moral resonance for prison staff in different jurisdictions and prison cultures.

In addition, as the Victorian and Queensland Supreme Courts have recently become more receptive to in prisoner lawsuits, further studies could consider the possibility that hard versions of civil oversight might contribute to effective network regulation of prison conditions in those states in

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<sup>114</sup> ACT Human Rights Commission, 'About Conciliation' (*ACT Human Rights Commission*, nd) <https://hrc.act.gov.au/complaints/conciliation/> accessed 2 April 2023.

<sup>115</sup> ACT ICS, 'NPM Joint Statement - SPT Terminates Visit to Australia' (*ACT Inspector of Correctional Services* 21 February 2023) [www.ics.act.gov.au/latest-news/articles/spt-terminates-visit-to-australia](http://www.ics.act.gov.au/latest-news/articles/spt-terminates-visit-to-australia) accessed 2 April 2023.

<sup>116</sup> Australian NPM, 'Joint Statement: Subcommittee on Prevention of Torture Decides to Terminate Visit to Australia' (*Commonwealth Ombudsman*, February 2023) [www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0023/290372/NPM-Network-Joint-Statement-21-February-2023.pdf](http://www.ombudsman.gov.au/_data/assets/pdf_file/0023/290372/NPM-Network-Joint-Statement-21-February-2023.pdf) accessed 2 April 2023; Ombudsman NT, 'Australian NPM Network' <https://ombudsman.nt.gov.au/opcat/australian-npm-network> accessed 21 February 2024.

<sup>117</sup> Charter of Human Rights and Responsibilities Act 2006 (VIC); Corrections, Prisons & Parole, 'Independent Prison Visitor Scheme' (*Victorian Government* 13 January 2023) [www.corrections.vic.gov.au/index.php/independent-prison-visitor-scheme](http://www.corrections.vic.gov.au/index.php/independent-prison-visitor-scheme) accessed 2 April 2023; Human Rights Act 2019 (QLD); Queensland Government, 'Official Visitors' (*Queensland Government*, 1995-2023) [www.qld.gov.au/law/sentencing-prisons-and-probation/prisons-and-detention-centres/visiting-a-prisoner/official-visitors](http://www.qld.gov.au/law/sentencing-prisons-and-probation/prisons-and-detention-centres/visiting-a-prisoner/official-visitors) accessed 2 April 2023.



future via judicial enforcement.<sup>118</sup> it would be useful to know empirically how and why the ‘reverse Panopticon’ effect described by Cliquennois and Snacken in 2018 varies between EU jurisdictions – and whether it is reasonable to expect that similar ‘smart’ regulatory arrangements will also emerge in other parts of the globe.

One way forward would be to replicate the insightful empirical studies of the staff experience of soft and hard civil prison oversight mechanisms in the UK and Europe by Vagg and Bennett<sup>119</sup> in other jurisdictions globally. Rogan and Morgenstern’s 2021 study of senior prison managers’ experience of human rights enforcement in Germany shows this work may have already begun.<sup>120</sup>

Another question worth investigating is whether discourse attributing heroic values to civil prison overseers over recent decades may have inadvertently added to the stigma of prisons work, increasing risks for both staff and prisoners. Eriksson’s 2021 article on prison work as ‘dirty’ work performed by stigmatised people may assist.<sup>121</sup>

A streamlined version of the methodology used in this study might be of benefit in other comparative regulatory contexts. The triangulated, mixed methods comparison and Most-Different-Systems design yielded rich, kaleidoscopic insights into the inner workings and effects of the oversight mechanism in each jurisdiction. This is explained by the fact that it is not just regulators or their intermediaries in a regulatory interaction who are custodians of regulatory insights. All the actors who animate a regulatory mechanism are custodians of knowledge that only they possess.

A 2022 empirical work by O’Connell and Rogan that examined the impact of European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visits to Scottish and Norwegian prisons through the eyes of staff and prisoners is a promising development in this vein.<sup>122</sup> While this study has focused on the lived experience of prison staff, it is also

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<sup>118</sup> Anita Mackay, ‘Recent Court Decisions about the Protection of Human Rights of Imprisoned People’ (2022) 28(2-3) *Australian Journal of Human Rights* 435.

<sup>119</sup> Jon Vagg, *Prison Systems: A Comparative Study of Accountability in England, France, Germany and the Netherlands* (Clarendon Press 1994); Jamie Bennett, ‘Resisting the Audit Explosion: The Art of Prison Inspection’ (2014) 53(5) *Howard Journal of Criminal Justice* 449; Jamie Bennett, *The Working Lives of Prison Managers: Global Change, Local Culture and Individual Agency in the Late Modern Prison* (Palgrave Macmillan 2016a).

<sup>120</sup> Mary Rogan and Christine Morgenstern, ‘“One Always Looks for a Compromise...” Senior Prison Managers Views of Law, Human Rights and Oversight in Germany’ (2021) Freie Universität Empirical Legal Studies Center Working Paper No. 9, [www.jura.fu-berlin.de/en/forschung/fuels/Research-Output/Working-Papers/FUELS\\_WP\\_Prisons\\_Human\\_Rights.pdf](http://www.jura.fu-berlin.de/en/forschung/fuels/Research-Output/Working-Papers/FUELS_WP_Prisons_Human_Rights.pdf) accessed 2 April 2023. See also Ciara O’Connell and Mary Rogan, ‘Monitoring Prisons in Europe: Understanding Perspectives of People in Prison and Prison Staff’ (2022) *Law & Social Inquiry* 1.

<sup>121</sup> Anna Eriksson, ‘The Taint of the Other: Prison Work as ‘Dirty Work’ in Australia’ (2021) 25(2) *Punishment & Society* 324.

<sup>122</sup> Ciara O’Connell and Mary Rogan, ‘Monitoring Prisons in Europe: Understanding Perspectives of People in Prison and Prison Staff’ (2022) 00 *Law & Social Inquiry* 1.

important to determine whether existing civil prison oversight models deliver as advertised from the perspective of prisoners – the intended beneficiaries. Aizpurua and Rogan’s 2022 work, which investigated the risk of reprisals for both prisoners and staff who speak to hard civil oversight bodies in the EU, may be a useful stepping stone.<sup>123</sup> Finally, another way forward may be to rely on Quinn, Tomczak and Buck’s 2022 work on the costs inherent in being a penal sector volunteer to investigate the lived experience of both prisoners who take on the risks of being a whistleblower in these mechanisms and overseers, who can be subject to unrealistic expectations and given scant support.<sup>124</sup>

Finally, it would also be possible to approach this civil prison oversight through the lens of penal populism.<sup>125</sup> As Garland’s 2021 article notes,<sup>126</sup> criminal justice policy is prone to being driven by powerful myths concerning law and order, yet criminologists understand that they run counter to what we know empirically and invite perverse outcomes. The inquiry would be into whether the enduring faith in soft civil prison oversight, despite the absence of any empirical evidence as to its efficacy, can be said to be among these criminological myths – and if so, what measures might balance its influence.

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<sup>123</sup> Eve Aizpurua and Mary Rogan, ‘Correctional Oversight Bodies’ Resources and Protections across the European Union: Are their Hands Tied?’ (2022) 22(3) *Criminology & Criminal Justice* 383.

<sup>124</sup> Kaitlyn Quinn, Philippa Tomczak and Gillian Buck, ‘“How You Keep Going”: Voluntary Sector Practitioners’ Storylines as Emotion Work’ (2022) *British Journal of Sociology* 1.

<sup>125</sup> See Anthony E Bottoms, ‘The Philosophy and Politics of Punishment and Sentencing’ in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995) 40; See also Julian V Roberts and others, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press 2002).

<sup>126</sup> David Garland, ‘What’s Wrong with Penal Populism? Politics, the Public and Criminological Expertise’ (2021) 16 *Asian Journal of Criminology* 257.

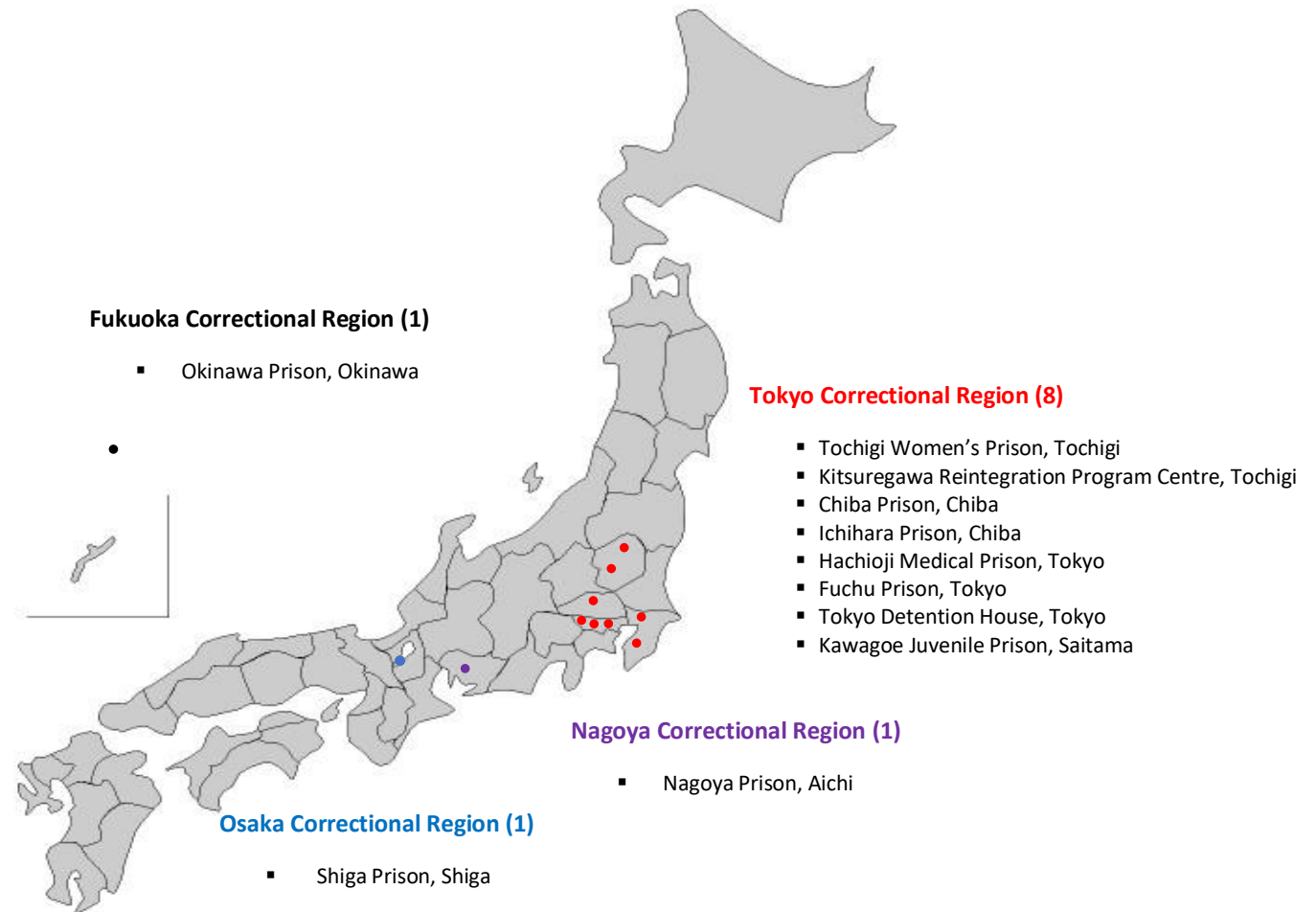
## Appendices

### Appendix A Phase 1: Exploratory Data Collection

#### A1 Japan: Participating penal institutions

##### Participating Penal Institution by Type

|                                                                                                                                                                                              |           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| Mainstream adult male prisons                                                                                                                                                                | 6         |
| Specialised penal institutions                                                                                                                                                               | 5         |
| <ul style="list-style-type: none"> <li>• PFI Prison x 1</li> <li>• Medical Prison x 1</li> <li>• Juvenile Prison x 1</li> <li>• Women's Prison x 1</li> <li>• Detention House x 1</li> </ul> |           |
| <b>Total</b>                                                                                                                                                                                 | <b>11</b> |



幹部職員 聞き取り調査 No. :

日付／時間 :

### 質問

1. 職員になられた経緯を教えてください。職員になろうと思ったのはなぜですか？（他に何かの理由は？）
2. 勤務年数は何年になりますでしょうか。今まで何カ所の刑務所で勤務されましたか？視察委員会庶務担当になられてどれくらいの年月が経っていますでしょうか。
3. 職員として刑務所環境に慣れて、自信を持って活躍するには、どのくらいかかりましたか？ 慣れるために誰かのアドバイスや、特定のことがお役に立ちましたか。職員としての役割の中で一番難しいと感じた事は何でしょうか。
4. 職員になりたての頃に受けられた訓練についてお尋ねします。訓練を受けられた当時、新任の職員にとって最も重要とみられたのは何でしたか？（他に何か？）
5. 名古屋刑務所事件後の抜本的改革の一環として、視察委員会制度が導入されて約 10 年が経ちます。この市民による新たな監視制度の導入初期段階で、最も記憶に残っている印象は何ですか？委員会の庶務担当者になる前に訓練・オリエンテーションを受けましたか？
6. 庶務担当者と委員会との関係において何が重要だと思われますか？委員と幹部職員との理想的な関係とはどんなものと思われますか。仲間のような交流を持ってもいいでしょうか。年月の経過とともに、考えは変わりましたか？
7. 刑事施設視察委員会制度は法的に意義があると感じますか？ そして、被収容者、職員、一般市民にとって意義があると感じますか？ 年月の経過とともに、考えは変わりましたか？
8. 委員会の役割や刑務所の環境に関して、不快に思ったり、不満を感じたことはありましたか？ 改善策の提案はありますか？
9. 最後になりますが、何か他に説明を付け足したい処はありますか？

刑務所所長 聞き取り調査 No. :

日付／時間 :

質問

1. 矯正局に入局された経緯を教えてください。職員になろうと思ったのはなぜですか？（他に何かの理由は？）
2. 勤務年数は何年になりますでしょうか。今まで何カ所の刑務所で勤務されましたか？刑務所所長になられてどれくらいの年月が経っていますでしょうか。
3. 職員として刑務所環境に慣れて、自信を持って活躍するには、どのくらいかかりましたか？ 慣れるために誰かのアドバイスや、特定のことがお役に立ちましたか。職員としての役割の中で一番難しいと感じた事は何でしょうか。
4. 職員になりたての頃に受けられた訓練についてお尋ねします。訓練を受けられた当時、新任の職員にとって最も重要とみられたのは何でしたか？（他に何か？）
5. 名古屋刑務所事件後の抜本的改革の一環として、視察委員会制度が導入されて約 10 年が経ちます。この市民による新たな監視制度の導入初期段階で、最も記憶に残っている印象は何ですか？所長になる前に視察委員会との関係についての経験、または訓練・オリエンテーションがありましたか？
6. 所長と委員会との関係において何が重要だと思われますか？委員と幹部職員との理想的な関係とはどんなものと思われますか。仲間のような交流を持ってもいいでしょうか。年月の経過とともに、お考えは変わりましたか？
7. 刑事施設視察委員会制度は法的に意義があると感じますか？ そして、被収容者、職員、一般市民にとって意義があると感じますか？ 年月の経過とともに、お考えは変わりましたか？
8. 委員会の役割や刑務所の環境に関して、不快に思ったり、不満を感じたことはありましたか？ 改善策の提案はありますか？
9. 最後になりますが、何か他に説明を付け足したい処はありますか？

刑事施設視察委員会委員 聞き取り調査 No.:

日付／時間：

質問

1. 視察委員会委員になられた経緯を教えてください。委員になろうと思ったのはなぜですか？（他に何か理由は？）
2. 受けられたオリエンテーションとその後のサポートについてどう思われますか？委員として刑務所環境に慣れて、自信を持って活躍するには、どのくらいかかりましたか？慣れるために誰かのアドバイスや、特定のことがお役に立ちましたか。委員としての役割の中で一番難しいと感じた事は何でしょうか。
3. 視察委員会がその役割を果たす上で、かなりの自由裁量が与えられていると理解しています。職務を遂行するに当たって、何が重要とお考えですか？（例えば頻度、訪問時間の長さ、抽象的にも？）
4. 面談についてですが、1回の訪問につき、何人の面談を行いますか？何人の委員の方が一つの面談に参加しますか。プライバシーレベルは適切でしょうか？面談希望被収容者、または委員会からの面談依頼対象被収容者と必ず面談出来ますか？幹部職員経由での面談依頼はいつも正確に伝えられていると思えますか？幹部職員との面談は十分に出来ますか？
5. 被収容者の書面についてですが、一般の信書・提案箱の投書は一回の訪問につき、何通ありますか。書面の管理・分類・処理・結果報告について特に思ったことありますか。
6. 幹部職員との関係についてお尋ねします。協力的ですか。それとも少し抵抗するような言動が見られますか？幹部職員との理想的な関係とはどんなものと思えますか。仲間のような交流を持ってもいいでしょうか。
7. 委員会の報告方法経験についてお聞きします。どのくらいの頻度で意見書を出していますか？期待通りに調査依頼問題は対処されますか。法務大臣への報告頻度は十分だと思えますか。
8. 刑事施設視察委員会制度は法的に意義があると感じますか？そして、被収容者、職員、一般市民にとって意義があると感じますか？年月の経過とともに、考えは変わりましたか？
9. 委員会の役割や刑務所の環境に関して、不快に思ったり、不満を感じたことはありましたか？改善策の提案はありますか？
10. 最後になりますが、何か他に説明を付け足したい処はありますか？

**A5 ACT: Interview questions - senior corrections officers**

**[ACT Prison] Official Visitor Liaison Manager Interview #:**

**Date/Time:**

**QUESTIONS**

10. I'd like to begin by asking how you came to be a corrections officer? May I ask how many correctional facilities you have worked at over how many years?
11. What do you think were the factors that motivated you at first, before you began your role?
12. How long did it take to feel effective in your role and the prison environment? What helped?
13. I wonder if you can tell me about the training you received early in your career. What characteristics and habits were seen as most important for new corrections officers at that time?
14. It has been some years since the Official Visitor system was introduced at the AMC. What is it you remember most about the early days of this new civil oversight system? How did you feel initially about the Official Visitor system? Did you receive training in your liaison role?
15. How would you describe your role in interacting with Official Visitors since the system was introduced? What do you think is important in that relationship, and has this changed over time? Are there any risks or benefits for corrections officer or detainees that come to mind?
16. Do you feel that the Official Visitor system is meaningful or effective for detainees, corrections officers, and Official Visitors? In what way? Have your views changed over time?
17. Has anything about the Official Visitors' role made you feel uncomfortable or frustrated? What improvements would you recommend?
18. Is there anything further you would like to add?

**QUESTIONS**

1. I'd like to begin by asking how you came to join Corrective Services? May I ask how many correctional facilities you have served at, over how many years?
2. What do you think were the factors that motivated you at first, before you joined Corrective Services?
3. How long did it take at first to feel effective in your correctional role and the prison environment? What helped?
4. I wonder if you can tell me about the training you received early in your career. What characteristics and habits were seen as most important for new corrections officers at that time?
5. It has been some years since the Official Visitor system was introduced at the AMC. What is it you remember most about the early days of this new civil oversight system? Do you remember how you felt initially about the Official Visitor system?
6. How would you describe your role in this civil oversight mechanism in the years since it was introduced? What did you initially think would be important for a General Manager to focus on in their role in the Official Visitor system? Has your view changed over time? Are there any risks or benefits for General Managers as they carry out this role?
7. Do you feel that the Official Visitor system is a meaningful or effective civil oversight regime for detainees, corrections officers, and Official Visitors? In what way? Have your views have changed over time?
8. Has anything about your role in the Official Visitor system made you feel uncomfortable or frustrated? If you could improve the system, what improvements would you recommend?
9. Is there anything further you would like to add?



**A7 ACT: Interview questions - overseers**

**[ACT Prison] Official Visitor Interview #:**

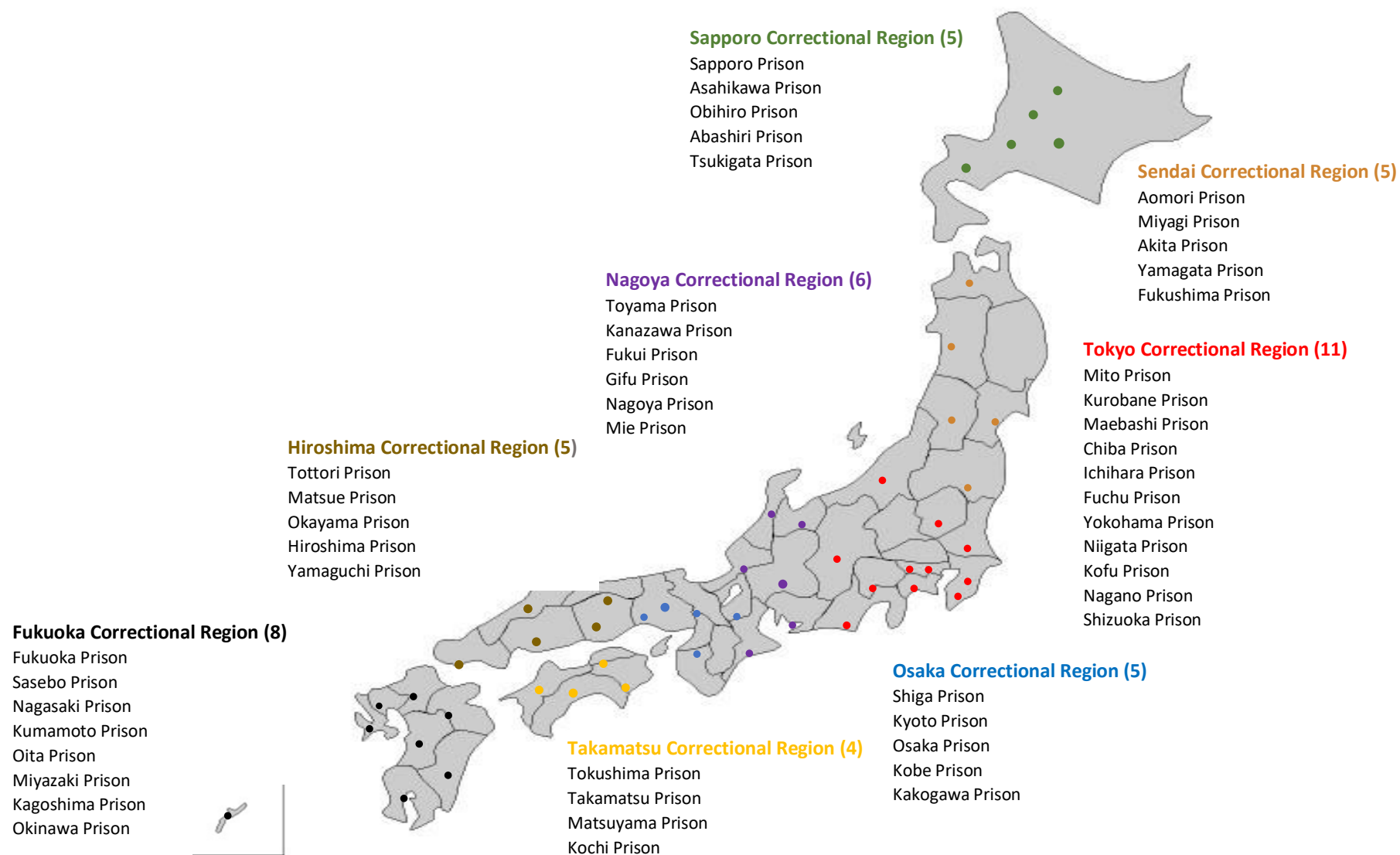
**Date/Time:**

**QUESTIONS**

1. I'd like to begin by asking how you came to be an Official Visitor?
2. What do you think were the factors that motivated you at first, before you began your role?
3. How did you find the training you received before you began and support from then on?
4. How long did it take to feel effective in your role and the prison environment? What helped?
5. I understand the Official Visitor system gives a lot of discretion to Official Visitors in how to carry out their role. Can you describe what you feel is important in how you carry out your role? (frequency / length of visits, scheduled/unannounced)
6. How would you describe interacting with detainees? Have you had the access to detainees and prison facilities you desired? An appropriate level of privacy? How many meetings per visit? Meetings with other concerned parties? Requests through corrections officers not an issue?
7. How have you found interacting with corrections officers? How would you describe that relationship? Have you experienced any resistance? Co-opting?
8. Can you describe your experience of the reporting aspect of your role: To whom? How often? Has the outcome been as you hoped?
9. Do you feel that the Official Visitor system is meaningful? Firstly, in terms of overarching legal concepts, and secondly for detainees, corrections officers, and the public. Have your views changed over time?
10. Has anything about the Official Visitor role or the prison environment made you feel uncomfortable or frustrated? What improvements would you recommend?
11. Is there anything further you would like to add?

## Appendix B Phase 2: Main Data Collection

### B1 Japan: Participating mainstream adult male prisons



## 刑事施設視察委員会に関するアンケート【職員用】

### 1. 目的

このアンケートは、刑事施設視察委員会（以下「委員会」という。）に関する研究を行うため、平成28年9月から同年10月までの間、当方で選定した複数の刑事施設の一定の役職以上の職員に対して、率直なご意見・ご感想等を伺うものです。

このアンケートに回答してもしなくても、不利益を課されたり、利益を得ることはありませんが、職員の皆さんにしか分からないこともありますので、何卒、ご協力ください。

### 2. 留意事項

- このアンケートは無名記ですので、名前を書かないでください。
- このアンケートの記入が終わりましたら、所定の封筒に入れて、封をしてから各施設で定める方法により、提出してください。調査期間が終わり次第、施設から研究者宛てに書留郵送されます。
- このアンケートは、厳格な秘密保持基準に従い、一定の期間保管した後、裁断等の適切な方法で廃棄されます。詳細については、別添の説明を参照してください。

### 3. 回答の方法

- 質問をよく読んで回答してください。
- 回答は、あてはまるものを1つ選ぶものと、すべて選ぶものの2種類あります。
- 回答は、下記の例のとおり、あてはまる番号の部分に○をつけてください。もし、ぴったりの回答がなければ、最も近い回答を選んでください。

#### 【「4」が当てはまるときの記載例】

委員会の基本的な姿勢等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                       | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う | 分<br>か<br>ら<br>な<br>い |
|---------------------------------------|--------------|---------------|---------------|------------|------------|-----------------------|
| 1. 委員会は、施設や職員の活動や専門性等に敬意を払っていると思いますか。 | 1            | 2             | 3             | ④          | 5          | 6                     |

**問１ 貴所の委員会の委員との関わり方についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                                                    | ない | ある | 分からない |
|----------------------------------------------------|----|----|-------|
| 1. 新任の委員による自己紹介を受けたことがありますか。                       | 1  | 2  | 3     |
| 2. 委員会の会議の席上で、質疑に答えたことがありますか。                      | 1  | 2  | 3     |
| 3. 上記2のほか、委員会から被収容者の処遇に関する個別事案の事実確認を求められたことがありますか。 | 1  | 2  | 3     |
| 4. 委員会の所内視察に同行して、説明等を行ったことがありますか。                  | 1  | 2  | 3     |
| 5. 委員会による職員用アンケートを受けたことがありますか。                     | 1  | 2  | 3     |
| 6. 委員による職員面接を受けたことがありますか。                          | 1  | 2  | 3     |
| 7. 外国語で書かれた意見・提案書の整理・翻訳に関わったことがありますか。              | 1  | 2  | 3     |
| 8. 勤務時間中における職員との意見交換の機会がありましたか。                    | 1  | 2  | 3     |
| 9. 勤務時間外における委員との懇談の機会（飲み会への参加など）に参加したことがありますか。     | 1  | 2  | 3     |

**問２ 被収容者が提出した意見・提案書の記載（以下「記載」といいます。）や委員による面接での被収容者の発言（以下「発言」といいます。）の内容等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

※ なお、職員の方は、立場上、個々の記載・発言の内容は知り得ないと思いますが、視察委員会が掲示する書面等を通じて、全体的な記載・発言内容は把握できる場合もあることから、お聞きしています。もし、全体的な記載・発言内容を把握できないときは、番号の「6」に○をつけてください。

|                                              | 全くそう思わない | あまりそう思わない | どちらともいえない | 少しそう思う | 強くそう思う | 分からない |
|----------------------------------------------|----------|-----------|-----------|--------|--------|-------|
| 1. 記載の内容は、施設の運営の改善に有益なものがあると思いますか。           | 1        | 2         | 3         | 4      | 5      | 6     |
| 2. 発言の内容は、施設の運営の改善に有益なものがあると思いますか。           | 1        | 2         | 3         | 4      | 5      | 6     |
| 3. 記載をした被収容者は、不服申立てを多数行うなど、好訴性の高い者がいると思いますか。 | 1        | 2         | 3         | 4      | 5      | 6     |
| 4. 発言をした被収容者は、不服申立てを多数行うなど、好訴性の高い者がいると思いますか。 | 1        | 2         | 3         | 4      | 5      | 6     |
| 5. 記載をした被収容者は、記載の後、心情が安定することがあると思いますか。       | 1        | 2         | 3         | 4      | 5      | 6     |
| 6. 発言をした被収容者は、発言の後、心情が安定することがあると思いますか。       | 1        | 2         | 3         | 4      | 5      | 6     |

**問3 貴所の委員会の基本的な姿勢等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                                                                     | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う | 分<br>か<br>ら<br>な<br>い |
|---------------------------------------------------------------------|--------------|---------------|---------------|------------|------------|-----------------------|
| 1. 委員会の運営において、各委員の主張や意見がそれぞれ尊重されていると思いますか。                          | 1            | 2             | 3             | 4          | 5          | 6                     |
| 2. 委員会の主張や意見は、施設や職員に尊重されていると思いますか。                                  | 1            | 2             | 3             | 4          | 5          | 6                     |
| 3. 委員会は、施設・職員の主張や意見を尊重していると思いますか。                                   | 1            | 2             | 3             | 4          | 5          | 6                     |
| 4. 委員会は、職員よりも被収容者の主張や意見を重視していると思いますか。                               | 1            | 2             | 3             | 4          | 5          | 6                     |
| 5. 委員会は、施設や職員の活動や専門性等に敬意を払っていると思いますか。                               | 1            | 2             | 3             | 4          | 5          | 6                     |
| 6. 委員会は、個別事案の救済等、法律上求められていない業務も行っていると思いますか。                         | 1            | 2             | 3             | 4          | 5          | 6                     |
| 7. 委員会は、意見・提案書の提出等をしない被収容者のことも考慮していると思いますか。                         | 1            | 2             | 3             | 4          | 5          | 6                     |
| 8. 委員会は、職員の勤務状況よりも、被収容者の処遇の改善を重視していると思いますか。                         | 1            | 2             | 3             | 4          | 5          | 6                     |
| 9. 委員会は、施設の人的・物的資源の限界を超えるような主張や意見をしていると思いますか。                       | 1            | 2             | 3             | 4          | 5          | 6                     |
| 10. 委員会は、施設の権限や裁量の範囲外の事項について主張や意見をしていると思いますか。                       | 1            | 2             | 3             | 4          | 5          | 6                     |
| 11. 委員会は、施設の規律秩序の維持に支障が生じるような主張や意見をしていると思いますか。                      | 1            | 2             | 3             | 4          | 5          | 6                     |
| 12. 委員会は、被害者や国民一般の考えとは異なるような主張や意見をしていると思いますか。                       | 1            | 2             | 3             | 4          | 5          | 6                     |
| 13. 弁護士や法学者である委員と、地方公共団体や地域社会から推薦された委員との間で、考え方について、大きな隔たりがあると思いますか。 | 1            | 2             | 3             | 4          | 5          | 6                     |

問4 貴所の委員会の活動の内容・程度等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                               | ない・少ない・短い | 少し少ない・少し短い | 適切である | 少し多い・少し長い | 多い・長い | 分からない |
|-----------------------------------------------|-----------|------------|-------|-----------|-------|-------|
| 1. 委員会の会議の年間開催回数は、適切だと思いますか。                  | 1         | 2          | 3     | 4         | 5     | 6     |
| 2. 1回の会議に要する時間は、適切だと思いますか。                    | 1         | 2          | 3     | 4         | 5     | 6     |
| 3. 委員会が行う所内視察の回数は、適切だと思いますか。                  | 1         | 2          | 3     | 4         | 5     | 6     |
| 4. 1回の所内視察に要する時間は、適切だと思いますか。                  | 1         | 2          | 3     | 4         | 5     | 6     |
| 5. 委員会に対する施設からの情報提供の分量は、適切だと思いますか。            | 1         | 2          | 3     | 4         | 5     | 6     |
| 6. 委員会に対する施設からの情報提供のタイミングは、適切だと思いますか。         | 1         | 2          | 3     | 4         | 5     | 6     |
| 7. 委員会が確認する意見・提案書の件数は、適切だと思いますか。              | 1         | 2          | 3     | 4         | 5     | 6     |
| 8. 被収容者の希望又は委員会の要請に基づく委員による面接の回数は、適切だと思いますか。  | 1         | 2          | 3     | 4         | 5     | 6     |
| 9. 1回の面接に要する時間は、適切だと思いますか。                    | 1         | 2          | 3     | 4         | 5     | 6     |
| 10. 被収容者が希望してから委員による面接が実施されるまでの期間は、適切だと思いますか。 | 1         | 2          | 3     | 4         | 5     | 6     |
| 11. 委員会が被収容者に活動内容を周知する回数は、適切だと思いますか。          | 1         | 2          | 3     | 4         | 5     | 6     |
| 12. 委員会が施設長に提出する意見の件数は、適切だと思いますか。             | 1         | 2          | 3     | 4         | 5     | 6     |
| 13. 委員会の活動の程度は、全体として、適切だと思いますか。               | 1         | 2          | 3     | 4         | 5     | 6     |

問5 貴所の委員会の活動に伴う職員の業務量等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                         | ない又は少ない  | 少し少ない     | 適切である     | 少し多い   | 多い     | 分からない |
|-------------------------------------------------------------------------|----------|-----------|-----------|--------|--------|-------|
| 1. 委員会の所内視察に伴う業務量（計画の立案や委員との同行等の手間）は、どの程度ですか。                           | 1        | 2         | 3         | 4      | 5      | 6     |
| 2. 委員会の意見・提案書の整理・確認に伴う業務量は、どの程度ですか。                                     | 1        | 2         | 3         | 4      | 5      | 6     |
| 3. 委員会の委員による面接に伴う業務量（被収容者の連行等の手間）は、どの程度ですか。                             | 1        | 2         | 3         | 4      | 5      | 6     |
| 4. 委員会の活動内容の周知に伴う業務量（印刷・掲示等の手間）は、どの程度ですか。                               | 1        | 2         | 3         | 4      | 5      | 6     |
| 5. 委員会が提出する意見に伴う業務量（事実確認や委員会との質疑応答等の手間）は、どの程度ですか。                       | 1        | 2         | 3         | 4      | 5      | 6     |
| 6. 委員会の活動に伴う業務量は、全体として、適切だと思いますか。                                       | 1        | 2         | 3         | 4      | 5      | 6     |
|                                                                         | 全くそう思わない | あまりそう思わない | どちらともいえない | 少しそう思う | 強くそう思う | 分からない |
| 7. 中立的な立場から広く刑事施設の運営に有意義な意見を述べるためには、専門的な知識・能力がなくても、一般的な常識があれば足りると思いますか。 | 1        | 2         | 3         | 4      | 5      | 6     |
| 8. 委員会の活動に伴う業務の負担は、委員長などの特定の委員に集中していると思いますか。                            | 1        | 2         | 3         | 4      | 5      | 6     |

**問6 貴所の委員会の活動に伴う効果や影響についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                                                  | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う | 分からない |
|--------------------------------------------------|--------------|---------------|---------------|------------|------------|-------|
| 1. 委員会の活動は、施設の運営を改善する効果があると思いますか。                | 1            | 2             | 3             | 4          | 5          | 6     |
| 2. 委員会の活動は、施設運営に国民の理解を得られる効果があると思いますか。           | 1            | 2             | 3             | 4          | 5          | 6     |
| 3. 委員会の活動は、社会の常識を施設運営に反映する効果があると思いますか。           | 1            | 2             | 3             | 4          | 5          | 6     |
| 4. 委員会の活動は、国民に被収容者の処遇の実情を認識してもらえ効果があると思いますか。     | 1            | 2             | 3             | 4          | 5          | 6     |
| 5. 委員会の活動は、国民に職員の勤務の実情を認識してもらえ効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          | 6     |
| 6. 委員会の活動は、職員の士気を向上する効果があると思いますか。                | 1            | 2             | 3             | 4          | 5          | 6     |
| 7. 委員会の活動は、職員の業務の効率化や事務負担の軽減を図る効果があると思いますか。      | 1            | 2             | 3             | 4          | 5          | 6     |
| 8. 委員会の活動は、施設や職員の正当な主張や意見を支持する効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          | 6     |
| 9. 委員会の活動は、被収容者の心情を安定させる効果があると思いますか。             | 1            | 2             | 3             | 4          | 5          | 6     |
| 10. 委員会の活動は、不当に制約された被収容者の人権を救済する効果があると思いますか。     | 1            | 2             | 3             | 4          | 5          | 6     |
| 11. 委員会の活動を通じて、被収容者も刑事施設の運営に参加や貢献させる効果があると思いますか。 | 1            | 2             | 3             | 4          | 5          | 6     |
| 12. 委員会の活動は、被収容者の悩みや主張を国民に知らせる効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          | 6     |
| 13. 委員会の活動は、施設の予算の増額や職員の増員をさせる効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          | 6     |
| 14. 委員会の活動は、かえって被収容者の不満や増長を招いていると思いますか。          | 1            | 2             | 3             | 4          | 5          | 6     |
| 15. 委員会の活動は、被収容者が職員を不当に牽制する手段として悪用されていると思いますか。   | 1            | 2             | 3             | 4          | 5          | 6     |



問7 委員会の意義等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|----------------------------------------------------------------|--------------|---------------|---------------|------------|------------|
| 1. 委員会の活動は、被収容者にとって、意義がある（価値がある）と思いますか。                        | 1            | 2             | 3             | 4          | 5          |
| 2. 委員会の活動は、職員にとって、意義がある（価値がある）と思いますか。                          | 1            | 2             | 3             | 4          | 5          |
| 3. 委員会の活動は、国民全体にとって、意義がある（価値がある）と思いますか。                        | 1            | 2             | 3             | 4          | 5          |
| 4. 委員会は、存在するだけでも、被収容者の人権や権利利益の不当な制約の防止にとって、意義がある（価値がある）と思いますか。 | 1            | 2             | 3             | 4          | 5          |

## 問8

貴所の委員会の今後の在り方等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                  | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う | 分からない |
|------------------------------------------------------------------|--------------|---------------|---------------|------------|------------|-------|
| 1. 委員の数を増員すべきだと思いますか。                                            | 1            | 2             | 3             | 4          | 5          | 6     |
| 2. 委員（推薦団体）の構成は、適切だと思いますか。                                       | 1            | 2             | 3             | 4          | 5          | 6     |
| 3. 委員会が、より積極的に被収容者に対するアンケート調査を行うことは、適切だと思いますか。                   | 1            | 2             | 3             | 4          | 5          | 6     |
| 4. 委員会が、より積極的に職員に対するアンケート調査を行うことは、適切だと思いますか。                     | 1            | 2             | 3             | 4          | 5          | 6     |
| 5. 委員会は、法務大臣に対して報告書を提出することも可能ですが、より積極的に法務大臣に対する報告書を提出すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          | 6     |

問9 全般的な委員会の今後の在り方等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                  | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う | 分からない |
|--------------------------------------------------|--------------|---------------|---------------|------------|------------|-------|
| 1. 矯正処遇や改善更生の専門的知識・経験を有する委員の数を増やすべきだと思いますか。      | 1            | 2             | 3             | 4          | 5          | 6     |
| 2. 女性である委員の数を増やすべきだと思いますか。                       | 1            | 2             | 3             | 4          | 5          | 6     |
| 3. 元職員である委員の数を増やすべきだと思いますか。                      | 1            | 2             | 3             | 4          | 5          | 6     |
| 4. 犯罪被害者や犯罪被害者の支援者である委員の数を増やすべきだと思いますか。          | 1            | 2             | 3             | 4          | 5          | 6     |
| 5. 外国人被収容者がいる施設では、外国人である委員を入れるべきだと思いますか。         | 1            | 2             | 3             | 4          | 5          | 6     |
| 6. 委員の手当は、増額すべきだと思いますか。                          | 1            | 2             | 3             | 4          | 5          | 6     |
| 7. 委員の手当を廃止して、無給とすべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          | 6     |
| 8. 委員は、非常勤の国家公務員ではなく、民間のボランティアとすべきだと思いますか。       | 1            | 2             | 3             | 4          | 5          | 6     |
| 9. 委員会は、権限、予算、事務処理体制等の面で、より独立性を高めるべきだと思いますか。     | 1            | 2             | 3             | 4          | 5          | 6     |
| 10. 新任の委員に対する研修を実施すべきだと思いますか。                    | 1            | 2             | 3             | 4          | 5          | 6     |
| 11. 委員会は、他の委員会と連携して、意見交換や研修を実施すべきだと思いますか。        | 1            | 2             | 3             | 4          | 5          | 6     |
| 12. 委員会は、委員会と類似の国内の組織と連携して、意見交換や研修を実施すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          | 6     |
| 13. 委員会は、委員会と類似の外国の組織と連携して、意見交換や研修を実施すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          | 6     |
| 14. 施設・職員は、委員会の主張や意見を一層尊重すべきだと思いますか。             | 1            | 2             | 3             | 4          | 5          | 6     |
| 15. 委員会は、施設・職員の主張や意見を一層尊重すべきだと思いますか。             | 1            | 2             | 3             | 4          | 5          | 6     |

|                                                                      | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う | 分らない |
|----------------------------------------------------------------------|--------------|---------------|---------------|------------|------------|------|
| 16. 委員会は、被収容者よりも、被害者や国民の考えを十分考慮して活動するべきだと思いますか。                      | 1            | 2             | 3             | 4          | 5          | 6    |
| 17. 委員会は、職員の主張や意見よりも、被収容者の主張や意見を重視すべきだと思いますか。                        | 1            | 2             | 3             | 4          | 5          | 6    |
| 18. 委員会は、施設や職員の活動や専門性等に一層敬意を払うべきだと思いますか。                             | 1            | 2             | 3             | 4          | 5          | 6    |
| 19. 委員会は、個別事案の救済等、法律上明確に記載されていない業務を避けるべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          | 6    |
| 20. 委員会は、意見・提案書の提出等をしない被収容者のことも考慮すべきだと思いますか。                         | 1            | 2             | 3             | 4          | 5          | 6    |
| 21. 委員会は、職員の勤務状況よりも、被収容者の処遇の改善を重視すべきだと思いますか。                         | 1            | 2             | 3             | 4          | 5          | 6    |
| 22. 委員会は、施設の人的・物的資源の限界を超えるような主張や意見を避けるべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          | 6    |
| 23. 委員会は、施設の権限や裁量の範囲外のような主張や意見も行うべきだと思いますか。                          | 1            | 2             | 3             | 4          | 5          | 6    |
| 24. 委員会は、施設の規律秩序の維持に支障が生じるような主張や意見を避けるべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          | 6    |
| 25. 委員会は、被害者や国民一般の考えとは異なるような主張や意見を避けるべきだと思いますか。                      | 1            | 2             | 3             | 4          | 5          | 6    |
| 26. 公表される委員会の意見及び施設が講じた措置の概要をより充実させるべきだと思いますか。                       | 1            | 2             | 3             | 4          | 5          | 6    |
| 27. 委員会は、施設の実情を的確に把握するため、自ら実際の処遇場面（食事、診察、昼夜単独室収容等）を積極的に確認すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          | 6    |
| 28. 委員の最短任期を1年より長くするべきだと思いますか。                                       | 1            | 2             | 3             | 4          | 5          | 6    |
| 29. 委員の任期の更新の上限を定めるべきだと思いますか。                                        | 1            | 2             | 3             | 4          | 5          | 6    |

問 10 上記の質問でおたずねした事項のほか、委員会の制度や活動（特に、委員会の制度の改善）について、考えていることや感じていることがあれば、下記の枠内に自由に記載してください。

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問 11 最後に、このアンケートに回答していただいた方の属性等について、あてはまるものをそれぞれ1つ選んで、番号に○をつけてください。

|               |                                                                                                                                            |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| 1. 性別         | 1. 男                      2. 女                                                                                                             |
| 2. 年齢         | 1. ～25 歳                      2. 26～35 歳                      3. 36 歳～45 歳<br>4. 46 歳～55 歳                      5. 56 歳～                   |
| 3. 勤務年数       | 1. ～5 年      2. 6 年～9 年      3. 10 年～14 年      4. 15 年～19 年<br>5. 20 年～24 年      6. 25 年～29 年      7. 30 年～                                |
| 4. 役職         | 1. 施設長                      2. 部長級                      3. 庶務課長<br>4. 課長級・課長補佐級（庶務課長を除く）                                                   |
| 5. 施設の処遇指標（※） | 1. A 指標                      2. LA 指標                      3. B 指標<br>4. LB 指標                      5. F 指標                      6. その他の指標 |
| 6. 施設所在地域     | 1. 東日本（札幌、仙台、東京又は名古屋の各矯正管区の管内）<br>2. 西日本（大阪、広島、高松又は福岡の各矯正管区の管内）                                                                            |
| 7. アンケートの作成時間 | 1. ～30 分                      2. 31 分～60 分                      3. 61 分～                                                                   |

※ A 指標と LA 指標の両方を有する施設は、「1」に○をせず、「2」に○をしてください。また、B 指標と LB 指標の両方を有する施設は、「3」に○をせず、「4」に○をしてください。さらに、F 指標とそれ以外の指標の両方を有する施設は、「5」とそれ以外の指標に該当する番号にそれぞれ○をしてください。

ご協力いただき誠にありがとうございました。

## 刑事施設視察委員会に関するアンケート【委員用】

### 1. 目的

このアンケートは、刑事施設視察委員会（以下「委員会」という。）に関する研究を行うため、平成28年9月から同年10月までの間、当方で選定した複数の刑事施設の委員会の全委員に対して、率直なご意見・ご感想等を伺うものです。

このアンケートに回答してもしなくても、不利益を課されたり、利益を得ることはありませんが、委員の皆さんにしか分からないこともありますので、何卒、ご協力ください。

### 2. 留意事項

- このアンケートは無名記ですので、名前を書かないでください。
- このアンケートの記入が終わりましたら、所定の封筒に入れて、封をしてから各施設で定める方法により、提出してください。調査期間が終わり次第、施設から研究者宛てに書留郵送されます。
- このアンケートは、厳格な秘密保持基準に従い、一定の期間保管した後、裁断等の適切な方法で廃棄されます。詳細については、別添の説明を参照してください。

### 3. 回答の方法

- 質問をよく読んで回答してください。
- 回答は、あてはまるものを1つ選ぶものと、すべて選ぶものの2種類あります。
- 回答は、下記の例のとおり、あてはまる番号の部分に○をつけてください。もし、ぴったりの回答がなければ、最も近い回答を選んでください

#### 【「4」が当てはまるときの記載例】

委員会の基本的な姿勢等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                          | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|--------------------------|--------------|---------------|---------------|------------|------------|
| 1. 委員会の活動に積極的な委員は、多いですか。 | 1            | 2             | 3             | 4          | 5          |

**問 1 貴委員会が置かれている施設の職員との関わり方についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                                                   | い な | る あ |
|---------------------------------------------------|-----|-----|
| 1. 新任の委員による自己紹介を行ったことがありますか。                      | 1   | 2   |
| 2. 委員会の会議の席上で、質疑に参加したことがありますか。                    | 1   | 2   |
| 3. 上記2.のほか、委員会から被収容者の処遇に関する個別事案の事実確認を求めたことがありますか。 | 1   | 2   |
| 4. 委員会の所内視察に同行している職員に、説明等を要請したことがありますか。           | 1   | 2   |
| 5. 委員会による職員用アンケートに関わったことがありますか。                   | 1   | 2   |
| 6. 委員による職員面接に参加したことがありますか。                        | 1   | 2   |
| 7. 外国語で書かれた意見・提案書の職員による整理・翻訳に関わったことがありますか。        | 1   | 2   |
| 8. 勤務時間中における職員との意見交換の機会がありましたか。                   | 1   | 2   |
| 9. 勤務時間外における職員との懇談の機会（飲み会への参加など）に参加したことがありますか。    | 1   | 2   |

**問 2 被収容者が提出した意見・提案書の記載（以下「記載」といいます。）や委員による面接での被収容者の発言（以下「発言」といいます。）の内容等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                                            | 全く<br>そう<br>思わない | あまり<br>そう<br>思わない | どちら<br>とも<br>いえ<br>ない | 少<br>し<br>さ<br>う<br>思<br>う | 強<br>く<br>さ<br>う<br>思<br>う |
|--------------------------------------------|------------------|-------------------|-----------------------|----------------------------|----------------------------|
| 1. 記載の内容は、施設の運営の改善に有益なものがあると思いますか。         | 1                | 2                 | 3                     | 4                          | 5                          |
| 2. 発言の内容は、施設の運営の改善に有益なものがあると思いますか。         | 1                | 2                 | 3                     | 4                          | 5                          |
| 3. 記載をした被収容者は、不服申立てを多数行うなど、好訴性の高い者だと思いますか。 | 1                | 2                 | 3                     | 4                          | 5                          |
| 4. 発言をした被収容者は、不服申立てを多数行うなど、好訴性の高い者だと思いますか。 | 1                | 2                 | 3                     | 4                          | 5                          |
| 5. 記載をした被収容者は、記載の後、心情が安定することがあると思いますか。     | 1                | 2                 | 3                     | 4                          | 5                          |
| 6. 発言をした被収容者は、発言の後、心情が安定することがあると思いますか。     | 1                | 2                 | 3                     | 4                          | 5                          |

**問3 貴委員会の基本的な姿勢等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                                                                     | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|---------------------------------------------------------------------|--------------|---------------|---------------|------------|------------|
| 1. 委員会の運営において、各委員の主張や意見がそれぞれ尊重されていると思いますか。                          | 1            | 2             | 3             | 4          | 5          |
| 2. 委員会の主張や意見は、施設や職員に尊重されていると思いますか。                                  | 1            | 2             | 3             | 4          | 5          |
| 3. 委員会は、施設・職員の主張や意見を尊重していると思いますか。                                   | 1            | 2             | 3             | 4          | 5          |
| 4. 委員会は、職員よりも被收容者の主張や意見を重視していると思いますか。                               | 1            | 2             | 3             | 4          | 5          |
| 5. 委員会は、施設や職員の活動や専門性等に敬意を払っていると思いますか。                               | 1            | 2             | 3             | 4          | 5          |
| 6. 委員会は、個別事案の救済等、法律上求められていない業務も行っていると思いますか。                         | 1            | 2             | 3             | 4          | 5          |
| 7. 委員会は、意見・提案書の提出等をしない被收容者のことも考慮していると思いますか。                         | 1            | 2             | 3             | 4          | 5          |
| 8. 委員会は、職員の勤務状況よりも、被收容者の処遇の改善を重視していると思いますか。                         | 1            | 2             | 3             | 4          | 5          |
| 9. 委員会は、施設の人的・物的資源の限界を超えるような主張や意見をしていると思いますか。                       | 1            | 2             | 3             | 4          | 5          |
| 10. 委員会は、施設の権限や裁量の範囲外の事項について主張や意見をしていると思いますか。                       | 1            | 2             | 3             | 4          | 5          |
| 11. 委員会は、施設の規律秩序の維持に支障が生じるような主張や意見をしていると思いますか。                      | 1            | 2             | 3             | 4          | 5          |
| 12. 委員会は、被害者や国民一般の考えとは異なるような主張や意見をしていると思いますか。                       | 1            | 2             | 3             | 4          | 5          |
| 13. 弁護士や法学者である委員と、地方公共団体や地域社会から推薦された委員との間で、考え方について、大きな隔たりがあると思いますか。 | 1            | 2             | 3             | 4          | 5          |
| <b>委員であるあなたは、</b>                                                   |              |               |               |            |            |
| 14. …委員会の活動に積極的だと思いますか。                                             | 1            | 2             | 3             | 4          | 5          |
| 15. …施設の実情を把握していると思いますか。                                            | 1            | 2             | 3             | 4          | 5          |
| 16. …委員会が法律上果たすべき役割を把握していると思いますか。                                   | 1            | 2             | 3             | 4          | 5          |

問4 貴委員会の活動の内容・程度等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                               | ない・少ない・短い | 少し少ない・少し短い | 適切である | 少し多い・少し長い | 多い・長い |
|-----------------------------------------------|-----------|------------|-------|-----------|-------|
| 1. 委員会の会議の年間開催回数は、適切だと思いますか。                  | 1         | 2          | 3     | 4         | 5     |
| 2. 1回の会議に要する時間は、適切だと思いますか。                    | 1         | 2          | 3     | 4         | 5     |
| 3. 委員会が行う所内視察の回数は、適切だと思いますか。                  | 1         | 2          | 3     | 4         | 5     |
| 4. 1回の所内視察に要する時間は、適切だと思いますか。                  | 1         | 2          | 3     | 4         | 5     |
| 5. 委員会に対する施設からの情報提供の分量は、適切だと思いますか。            | 1         | 2          | 3     | 4         | 5     |
| 6. 委員会に対する施設からの情報提供のタイミングは、適切だと思いますか。         | 1         | 2          | 3     | 4         | 5     |
| 7. 委員会が確認する意見・提案書の件数は、適切だと思いますか。              | 1         | 2          | 3     | 4         | 5     |
| 8. 被収容者の希望又は委員会の要請に基づく委員による面接の回数は、適切だと思いますか。  | 1         | 2          | 3     | 4         | 5     |
| 9. 1回の面接に要する時間は、適切だと思いますか。                    | 1         | 2          | 3     | 4         | 5     |
| 10. 被収容者が希望してから委員による面接が実施されるまでの期間は、適切だと思いますか。 | 1         | 2          | 3     | 4         | 5     |
| 11. 委員会が被収容者に活動内容を周知する回数は、適切だと思いますか。          | 1         | 2          | 3     | 4         | 5     |
| 12. 委員会が施設長に提出する意見の件数は、適切だと思いますか。             | 1         | 2          | 3     | 4         | 5     |
| 13. 委員会の活動の程度は、全体として、適切だと思いますか。               | 1         | 2          | 3     | 4         | 5     |



問5 貴委員会の活動に伴う委員の業務量等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                         | ない又は少ない  | 少し少ない     | 適切である     | 少し多い   | 多い     |
|-------------------------------------------------------------------------|----------|-----------|-----------|--------|--------|
| 1. 委員会の所内視察に伴う委員会の業務量は、どの程度ですか。                                         | 1        | 2         | 3         | 4      | 5      |
| 2. 委員会の意見・提案書の整理・確認に伴う委員会の業務量は、どの程度ですか。                                 | 1        | 2         | 3         | 4      | 5      |
| 3. 委員会の委員による面接に伴う委員会の業務量は、どの程度ですか。                                      | 1        | 2         | 3         | 4      | 5      |
| 4. 委員会の活動内容の周知に伴う委員会の業務量は、どの程度ですか。                                      | 1        | 2         | 3         | 4      | 5      |
| 5. 委員会が提出する意見に伴う委員会の業務量は、どの程度ですか。                                       | 1        | 2         | 3         | 4      | 5      |
| 6. 委員会の活動に伴う業務量は、全体として、どの程度ですか。                                         | 1        | 2         | 3         | 4      | 5      |
|                                                                         | 全くそう思わない | あまりそう思わない | どちらともいえない | 少しそう思う | 強くそう思う |
| 7. 中立的な立場から広く刑事施設の運営に有意義な意見を述べるためには、専門的な知識・能力がなくても、一般的な常識があれば足りると思いますか。 | 1        | 2         | 3         | 4      | 5      |
| 8. 委員会の活動に伴う業務の負担は、委員長などの特定の委員に集中していると思いますか。                            | 1        | 2         | 3         | 4      | 5      |
| 9. 委員会の活動に伴う自らの業務量は、能力等との関係で、重い負担になっていると思いますか。                          | 1        | 2         | 3         | 4      | 5      |
| 10. 委員会の会議への出席は、本業等との関係で、重い負担になっていると思いますか。                              | 1        | 2         | 3         | 4      | 5      |

問6 貴委員会の活動に伴う効果や影響についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                  | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|--------------------------------------------------|--------------|---------------|---------------|------------|------------|
| 1. 委員会の活動は、施設の運営を改善する効果があると思いますか。                | 1            | 2             | 3             | 4          | 5          |
| 2. 委員会の活動は、施設運営に国民の理解を得られる効果があると思いますか。           | 1            | 2             | 3             | 4          | 5          |
| 3. 委員会の活動は、社会の常識を施設運営に反映する効果があると思いますか。           | 1            | 2             | 3             | 4          | 5          |
| 4. 委員会の活動は、国民に被収容者の処遇の実情を認識してもらえ効果があると思いますか。     | 1            | 2             | 3             | 4          | 5          |
| 5. 委員会の活動は、国民に職員の勤務の実情を認識してもらえ効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          |
| 6. 委員会の活動は、職員の士気を向上する効果があると思いますか。                | 1            | 2             | 3             | 4          | 5          |
| 7. 委員会の活動は、職員の業務の効率化や事務負担の軽減を図る効果があると思いますか。      | 1            | 2             | 3             | 4          | 5          |
| 8. 委員会の活動は、施設や職員の正当な主張や意見を支持する効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          |
| 9. 委員会の活動は、被収容者の心情を安定させる効果があると思いますか。             | 1            | 2             | 3             | 4          | 5          |
| 10. 委員会の活動は、不当に制約された被収容者の人権を救済する効果があると思いますか。     | 1            | 2             | 3             | 4          | 5          |
| 11. 委員会の活動を通じて、被収容者も刑事施設の運営に参加や貢献させる効果があると思いますか。 | 1            | 2             | 3             | 4          | 5          |
| 12. 委員会の活動は、被収容者の悩みや主張を国民に知らせる効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          |
| 13. 委員会の活動は、施設の予算の増額や職員の増員をさせる効果があると思いますか。       | 1            | 2             | 3             | 4          | 5          |
| 14. 委員会の活動は、かえって被収容者の不満や増長を招いていると思いますか。          | 1            | 2             | 3             | 4          | 5          |
| 15. 委員会の活動は、被収容者が職員を不当に牽制する手段として悪用されていると思いますか。   | 1            | 2             | 3             | 4          | 5          |

問7 委員会の意義等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|----------------------------------------------------------------|--------------|---------------|---------------|------------|------------|
| 1. 委員会の活動は、被収容者にとって、意義がある（価値がある）と思いますか。                        | 1            | 2             | 3             | 4          | 5          |
| 2. 委員会の活動は、職員にとって、意義がある（価値がある）と思いますか。                          | 1            | 2             | 3             | 4          | 5          |
| 3. 委員会の活動は、国民全体にとって、意義がある（価値がある）と思いますか。                        | 1            | 2             | 3             | 4          | 5          |
| 4. 委員会は、存在するだけでも、被収容者の人権や権利利益の不当な制約の防止にとって、意義がある（価値がある）と思いますか。 | 1            | 2             | 3             | 4          | 5          |

問8 貴委員会の今後の在り方等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                  | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|------------------------------------------------------------------|--------------|---------------|---------------|------------|------------|
| 1. 委員の数を増員すべきだと思いますか。                                            | 1            | 2             | 3             | 4          | 5          |
| 2. 委員（推薦団体）の構成は、適切だと思いますか。                                       | 1            | 2             | 3             | 4          | 5          |
| 3. 委員会が、積極的に被収容者に対するアンケート調査を行うことは、適切だと思いますか。                     | 1            | 2             | 3             | 4          | 5          |
| 4. 委員会が、積極的に職員に対するアンケート調査を行うことは、適切だと思いますか。                       | 1            | 2             | 3             | 4          | 5          |
| 5. 委員会は、法務大臣に対して報告書を提出することも可能ですが、より積極的に法務大臣に対する報告書を提出すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          |

問9 全般的な委員会の今後の在り方等についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                  | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|--------------------------------------------------|--------------|---------------|---------------|------------|------------|
| 1. 矯正処遇や改善更生の専門的知識・経験を有する委員の数を増やすべきだと思いますか。      | 1            | 2             | 3             | 4          | 5          |
| 2. 女性である委員の数を増やすべきだと思いますか。                       | 1            | 2             | 3             | 4          | 5          |
| 3. 元職員である委員の数を増やすべきだと思いますか。                      | 1            | 2             | 3             | 4          | 5          |
| 4. 犯罪被害者や犯罪被害者の支援者である委員の数を増やすべきだと思いますか。          | 1            | 2             | 3             | 4          | 5          |
| 5. 外国人被収容者がいる施設では、外国人である委員を入れるべきだと思いますか。         | 1            | 2             | 3             | 4          | 5          |
| 6. 委員の手当は、増額すべきだと思いますか。                          | 1            | 2             | 3             | 4          | 5          |
| 7. 委員の手当を廃止して、無給とすべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          |
| 8. 委員は、非常勤の国家公務員ではなく、民間のボランティアとすべきだと思いますか。       | 1            | 2             | 3             | 4          | 5          |
| 9. 委員会は、権限、予算、事務処理体制等の面で、より独立性を高めるべきだと思いますか。     | 1            | 2             | 3             | 4          | 5          |
| 10. 新任の委員に対する研修を実施すべきだと思いますか。                    | 1            | 2             | 3             | 4          | 5          |
| 11. 委員会は、他の委員会と連携して、意見交換や研修を実施すべきだと思いますか。        | 1            | 2             | 3             | 4          | 5          |
| 12. 委員会は、委員会と類似の国内の組織と連携して、意見交換や研修を実施すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          |
| 13. 委員会は、委員会と類似の外国の組織と連携して、意見交換や研修を実施すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          |
| 14. 施設・職員は、委員会の主張や意見を一層尊重すべきだと思いますか。             | 1            | 2             | 3             | 4          | 5          |
| 15. 委員会は、施設・職員の主張や意見を一層尊重すべきだと思いますか。             | 1            | 2             | 3             | 4          | 5          |

|                                                                      | 全くそう<br>思わない | あまりそう<br>思わない | どちらとも<br>いえない | 少しそう<br>思う | 強くそう<br>思う |
|----------------------------------------------------------------------|--------------|---------------|---------------|------------|------------|
| 16. 委員会は、被収容者よりも、被害者や国民の考えを十分考慮して活動すべきだと思いますか。                       | 1            | 2             | 3             | 4          | 5          |
| 17. 委員会は、職員の主張や意見よりも、被収容者の主張や意見を重視すべきだと思いますか。                        | 1            | 2             | 3             | 4          | 5          |
| 18. 委員会は、施設や職員の活動や専門性等に一層敬意を払うべきだと思いますか。                             | 1            | 2             | 3             | 4          | 5          |
| 19. 委員会は、個別事案の救済等、法律上明確に記載されていない業務を避けるべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          |
| 20. 委員会は、意見・提案書の提出等をしない被収容者のことも考慮すべきだと思いますか。                         | 1            | 2             | 3             | 4          | 5          |
| 21. 委員会は、職員の勤務状況よりも、被収容者の処遇の改善を重視すべきだと思いますか。                         | 1            | 2             | 3             | 4          | 5          |
| 22. 委員会は、施設の人的・物的資源の限界を超えるような主張や意見を避けるべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          |
| 23. 委員会は、施設の権限や裁量の範囲外のような主張や意見を避けるべきだと思いますか。                         | 1            | 2             | 3             | 4          | 5          |
| 24. 委員会は、施設の規律秩序の維持に支障が生じるような主張や意見を避けるべきだと思いますか。                     | 1            | 2             | 3             | 4          | 5          |
| 25. 委員会は、被害者や国民一般の考えとは異なるような主張や意見を避けるべきだと思いますか。                      | 1            | 2             | 3             | 4          | 5          |
| 26. 公表される委員会の意見及び施設が講じた措置の概要をより充実させるべきだと思いますか。                       | 1            | 2             | 3             | 4          | 5          |
| 27. 委員会は、施設の実情を的確に把握するため、自ら実際の処遇場面（食事、診察、昼夜単独室収容等）を積極的に確認すべきだと思いますか。 | 1            | 2             | 3             | 4          | 5          |
| 28. 委員の最短任期を1年より長くするべきだと思いますか。                                       | 1            | 2             | 3             | 4          | 5          |
| 29. 委員の任期の更新の上限を定めるべきだと思いますか。                                        | 1            | 2             | 3             | 4          | 5          |

問 10 以上の質問でおたずねした事項のほか、委員会の制度や活動（特に、委員会の制度の改善）について、考えていることや感じていることがあれば、下記の枠内に自由に記載してください。

|  |
|--|
|  |
|--|

問 11 最後に、このアンケートに回答していただいた方の属性等について、あてはまるものをそれぞれ 1 つ選んで、番号に○をつけてください。

|               |                                                                                                                                            |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| 1. 性別         | 1. 男                      2. 女                                                                                                             |
| 2. 年齢         | 1. ～25 歳      2. 26～35 歳      3. 36 歳～45 歳      4. 46 歳～55 歳<br>5. 56 歳～65 歳              6. 66 歳～75 歳              7. 76 歳～               |
| 3. 委員の推薦団体    | 1. 弁護士会      2. 医師会              3. 地方公共団体<br>4. 地元自治会              5. 福祉関係              6. 教育関係              7. その他                       |
| 4. 委員在任年数     | 1. ～1 年                      2. 2 年～3 年<br>3. 4 年～5 年                      4. 6 年～10 年                                                     |
| 5. 役職         | 1. 委員長                      2. 副委員長                      3. 委員                                                                             |
| 6. 施設の処遇指標（※） | 1. A 指標                      2. LA 指標                      3. B 指標<br>4. LB 指標                      5. F 指標                      6. その他の指標 |
| 7. 施設所在地域     | 1. 東日本（札幌、仙台、東京又は名古屋の各矯正管区の管内）<br>2. 西日本（大阪、広島、高松又は福岡の各矯正管区の管内）                                                                            |
| 8. アンケートの作成時間 | 1. ～30 分                      2. 31 分～60 分                      3. 61 分～                                                                   |

※ A 指標と LA 指標の両方を有する施設は、「1」に○をせず、「2」に○をしてください。また、B 指標と LB 指標の両方を有する施設は、「3」に○をせず、「4」に○をしてください。さらに、F 指標とそれ以外の指標の両方を有する施設は、「5」とそれ以外の指標に該当する番号にそれぞれ○をしてください。

ご協力いただき誠にありがとうございました。

## B4 Japan: Survey - prisoners\*

\*The Likert scale questions in this survey were reversed for reporting purposes

### 刑事施設視察委員会に関するアンケート【受刑者用】

#### 1. 目的

このアンケートは、刑事施設視察委員会（以下「委員会」という。）に関する研究を行うため、平成28年9月から同年10月までの間、当方で選定した複数の刑事施設から釈放されるすべての受刑者に対して、率直なご意見・ご感想等を伺うものです。

このアンケートに回答してもしなくても、不利益を課されたり、利益を得ることはありませんが、受刑者の皆さんにしか分からないこともあるので、何卒、ご協力ください。

#### 2. 留意事項

- このアンケートは無記名ですので、名前を書かないでください。
- このアンケートの内容等について、職員に質問しても回答することができませんので、ご了承ください。
- このアンケートの記入は、余暇時間帯又は職員が特に許可した時間帯に実施してください。
- このアンケートの記入が終わりましたら、職員の指示に従って、提出してください。その後、施設から研究者宛てに郵送されます。
- 職員は、このアンケートの内容を確認しません。また、このアンケートは、厳格な秘密保持基準に従い、一定の期間保管した後、裁断等の適切な方法で廃棄されます。詳細については、末尾の別添を参照してください。

#### 3. 回答の方法

- 質問をよく読んで回答してください。
- 問2と問3は、それぞれ特定の人だけが答える質問ですので、注意してください。
- 回答は、あてはまるものを1つ選ぶものと、すべて選ぶものの2種類あります。
- 回答は、下記の記載例のとおり、あてはまる番号の部分に○をつけてください。もし、ぴったりの回答がなければ、最も近い回答を選んでください。

【「1」があてはまるときの記載例】

委員会に対して、面接を希望した回数について、あてはまるものを1つ選んで、番号に○をつけてください。

- ①. 0回      2. 1回～2回      3. 3回～4回      4. 5回～

※ 問1－1から問1－3までは、すべてのアンケート回答者におたずねします。

問1－1

今回の受刑期間中、委員会に対して、提出した意見・提案書の通数について、あてはまるものを1つ選んで、番号に○をつけてください。

1. 0通      2. 1通～2通      3. 3通～5通  
4. 6通～10通      5. 11通～15通      6. 16通～

問1－2

今回の受刑期間中、委員会に対して、面接を希望した回数について、あてはまるものを1つ選んで、番号に○をつけてください。

1. 0回      2. 1回～2回      3. 3回～4回      4. 5回～

問1－3

今回の受刑期間中、委員との面接を実施した回数について、あてはまるものを1つ選んで、番号に○をつけてください。

なお、面接を希望しなくても、委員会の要請により、委員との面接を実施する場合がありますので、問1－2で「1」を選択した人も、あてはまるものを1つ選んで、番号に○をつけてください。



1. 0回

2. 1回～2回

3. 3回～4回

4. 5回～

※ 問 2 は、問 1－1 と問 1－2 で、意見・提案書の提出も、面接の希望も一切していないと答えた人だけにおたずねします。

## 問 2

意見・提案書の提出も委員との面接の希望もしなかった人だけにおたずねします。

意見・提案書の提出及び委員との面接の希望を一度もしなかった理由について、あてはまるものをすべて選んで、番号に○をつけてください（「11」を選択するときは括弧内に内容も記載してください。）。

1. 意見・提案書の提出や委員との面接が必要なほどの課題や問題はないから
2. 苦情や要望があれば、職員に相談したり、不服申立てをすれば足りるから
3. 人権に関する苦情があれば、弁護士に相談したり、裁判をした方がいいから
4. 受刑者が施設運営に意見や要望を出すのは、立场上適切ではないと思うから
5. 職員や他の受刑者から苦情や不満の多い問題受刑者と思われたくないから
6. 意見・提案書の提出や委員との面接は面倒だから
7. 意見・提案書の提出や委員との面接をしても何も変わらないから
8. 意見・提案書や面接の内容が職員に知られるおそれがあるから
9. 意見・提案書の提出や委員との面接ができるとは知らなかったから
10. 日本語の読み書きや会話が十分にできなかったから
11. その他（ ）

※ 問 3－1 から問 3－4 までは、問 1－1 と問 1－2 で、何回か意見・提案書の提出をした、又は面接を希望したことがあると答えた人だけにおたずねします。

### 問 3－1

意見・提案書の提出又は委員との面接を希望した人だけにおたずねします。

提出した意見・提案書や委員との面接を希望した内容について、あてはまるものをすべて選んで、番号に○をつけてください（「12」を選択するときは括弧内に内容も記載してください。）。

1. 保健衛生及び医療に関すること（例：医療の充実、運動・入浴等衛生面の改善）
2. 組織・職員に関すること（例：職員の言動、職員の不足）
3. 矯正処遇等の実施に関すること（例：作業、優遇措置、改善指導の充実）
4. 食事以外の物品の貸与等及び自弁に関すること（例：使用できる物品の充実）
5. 食事に関すること（支給され、又は自弁する菓子・飲料を含む。）
6. 施設の建物・設備などに関すること（例：建物や設備の改築・修繕）
7. 委員会に関すること（例：手続の改善や委員会活動の周知）
8. 収容状況に関すること（例：被収容者間の雰囲気、過剰収容の改善）
9. 規律及び秩序に関すること（例：被収容者の動作規制や懲罰の在り方）
10. 外部交通に関すること（例：被収容者の面会や信書の発受の制限の在り方）
11. 書籍等の閲覧に関すること（例：時事報道の充実、閲覧後書籍の取扱い）
12. その他（ ）

### 問 3－2

意見・提案書の提出や委員との面接を希望した人だけにおたずねします。

提出した意見・提案書や委員との面接において、施設又は職員に対する感謝の気持ちを記載したり、述べようと思ったりしたことはありますか。あてはまるものを1つ選んで、番号に○をつけてください。

1. ない
2. ある

とい  
問 3-3

いけん ていあんしょ ていしゅつ いいん めんせつ きぼう ひと  
意見・提案書の提出や委員との面接を希望した人だけにおたずねします。

ていしゅつ いけん ていあんしょ いいん めんせつ ないよう  
提出した意見・提案書や委員との面接の内容について、あてはまるものがあれば、すべて  
えら ばんごう  
選んで、番号に○をつけてください。

1. じぶん しょぐう かん  
自分の処遇に関すること
2. じぶん た ひしゅうようしゃ  
自分のためにはなくても他の被収容者のためになること
3. じぶん しせつぜんたい  
自分のためにはなくても施設全体のためになること

とい  
問 3-4

いけん ていあんしょ ていしゅつ いいん めんせつ きぼう ひと  
意見・提案書の提出や委員との面接を希望した人だけにおたずねします。

ご しょくいん はんのう  
その後、職員はどのような反応をしましたか。あてはまるものを1つえら ばんごう  
選んで、番号に○をつけてください。

1. つよ ひていてき はんのう  
強く否定的な反応をした
2. すこ ひていてき はんのう  
少し否定的な反応をした
3. とく はんのう  
特に反応はしなかった
4. すこ こうていてき はんのう  
少し肯定的な反応をした
5. つよ こうていてき はんのう  
強く肯定的な反応をした

とい とい とい いけん ていあんしょ ていしゅつ いいん めんせつ  
※ 問 3-5 は、問 1-1 又は問 1-3 で、意見・提案書の提出や委員との面接  
こた ひと  
をしたことがあると答えた人だけにおたずねします。

とい  
問 3-5

いけん ていあんしょ ていしゅつ いいん めんせつ ひと  
意見・提案書の提出や委員との面接をしたことがある人だけにおたずねします。

いけん ていあんしょ ていしゅつ あと めんせつ あと なん へんか おも  
意見・提案書を提出した後、又は面接をした後は、何らかのいい変化があったと思います  
か。あてはまるものを1つえら ばんごう  
選んで、番号に○をつけてください。

1. つよ おも  
強くそう思う
2. すこ おも  
少しそう思う
3. どちらともいえない
4. おも  
あまりそう思わない
5. まった おも  
全くそう思わない

※ 問 3－6 は、問 1－2 で、何回か面接を希望したことがあると答えた人だけにおたずねします。

問 3－6

委員との面接を希望したことがある人だけにおたずねします。

委員との面接を希望した後、面接が行われるまでの期間は、どの程度でしたか。あてはまるものを 1 つ選んで、番号に○をつけてください。

- |              |             |             |
|--------------|-------------|-------------|
| 1. 1～2 か月程度  | 2. 3～4 か月程度 | 3. 5～6 か月程度 |
| 4. 7～12 か月程度 | 5. 13 か月～   | 6. 行われていない  |

※ 問 3－7 は、問 1－3 で、何回か面接をしたことがあると答えた人だけにおたずねします。

問 3－7

実際に面接をしたことがある人だけにおたずねします。

委員と面接をした際、自分の話を丁寧に聞いてくれたと思いますか。あてはまるものを 1 つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない |              |

※ 問 4－1 から最後の問 7 までは、すべてのアンケート回答者におたずねします。

問 4－1

施設内において、委員会の活動や成果について、どのような方法で周知されていますか。あてはまるものをすべて選んで、番号に○をつけてください（「5」を選択するときは括弧内に内容も記載してください。）。

- |             |            |            |
|-------------|------------|------------|
| 1. 書面の掲示    | 2. 書面の回覧   | 3. 委員の口頭説明 |
| 4. 職員の口頭説明  | 5. その他の方法（ | ）          |
| 6. 周知されていない |            |            |

とい  
問 4－2

施設内において、委員会の活動や成果についてよく周知されていると思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない |              |

とい  
問 4－3

委員会が施設内を視察しているのを見かける頻度はどのくらいですか。あてはまるものを1つ選んで、番号に○をつけてください。

- |             |             |            |
|-------------|-------------|------------|
| 1. 2か月に1回程度 | 2. 3か月に1回程度 | 3. 半年に1回程度 |
| 4. 1年に1回程度  | 5. ほとんどない   | 6. 全くない    |

とい  
問 5－1

委員会と職員・受刑者との関係について、どのように感じていますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |               |               |
|---------------|---------------|
| 1. 強く受刑者寄りである | 2. 少し受刑者寄りである |
| 3. 中立的である     | 4. 少し職員寄りである  |
| 5. 強く職員寄りである  | 6. 分からない      |

とい  
問 5－2

視察委員会の活動は、国民が受刑者の処遇の実情をよく知るために有益と思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問 5－3

視察委員会の活動は、国民が職員の勤務の実情をよく知るために有益と思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問5-4

意見・提案書の提出や委員との面接は、特定少数の受刑者ばかりではなく、不特定多数の受刑者から広く行われていると思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問5-5

意見・提案書の提出や委員との面接を通じて、受刑者の悩み事や主張を国民に知ってもらうことは、結果はともかく、何らかの意味があると思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問5-6

委員会の存在や活動のおかげで、結果的に、受刑者も刑事施設の運営に参加・貢献することができていると思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問5-7

委員会の存在や活動のおかげで、結果的に、受刑者の人権が不当に制約される事態を防止することができていると思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問 5－8

委員会の存在や活動のおかげで、刑事施設の運営の改善向上が図られていると思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問 5－9

委員会の存在や活動は、受刑者にとって、意義がある（価値がある）と思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問 5－10

委員会の存在や活動は、職員にとって、意義がある（価値がある）と思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

とい  
問 5－11

委員会の存在や活動は、国民全体にとって、意義がある（価値がある）と思いますか。あてはまるものを1つ選んで、番号に○をつけてください。

- |            |           |              |
|------------|-----------|--------------|
| 1. 強く思う    | 2. 少し思う   | 3. どちらともいえない |
| 4. あまり思わない | 5. 全く思わない | 6. 分からない     |

※ すべての回答者におたずねする最後の質問（問 6 と問 7）は、次のページにあります。



問6 上記の質問でおたずねした事項のほか、委員会の制度や活動（特に、委員会の制度の改善）について、考えていることや感じていることがあれば、下記の枠内に自由に記載してください。

問7 最後に、このアンケートに回答していただいた方の属性等について、あてはまるものをそれぞれ1つ選んで、番号に○をつけてください。

|                                       |                                                                                |
|---------------------------------------|--------------------------------------------------------------------------------|
| 1. 国籍                                 | 1. 日本国籍      2. 日本国籍以外の方                                                       |
| 2. 年齢                                 | 1. ～25歳      2. 26～35歳      3. 36～45歳<br>4. 46～55歳      5. 56～65歳      6. 66歳～ |
| 3. 釈放理由                               | 1. 満期釈放      2. 仮釈放                                                            |
| 4. 平成18年(2006年)5月23日以前における日本での受刑経験の有無 | 1. ない      2. ある                                                               |
| 5. 処遇指標                               | 1. A指標      2. LA指標      3. B指標<br>4. LB指標      5. F指標      6. その他の指標          |
| 6. 施設所在地域                             | 1. 東日本（札幌、仙台、東京又は名古屋の各矯正管区の管内）<br>2. 西日本（大阪、広島、高松又は福岡の各矯正管区の管内）                |
| 7. アンケートの作成時間                         | 1. おおむね～30分<br>2. おおむね31分～60分<br>3. おおむね61分～                                   |

ご協力いただき誠にありがとうございました。

## 刑事施設視察委員会に関するアンケート【委員長用】

### 1. 目的

このアンケートは、刑事施設視察委員会（以下「委員会」という。）に関する研究を行うため、平成28年9月から同年10月までの間、当方で選定した複数の刑事施設の委員会の委員長に対して、委員会の活動内容等を伺うものです。

このアンケートに回答してもしなくても、不利益を課されたり、利益を得ることはありませんが、何卒、ご協力ください。

なお、このアンケートは、客観的な事実関係をお尋ねするものなので、不明な点があれば、前任の委員長や他の委員の方に確認しながら回答していただいても差し支えありません。

### 2. 留意事項

- このアンケートは無名記ですので、名前を書かないでください。
- このアンケートの記入が終わりましたら、所定の封筒に入れて、封をしてから各施設で定める方法により、提出してください。調査期間が終わり次第、施設から研究者宛てに書留郵送されます。
- このアンケートは、厳格な秘密保持基準に従い、一定の期間保管した後、裁断等の適切な方法で廃棄されます。詳細については、別添の説明を参照してください。

### 3. 回答の方法

- 質問をよく読んで回答してください。
- 回答は、あてはまるものを1つ選ぶものと、すべて選ぶものの2種類あります。
- 回答は、下記の例のとおり、あてはまる番号の部分に○をつけてください。もし、ぴったりの回答がなければ、最も近い回答を選んでください。

#### 【「3」が当てはまるときの記載例】

昨年度の委員会の会議の開催状況についてお聞きします。あてはまるものを1つ選んで、番号に○をつけてください。

1. 委員会の会議は何回ありましたか。

1. ～5回

2. 6回

③. 7回～

### 問 1

昨年度の委員会の会議の開催状況についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                                                     |
|-----------------------------------------------------------------------------------------------------|
| 1. 委員会の会議は、何回ありましたか。<br>1. ～5回                      2. 6回                      3. 7回～               |
| 2. 1回の会議に要した時間は、平均何時間ぐらいですか。<br>1. 2～3時間                      2. 4～5時間                      3. 6時間～ |

### 問 2

昨年度の委員会による視察の状況についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                                                                                                          |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. 委員会による本所の視察は、何回ありましたか。<br>1. 0回                      2. 1～2回                      3. 3～4回                      4. 5回～                                 |
| 2. 委員会による支所の視察は、何回ありましたか。<br>1. 0回                      2. 1～2回                      3. 3回～4回<br>4. 5回～                      5. 支所がない                    |
| 3. 本所又は支所の1回の視察に要した時間は、平均何分ぐらいですか。<br>1. ～30分                      2. 31～60分                      3. 61～90分<br>4. 91分～                      5. 視察を行っていない |

### 問 3

昨年度の意見・提案書の状況についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                                                                                                                            |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. 提出された意見・提案書の回収は、何回行いましたか。<br>1. ～5回                      2. 6回                      3. 7回～9回                      4. 10回～                               |
| 2. 提出された意見・提案書は、何通ありましたか。<br>1. 0～100通                      2. 101～250通                      3. 251～500通<br>4. 501～1000通                      5. 1001通～    |
| 3. 委員会が確認した意見・提案書は、何通ありましたか。<br>1. 0～100通                      2. 101～250通                      3. 251～500通<br>4. 501～1000通                      5. 1001通～ |

#### 問 4

昨年度の委員による被收容者との面接の状況についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                |            |              |
|------------------------------------------------|------------|--------------|
| 1. 被收容者の希望に基づく委員による被收容者との面接は、何人で行いましたか（延べ人数）。  |            |              |
| 1. 0人                                          | 2. 1～5人    | 3. 6～10人     |
| 4. 11～20人                                      | 5. 21人～    |              |
| 2. 被收容者が希望してから委員による面接が実施されるまでの期間は、平均何か月ぐらいですか。 |            |              |
| 1. 数週間                                         | 2. 1～2か月   | 3. 3～4か月     |
| 4. 5～6か月                                       | 5. 7か月～    | 6. 面接を行っていない |
| 3. 委員会の要請に基づく委員による被收容者との面接は、何人で行いましたか。         |            |              |
| 1. 0人                                          | 2. 1～5人    | 3. 6～10人     |
| 4. 11～20人                                      | 5. 21人～    |              |
| 4. 上記1・3の面接に要した時間は、1回平均何分ぐらいですか。               |            |              |
| 1. ～15分                                        | 2. 16分～30分 | 3. 31分～45分   |
| 4. 46分～60分                                     | 5. 61分～    | 6. 面接を行っていない |

#### 問 5

昨年度の委員による職員との面接等の状況についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。

|                                                 |              |            |
|-------------------------------------------------|--------------|------------|
| 1. 委員会の要請に基づく委員による職員との面接は、何人で行いましたか。            |              |            |
| 1. 0人                                           | 2. 1～5人      | 3. 6～10人   |
| 4. 11～20人                                       | 5. 21人～      |            |
| 2. 上記1の面接に要した時間は、1回平均何分ぐらいですか。                  |              |            |
| 1. ～15分                                         | 2. 16分～30分   | 3. 31分～60分 |
| 4. 61分～                                         | 5. 面接を行っていない |            |
| 3. 個別事案の事実関係について、施設に調査を要請したり、自ら調査したことは何回ありましたか。 |              |            |
| 1. 0回                                           | 2. 1～3回      | 3. 4～5回    |
| 4. 6～9回                                         | 5. 10回～      |            |

**問6 昨年度の委員会によるアンケートの実施の状況についてお聞きします。あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                             |       |       |        |
|-----------------------------|-------|-------|--------|
| 1. 被収容者に対するアンケートは、何回行いましたか。 |       |       |        |
| 1. 0回                       | 2. 1回 | 3. 2回 | 4. 3回～ |
| 2. 職員に対するアンケートは、何回行いましたか。   |       |       |        |
| 1. 0回                       | 2. 1回 | 3. 2回 | 4. 3回～ |

**問7 昨年度の委員会が施設長に提出した意見の状況についてお聞きします（質問ではなく意見の件数をお尋ねしています。）。あてはまるものを1つ選んで、番号に○をつけてください。**

|                              |          |         |  |
|------------------------------|----------|---------|--|
| 委員会が施設長に提出した意見の件数は、何件ありましたか。 |          |         |  |
| 1. 0件                        | 2. 1件    | 3. 2～3件 |  |
| 4. 4～5件                      | 5. 6件～9件 | 6. 10件～ |  |

**問8 委員会は、法務大臣に対して報告書を提出することも可能ですが、昨年度の委員会が法務大臣に提出した報告書の件数の状況についてお聞きします。あてはまるものを1つ選んで、番号に○をつけてください。**

|                                |          |         |  |
|--------------------------------|----------|---------|--|
| 委員会が法務大臣に提出した報告書の件数は、何件ありましたか。 |          |         |  |
| 1. 0件                          | 2. 1件    | 3. 2～3件 |  |
| 4. 4～5件                        | 5. 6件～9件 | 6. 10件～ |  |

**問9 最後に、施設の処遇指標等について、あてはまるものをそれぞれ1つずつ選んで、番号に○をつけてください。**

|                      |                                |           |           |
|----------------------|--------------------------------|-----------|-----------|
| <b>1. 施設の処遇指標（※）</b> | 1. A指標                         | 2. LA指標   | 3. B指標    |
|                      | 4. LB指標                        | 5. F指標    | 6. その他の指標 |
| <b>2. 施設所在地域</b>     | 1. 東日本（札幌、仙台、東京又は名古屋の各矯正管区の管内） |           |           |
|                      | 2. 西日本（大阪、広島、高松又は福岡の各矯正管区の管内）  |           |           |
| <b>3. アンケートの作成時間</b> | 1. ～10分                        | 2. 11～30分 | 3. 31分～   |

※ A指標とLA指標の両方を有する施設は、「1」に○をせず、「2」に○をしてください。また、B指標とLB指標の両方を有する施設は、「3」に○をせず、「4」に○をしてください。さらに、F指標とそれ以外の指標の両方を有する施設は、「5」とそれ以外の指標に該当する番号にそれぞれ○をしてください。

**ご協力いただき誠にありがとうございました。**

## B6 ACT: Survey - corrections officers

### Corrections Officer Opinion Survey

\*There are some gaps in the numbering of some questions. This is just because some questions asked in Japan don't apply in Australia.

**Q. 1** This question asks about your own interactions with the Official Visitors ("Visitors") at the AMC. For each item, select one number for the answer that applies.

|                                                                                                                                   | No | Yes | Don't know |
|-----------------------------------------------------------------------------------------------------------------------------------|----|-----|------------|
| 1. Has any newly appointed Visitor formally introduced themselves to you?                                                         | 1  | 2   | 3          |
| 2. Have you answered any questions asked by a Visitor?                                                                            | 1  | 2   | 3          |
| 3. Has a Visitor asked you to investigate any individual cases regarding the treatment of detainees (other than in Item 2 above)? | 1  | 2   | 3          |
| 4. Have you guided a Visitor around the prison on any of their visits to the AMC?                                                 | 1  | 2   | 3          |
| 5. Have you socialized (chatted) casually with a Visitor during working hours?                                                    | 1  | 2   | 3          |
| 6. Have you gone to any social events with a Visitor outside working hours?                                                       | 1  | 2   | 3          |

**Q. 2** This question asks your views on detainees' contact with the Visitors at the AMC. For each item, select one number for the answer that applies.

※ Corrections Officers don't formally know the details of detainees' talks with the Visitors. But sometimes Corrections Officers will have an idea of what detainees talk with Official Visitors about, e.g. through the Official Visitors. If this doesn't apply to you, please select "6" for "Don't know".

|                                                                                                                  | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so | Don't know |
|------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|------------|
| 1. Do you think detainees talking with the Visitors helps improve how the prison is run?                         | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 2. Do you think some detainees who talk with the Visitors are vexatious detainees, who file a lot of complaints? | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 3. Do you think detainees who talk with the Visitors sometimes feel calmer afterwards?                           | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |

**Q. 3** This question asks your views on the way the Visitors approach their role at the AMC. For each item, select one number for the answer that applies.

| Do you think:                                                                                                                 | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so | Don't know |
|-------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|------------|
| 2. ...the prison side respects the Visitors' views?                                                                           | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 3. ...the Visitors respect the views of the prison side?                                                                      | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 4. ...the Visitors give more weight to what detainees say than to what corrections officers say?                              | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 5. ...the Visitors respect the prison (including corrections officers' activities and expertise)?                             | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 6. ...the Visitors also do work that isn't required by legislation, like providing remedies in individual cases?              | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 7. ...the Visitors also consider detainees who don't contact the Visitors?                                                    | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 8. ...the Visitors give more weight to improving the treatment of detainees than to corrections officers' working conditions? | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 9. ...the Visitors advocate for things that would go beyond the prison's resources (physical and human)?                      | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 10. ...the Visitors advocate for things that would be outside the prison's power (including discretion and authority)?        | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 11. ...the Visitors advocate for things that would make it harder to maintain prison security (discipline and order)?         | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 12. ...the Visitors advocate for things that the general public (including victims) would disagree with?                      | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |

**Q. 4** This question asks your views on the nature and frequency of the Visitor's activities at the AMC. For each item, select one number for the answer that applies.

| Do you think:                                                                                                                                                                      | None<br>•<br>Not enough<br>•<br>Too few<br>•<br>Too short | Not quite enough<br>•<br>A little too few<br>•<br>A little too short | Yes | A little too much<br>•<br>A little too many<br>•<br>A little too long | Too much<br>•<br>Too many<br>•<br>Too long | Don't know |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|----------------------------------------------------------------------|-----|-----------------------------------------------------------------------|--------------------------------------------|------------|
| 3. ...the number of Visitor visits inside the custodial areas of the prison each year is appropriate?                                                                              | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 4. ...the length of Visitors' visits inside the custodial areas of the prison is appropriate?                                                                                      | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 5. ...the amount of information the prison provides to the Visitors is appropriate?                                                                                                | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 6. ...the timing of when the prison provides information to the Visitors is appropriate?                                                                                           | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 8. ...the number of talks detainees have with the Visitors (during a visit to the prison) is appropriate (including talks that detainees ask for and talks that Visitors ask for)? | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 9. ...the time taken for each detainee talk with the Visitors is appropriate?                                                                                                      | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 10. ...the length of time from when a detainee asks to talk with a Visitor to when it happens is appropriate?                                                                      | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 11. ...the number of times a year the Visitors notify detainees about their activities is appropriate?                                                                             | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 12. ...the number of the Visitors' written reports by to the Minister under s.17 of the <i>Official Visitors Act</i> (2012) in a year is appropriate?                              | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |
| 13. ...the Visitors' overall activity level is appropriate?                                                                                                                        | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          | 6          |



**Q. 5 This question asks about the corrections officer workload associated with the Visitors at the AMC.** For each item, select one number for the answer that applies.

|                                                                                                                                                        | None<br>•<br>Not<br>enough | Not<br>quite<br>enough | An<br>appropriate<br>amount | A little<br>too<br>much | Too much | Don't<br>know |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|------------------------|-----------------------------|-------------------------|----------|---------------|
| 1. How much work for corrections officers is associated with the Visitors' visits inside the custodial areas of the prison?                            | 1                          | 2                      | 3                           | 4                       | 5        | 6             |
| 2. How much work for corrections officers is associated with dealing with written (e.g. "bluey") requests from detainees concerning the Visitors?      | 1                          | 2                      | 3                           | 4                       | 5        | 6             |
| 3. How much work for corrections officers is associated with detainee talks with Visitors that Visitors ask for?                                       | 1                          | 2                      | 3                           | 4                       | 5        | 6             |
| 4. How much work for corrections officers is associated with notifying detainees about the Visitors' activities?                                       | 1                          | 2                      | 3                           | 4                       | 5        | 6             |
| 5. How much work for corrections officers is associated with written tasks relating to the Visitors, like doing incident reports and answering emails? | 1                          | 2                      | 3                           | 4                       | 5        | 6             |
| 6. What do you think of corrections officers' overall workload associated with the Visitors?                                                           | 1                          | 2                      | 3                           | 4                       | 5        | 6             |

| <b>Do you think:</b>                                                                                                                                            | Don't<br>think so at<br>all | Don't<br>really<br>think so | Can't say<br>either way | Think<br>so to<br>some<br>extent | Definitely<br>think<br>so | Don't<br>know |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|-----------------------------|-------------------------|----------------------------------|---------------------------|---------------|
| 7. ...even if Visitors don't have specialist knowledge or ability, ordinary common sense qualifies them to give broad, neutral opinions on how the prison runs? | 1                           | 2                           | 3                       | 4                                | 5                         | 6             |

**Q. 6** This question asks your views on the impact of the Visitors' activities at the AMC. For each item, select one number for the answer that applies.

| Do you think the Visitors' activities:                                                                      | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so | Don't know |
|-------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|------------|
| 1. ...are effective in improving the way the prison is run?                                                 | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 2. ...are effective in helping the prison gain public support?                                              | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 3. ...are effective in helping the way the prison is run reflect community common sense?                    | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 4. ...are effective in raising public awareness of the reality of how detainees are treated?                | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 5. ...are effective in raising public awareness of the reality of corrections officers' working conditions? | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 6. ...are effective in raising corrections officer morale?                                                  | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 7. ...are effective in striving to increase efficiency and reduce the workload of corrections officers?     | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 8. ...are effective in backing up legitimate positions taken by the prison side?                            | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 9. ...are effective in calming detainees' emotions?                                                         | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 10. ...are effective in providing relief for detainees whose human rights have been abused?                 | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 11. ...in effect help detainees too to have a say in the running of the prison?                             | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 12. ...are effective in letting the public know about detainees' concerns?                                  | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 13. ...are effective in increasing the prison's budget or staffing levels?                                  | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 14. ...actually have the opposite effect of making detainees feel frustrated, or inappropriately entitled?  | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 15. ...are misused by detainees as a way to hamstring corrections officers?                                 | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |

**Q. 7** This question asks your views on the significance of the Official Visitors system in general at the AMC. For each item, select one number for the answer that applies.

| Do you think:                                                                                                                                         | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|
| 1. ...Visitors' activities are significant (valuable) from detainees' perspective?                                                                    | 1                     | 2                     | 3                    | 4                       | 5                   |
| 2. ...Visitors' activities are significant (valuable) from corrections officers' perspective?                                                         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 3. ...Visitors' activities are significant (valuable) from the general public's perspective?                                                          | 1                     | 2                     | 3                    | 4                       | 5                   |
| 4. ...Visitors are significant (valuable) in preventing the abuse of detainees' rights and interests (including human rights), even just by existing? | 1                     | 2                     | 3                    | 4                       | 5                   |

The next two questions ask your views on the future shape of the Official Visitor system at the AMC.

**Q. 8** For each item, select one number for the answer that applies.

| Do you think:                                                                                                                                                  | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so | Don't know |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|------------|
| 1. ...there should be more Visitors?                                                                                                                           | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 2. ...the way the Visitors are recruited is appropriate?                                                                                                       | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 3. ...the Visitors should be more proactive in talking with detainees?                                                                                         | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 4. ...the Visitors should be more proactive in talking with corrections officers?                                                                              | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 5. ...the Visitors should be more proactive in reporting under s. 16 of the <i>Official Visitors Act</i> (2012) when they believe the prison is non-compliant? | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |

**Q. 9** For each item, select one number for the answer that applies.

| Do you think:                                                                                                                                          | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so | Don't know |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|------------|
| 1. ...there should be more Visitors who have specialist knowledge or experience in correctional treatment and rehabilitation?                          | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 2. ...Visitors should be gender-balanced?                                                                                                              | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 3. ...there should be more Visitors who used to be corrections officers?                                                                               | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 4. ...there should be more Visitors recruited from victims' groups?                                                                                    | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 6. ...Visitors' pay should be increased?                                                                                                               | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 7. ...Visitors' pay should be abolished, making them unpaid?                                                                                           | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 9. ...Visitors should have more independence, for example in terms of authority, budget and administrative support structure?                          | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 10. ...new Visitors should be trained?                                                                                                                 | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 11. ...it's helpful that Visitors are linked with other ACT Visitors to exchange ideas and conduct training?                                           | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 12. ...Visitors should be linked with similar bodies within Australia to exchange ideas and conduct training?                                          | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 13. ...Visitors should be linked with similar bodies internationally to exchange ideas and conduct training?                                           | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 14. ...the prison side should have more respect for Visitors' views?                                                                                   | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 15. ...Visitors should have more respect for the views of the prison side?                                                                             | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 16. ...Visitors should, in their activities, consider the views of the public (including victims) more thoroughly than they consider detainees' views? | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 17. ...Visitors should give more weight to the views of detainees than to corrections officers' views?                                                 | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 18. ...Visitors should have more respect for the prison (including corrections officers' activities and expertise)?                                    | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |

**Do you think:**

|                                                                                                                                                                                                                        | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so | Don't know |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|------------|
| 19. ...Visitors should avoid doing work that isn't expressly stated in legislation, like providing relief in individual cases?                                                                                         | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 20. ...Visitors should also consider detainees who don't contact Visitors?                                                                                                                                             | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 21. ...Visitors should give more weight to improving detainees' treatment than to corrections officers' working conditions?                                                                                            | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 22. ...Visitors should avoid advocating for things that would go beyond the prison's resources (human and physical)?                                                                                                   | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 23. ...Visitors should avoid advocating for things that would be outside the prison's power (including discretion and authority)?                                                                                      | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 24. ...Visitors should avoid advocating for things that would make it harder to maintain prison security (discipline and order)?                                                                                       | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 25. ...Visitors should avoid advocating for things that the general public (including victims) would disagree with?                                                                                                    | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 26. ... Visitors' written quarterly reports to the Minister under s.17 of the <i>Official Visitors Act</i> (2012) should be made public?                                                                               | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 27. ...Visitors should take initiative to observe for themselves how detainees are really treated (for example at meals, in medical appointments, in segregation) to accurately grasp actual conditions in the prison? | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 28. ...there should be a minimum appointment period for Visitors?                                                                                                                                                      | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |
| 29. ...there should be a maximum number of times a Visitor's appointment is renewed?                                                                                                                                   | 1                     | 2                     | 3                    | 4                       | 5                   | 6          |

**Q. 10** Please write any additional thoughts or views you may have about the Official Visitors system or activities – especially how to improve the Official Visitors system at the AMC.

**Q. 11** This question asks for some basic demographic information. For each item, select one number for the answer that applies.

|                                          |                                                                                                                               |
|------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|
| <b>1. Gender</b>                         | 1. Male      2. Female                                                                                                        |
| <b>2. Age</b>                            | 1. ~25 years      2. 26~35 years      3. 36~45 years<br>4. 46~55 years      5. 56 years~                                      |
| <b>3. Years as a corrections officer</b> | 1. ~5 years      2. 6~9 years      3. 10~14 years      4. 15~19 years<br>5. 20~24 years      6. 25~29 years      7. 30 years~ |
| <b>4. Position</b>                       | 1. Corrections Officer Level 1      2. Corrections Officer Level 2 and above                                                  |
| <b>5. Time spent on this survey</b>      | 1. ~30 minutes      2. 31~60 minutes      3. 61 minutes~                                                                      |

**Thank you very much for participating in this survey**

### Official Visitor Opinion Survey

**Q. 1** This question asks about your own interactions with corrections officers at the AMC. For each item, select one number for the answer that applies.

|                                                                                                                                                | No | Yes |
|------------------------------------------------------------------------------------------------------------------------------------------------|----|-----|
| 1. Have you formally introduced yourself as a newly appointed Visitor?                                                                         | 1  | 2   |
| 2. Have you met with corrections officers to ask questions?                                                                                    | 1  | 2   |
| 3. Have you asked corrections officers to investigate any individual cases concerning the treatment of detainees (other than in Item 2 above)? | 1  | 2   |
| 4. Have you been guided around the prison by corrections officers on any of your visits to the AMC?                                            | 1  | 2   |
| 5. Have you socialized (chatted) casually with corrections officers during working hours?                                                      | 1  | 2   |
| 6. Have you gone to any social events with corrections officers outside working hours?                                                         | 1  | 2   |

**Q. 2** This question asks your views on detainees' contact with the Visitors at the AMC. For each item, select one number for the answer that applies.

| Do you think:                                                                                          | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so |
|--------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|
| 1. ...detainees talking with the Visitors helps improve how the prison is run?                         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 2. ...some detainees who talk with the Visitors are vexatious detainees, who file a lot of complaints? | 1                     | 2                     | 3                    | 4                       | 5                   |
| 3. ...detainees who talk with the Visitors sometimes feel calmer afterwards?                           | 1                     | 2                     | 3                    | 4                       | 5                   |

**Q. 3** This question asks your views on the way the Visitors approach their role at the AMC. For each item, select one number for the answer that applies.

| Do you think:                                                                                                                 | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so |
|-------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|
| 2. ...the prison side respects the Visitors' views?                                                                           | 1                     | 2                     | 3                    | 4                       | 5                   |
| 3. ...the Visitors respect the views of the prison side?                                                                      | 1                     | 2                     | 3                    | 4                       | 5                   |
| 4. ...the Visitors give more weight to what detainees say than to what corrections officers say?                              | 1                     | 2                     | 3                    | 4                       | 5                   |
| 5. ...the Visitors respect the prison (including corrections officers' activities and expertise)?                             | 1                     | 2                     | 3                    | 4                       | 5                   |
| 6. ...the Visitors also do work that isn't required by legislation, like providing remedies in individual cases?              | 1                     | 2                     | 3                    | 4                       | 5                   |
| 7. ...the Visitors also consider detainees who don't contact the Visitors?                                                    | 1                     | 2                     | 3                    | 4                       | 5                   |
| 8. ...the Visitors give more weight to improving the treatment of detainees than to corrections officers' working conditions? | 1                     | 2                     | 3                    | 4                       | 5                   |
| 9. ...the Visitors advocate for things that would go beyond the prison's resources (physical and human)?                      | 1                     | 2                     | 3                    | 4                       | 5                   |
| 10. ...the Visitors advocate for things that would be outside the prison's power (including discretion and authority)?        | 1                     | 2                     | 3                    | 4                       | 5                   |
| 11. ...the Visitors advocate for things that would make it harder to maintain prison security (discipline and order)?         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 12. ...the Visitors advocate for things that the general public (including victims) would disagree with?                      | 1                     | 2                     | 3                    | 4                       | 5                   |
| 14. ...you are enthusiastic about the activities you do as a Visitor?                                                         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 15. ...you understand the actual situation in the prison?                                                                     | 1                     | 2                     | 3                    | 4                       | 5                   |
| 16. ...you understand the legislated role Visitors have to fulfil?                                                            | 1                     | 2                     | 3                    | 4                       | 5                   |



**Q. 4** This question asks for your views on the nature and frequency of the Visitors' activities at the AMC. For each item, select one number for the answer that applies.

| Do you think:                                                                                                                                                                          | None<br>▪<br>Not enough<br>▪<br>Too few<br>▪<br>Too short | Not quite enough<br>▪<br>A little too few<br>▪<br>A little too short | Yes | A little too much<br>▪<br>A little too many<br>▪<br>A little too long | Too much<br>▪<br>Too many<br>▪<br>Too long |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|----------------------------------------------------------------------|-----|-----------------------------------------------------------------------|--------------------------------------------|
| 3. ...the number of Visitor visits inside the custodial areas of the prison each year is appropriate?                                                                                  | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 4. ...the length of Visitors' visits inside the custodial areas of the prison is appropriate?                                                                                          | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 5. ...the amount of information the prison provides to the Visitors is appropriate?                                                                                                    | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 6. ...the timing of when the prison provides information to the Visitors is appropriate?                                                                                               | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 8. ...the number of times the detainees talk with the Visitors (during a visit to the prison) is appropriate (including talks that detainees ask for and talks that Visitors ask for)? | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 9. ...the time taken for each detainee talk with the Visitors is appropriate?                                                                                                          | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 10. ...the length of time from when a detainee asks to talk with a Visitor to when it happens is appropriate?                                                                          | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 11. ...the number of times a year the Visitors notify detainees about their activities is appropriate?                                                                                 | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 12. ...the number of the Visitors' written reports by to the Minister under s.17 of the <i>Official Visitors Act</i> (2012) in a year is appropriate?                                  | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |
| 13. Do you think the Visitors' overall activity level is appropriate?                                                                                                                  | 1                                                         | 2                                                                    | 3   | 4                                                                     | 5                                          |

**Q. 5 This question asks about the Visitors' workload at the AMC.** For each item, select one number for the answer that applies.

|                                                                                                                                                                 | None<br>•<br>Not<br>enough | Not<br>quite<br>enough | An<br>appropriate<br>amount | A little<br>too much | Too<br>much |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|------------------------|-----------------------------|----------------------|-------------|
| 1. How much work for Visitors is associated with Visitors' visits inside the custodial areas of the prison?                                                     | 1                          | 2                      | 3                           | 4                    | 5           |
| 2. How much work for Visitors is associated with dealing with written requests from detainees?                                                                  | 1                          | 2                      | 3                           | 4                    | 5           |
| 3. How much work for Visitors is associated with talks with detainees that Visitors ask for?                                                                    | 1                          | 2                      | 3                           | 4                    | 5           |
| 4. How much work for Visitors is associated with notifying detainees about the Visitors' activities?                                                            | 1                          | 2                      | 3                           | 4                    | 5           |
| 5. How much work for Visitors is associated with the Visitors' written quarterly reports to the Minister under s.17 of the <i>Official Visitors Act</i> (2012)? | 1                          | 2                      | 3                           | 4                    | 5           |
| 6. What do you think of the Visitors' overall workload?                                                                                                         | 1                          | 2                      | 3                           | 4                    | 5           |

| <b>Do you think:</b>                                                                                                                                            | Don't<br>think so<br>at all | Don't<br>really<br>think so | Can't say<br>either way | Think so<br>to some<br>extent | Definitely<br>think so |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|-----------------------------|-------------------------|-------------------------------|------------------------|
| 7. ...even if Visitors don't have specialist knowledge or ability, ordinary common sense qualifies them to give broad, neutral opinions on how the prison runs? | 1                           | 2                           | 3                       | 4                             | 5                      |
| 9. ...your own workload associated with Visitor activities is a heavy burden, given your capacity?                                                              | 1                           | 2                           | 3                       | 4                             | 5                      |
| 10. ...your Visitor role is a heavy burden, given your other commitments?                                                                                       | 1                           | 2                           | 3                       | 4                             | 5                      |

**Q. 6** This question asks for your views on the impact of the Visitors' activities at the AMC. For each item, select one number for the answer that applies.

| Do you think the Visitors' activities:                                                                      | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so |
|-------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|
| 1. ...are effective in improving the way the prison is run?                                                 | 1                     | 2                     | 3                    | 4                       | 5                   |
| 2. ...are effective in helping the prison gain public support?                                              | 1                     | 2                     | 3                    | 4                       | 5                   |
| 3. ...are effective in helping the way the prison is run reflect community common sense?                    | 1                     | 2                     | 3                    | 4                       | 5                   |
| 4. ...are effective in raising public awareness of the reality of how detainees are treated?                | 1                     | 2                     | 3                    | 4                       | 5                   |
| 5. ...are effective in raising public awareness of the reality of corrections officers' working conditions? | 1                     | 2                     | 3                    | 4                       | 5                   |
| 6. ...are effective in raising corrections officer morale?                                                  | 1                     | 2                     | 3                    | 4                       | 5                   |
| 7. ...are effective in striving to increase efficiency and reduce the workload of corrections officers?     | 1                     | 2                     | 3                    | 4                       | 5                   |
| 8. ...are effective in backing up legitimate positions taken by the prison side?                            | 1                     | 2                     | 3                    | 4                       | 5                   |
| 9. ...are effective in calming detainees' emotions?                                                         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 10. ...are effective in providing relief for detainees whose human rights have been abused?                 | 1                     | 2                     | 3                    | 4                       | 5                   |
| 11. ...in effect help detainees too to have a say in the running of the prison?                             | 1                     | 2                     | 3                    | 4                       | 5                   |
| 12. ...are effective in letting the public know about detainees' concerns?                                  | 1                     | 2                     | 3                    | 4                       | 5                   |
| 13. ...are effective in increasing the prison's budget or staffing levels?                                  | 1                     | 2                     | 3                    | 4                       | 5                   |
| 14. ...actually have the opposite effect of making detainees feel frustrated, or inappropriately entitled?  | 1                     | 2                     | 3                    | 4                       | 5                   |
| 15. ...are misused by detainees as a way to hamstring corrections officers?                                 | 1                     | 2                     | 3                    | 4                       | 5                   |

**Q. 7** This question asks your views on the significance of the Visitors at the AMC. For each item, select one number for the answer that applies.

| Do you think:                                                                                                                                         | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|
| 1. ...Visitors' activities are significant (valuable) from detainees' perspective?                                                                    | 1                     | 2                     | 3                    | 4                       | 5                   |
| 2. ...Visitors' activities are significant (valuable) from corrections officers' perspective?                                                         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 3. ...Visitors' activities are significant (valuable) from the general public's perspective?                                                          | 1                     | 2                     | 3                    | 4                       | 5                   |
| 4. ...Visitors are significant (valuable) in preventing the abuse of detainees' rights and interests (including human rights), even just by existing? | 1                     | 2                     | 3                    | 4                       | 5                   |

The next two questions ask your views on the future shape of the Official Visitor system at the AMC.

**Q. 8** For each item, select one number for the answer that applies.

| Do you think:                                                                                                                                                  | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|
| 1. ...there should be more Visitors?                                                                                                                           | 1                     | 2                     | 3                    | 4                       | 5                   |
| 2. ...the way the Visitors are recruited is appropriate?                                                                                                       | 1                     | 2                     | 3                    | 4                       | 5                   |
| 3. ...the Visitors should be more proactive in talking with detainees?                                                                                         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 4. ...the Visitors should be more proactive in talking with corrections officers?                                                                              | 1                     | 2                     | 3                    | 4                       | 5                   |
| 5. ...the Visitors should be more proactive in reporting under s. 16 of the <i>Official Visitors Act</i> (2012) when they believe the prison is non-compliant? | 1                     | 2                     | 3                    | 4                       | 5                   |

**Q. 9** For each item, select one number for the answer that applies.

| <b>Do you think:</b>                                                                                                                                   | <b>Don't think so at all</b> | <b>Don't really think so</b> | <b>Can't say either way</b> | <b>Think so to some extent</b> | <b>Definitely think so</b> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|------------------------------|-----------------------------|--------------------------------|----------------------------|
| 1. ...there should be more Visitors who have specialist knowledge or experience in correctional treatment and rehabilitation?                          | 1                            | 2                            | 3                           | 4                              | 5                          |
| 2. ...Visitors should be gender-balanced?                                                                                                              | 1                            | 2                            | 3                           | 4                              | 5                          |
| 3. ...there should be more Visitors who used to be corrections officers?                                                                               | 1                            | 2                            | 3                           | 4                              | 5                          |
| 4. ...there should be more Visitors recruited from victims' groups?                                                                                    | 1                            | 2                            | 3                           | 4                              | 5                          |
| 6. ...Visitors' pay should be increased?                                                                                                               | 1                            | 2                            | 3                           | 4                              | 5                          |
| 7. ...Visitors' pay should be abolished, making them unpaid?                                                                                           | 1                            | 2                            | 3                           | 4                              | 5                          |
| 9. ...Visitors should have more independence, for example in terms of authority, budget and administrative support structure?                          | 1                            | 2                            | 3                           | 4                              | 5                          |
| 10. ...new Visitors should be trained?                                                                                                                 | 1                            | 2                            | 3                           | 4                              | 5                          |
| 11. ...it's helpful that Visitors are linked with other ACT Visitors to exchange ideas and conduct training?                                           | 1                            | 2                            | 3                           | 4                              | 5                          |
| 12. ...Visitors should be linked with similar bodies within Australia to exchange ideas and conduct training?                                          | 1                            | 2                            | 3                           | 4                              | 5                          |
| 13. ...Visitors should be linked with similar bodies internationally to exchange ideas and conduct training?                                           | 1                            | 2                            | 3                           | 4                              | 5                          |
| 14. ...the prison side should have more respect for Visitors' views?                                                                                   | 1                            | 2                            | 3                           | 4                              | 5                          |
| 15. ...Visitors should have more respect for the views of the prison side?                                                                             | 1                            | 2                            | 3                           | 4                              | 5                          |
| 16. ...Visitors should, in their activities, consider the views of the public (including victims) more thoroughly than they consider detainees' views? | 1                            | 2                            | 3                           | 4                              | 5                          |
| 17. ...Visitors should give more weight to the views of detainees than to corrections officers' views?                                                 | 1                            | 2                            | 3                           | 4                              | 5                          |
| 18. ...Visitors should have more respect for the prison (including corrections officers' activities and expertise)?                                    | 1                            | 2                            | 3                           | 4                              | 5                          |

**Do you think:**

|                                                                                                                                                                                                                        | Don't think so at all | Don't really think so | Can't say either way | Think so to some extent | Definitely think so |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|----------------------|-------------------------|---------------------|
| 19. ...Visitors should avoid doing work that isn't expressly stated in legislation, like providing relief in individual cases?                                                                                         | 1                     | 2                     | 3                    | 4                       | 5                   |
| 20. ...Visitors should also consider detainees who don't contact Visitors?                                                                                                                                             | 1                     | 2                     | 3                    | 4                       | 5                   |
| 21. ...Visitors should give more weight to improving detainees' treatment than to corrections officers' working conditions?                                                                                            | 1                     | 2                     | 3                    | 4                       | 5                   |
| 22. ...Visitors should avoid advocating for things that would go beyond the prison's resources (human and physical)?                                                                                                   | 1                     | 2                     | 3                    | 4                       | 5                   |
| 23. ...Visitors should avoid advocating for things that would be outside the prison's power (including discretion and authority)?                                                                                      | 1                     | 2                     | 3                    | 4                       | 5                   |
| 24. ...Visitors should avoid advocating for things that would make it harder to maintain prison security (discipline and order)?                                                                                       | 1                     | 2                     | 3                    | 4                       | 5                   |
| 25. ...Visitors should avoid advocating for things that the general public (including victims) would disagree with?                                                                                                    | 1                     | 2                     | 3                    | 4                       | 5                   |
| 26. ... Visitors' written quarterly reports to the Minister under s.17 of the <i>Official Visitors Act</i> (2012) should be made public?                                                                               | 1                     | 2                     | 3                    | 4                       | 5                   |
| 27. ...Visitors should take initiative to observe for themselves how detainees are really treated (for example at meals, in medical appointments, in segregation) to accurately grasp actual conditions in the prison? | 1                     | 2                     | 3                    | 4                       | 5                   |
| 28. ...there should be a minimum appointment period for Visitors?                                                                                                                                                      | 1                     | 2                     | 3                    | 4                       | 5                   |
| 29. ...there should be a maximum number of times a Visitor's appointment is renewed?                                                                                                                                   | 1                     | 2                     | 3                    | 4                       | 5                   |

**Q. 10** Please write any additional thoughts or views you have about the Official Visitors system or activities here – especially how to improve the Official Visitors system at the AMC.

**Q. 11** This question asks for some basic demographic information. For each item, select one number for the answer that applies.

|                              |                                                                                                                                 |
|------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| <b>1. Gender</b>             | 1. Male            2. Female                                                                                                    |
| <b>2. Age</b>                | 1. ~25 years   2. 26~35 years   3. 36~45 years   4. 46~55 years<br>5. 56~65 years          6. 66~75 years          7. 76 years~ |
| <b>4. Years as a Visitor</b> | 1. ~1 year          2. 2~3 years          3. 4~5 years          4. 6~10 years                                                   |

## APPENDIX: Questions on Activities Performed as an Official Visitor

**Appendix Q. 1** This question asks about your visits to the prison in calendar 2016. For each item, select one number for the answer that applies.

|                                                                                                                                                                                                                                                                                                                                                                                      |  |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|
| 1. Roughly how many times did you visit the prison?<br>1. 1~52 times (up to once a week)<br>2. 53~78 times (more than once a week and up to three times a fortnight)<br>3. 79~104 times (more than three times a fortnight and up to twice a week)<br>4. 105~130 times (more than twice a week and up to five times a fortnight)<br>5. 131 times~ (more than five times a fortnight) |  |  |
| 2. Roughly how many hours did each visit take?<br>1. 2~3 hours                                      2. 4~5 hours                                      3. 6 hours~                                                                                                                                                                                                                    |  |  |

**Appendix Q. 2** This question asks about the time you spent as an Official Visitor inside the custodial areas of the prison in calendar 2016. For each item, select one number for the answer that applies.

|                                                                                                                                                                                                                                                                                                                                                                                                                    |  |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|
| 1. Roughly how many times did you visit inside the custodial areas of the prison?<br>1. 1~52 times (up to once a week)<br>2. 53~78 times (more than once a week and up to three times a fortnight)<br>3. 79~104 times (more than three times a fortnight and up to twice a week)<br>4. 105~130 times (more than twice a week and up to five times a fortnight)<br>5. 131 times~ (more than five times a fortnight) |  |  |
| 3. Roughly how many hours did you spend inside the custodial areas of the prison each visit?<br>1. 2~3 hours                                      2. 4~5 hours                                      3. 6 hours~                                                                                                                                                                                                    |  |  |

**Appendix Q. 3** This question asks about letters, messages and phone calls about detainees you handled as an Official Visitor in calendar 2016. For each item, select one number for the answer that applies.

|                                                                                                                                                                                                                                                                                                                                                                        |  |  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|
| 1. How many letters did you get from detainees?<br>1. None                      2. 1~5 letters                      3. 6~10 letters<br>4. 11~20 letters                      5. 21~ 30 letters                      6. More (write number_____)                                                                                                                        |  |  |
| 2. How many phone messages did you get from detainees?<br>1. None                      2. 1~5 messages                      3. 6~10 messages<br>4. 11 ~20 messages                      5. 21~30 messages                      6. More (write number_____)                                                                                                             |  |  |
| 3. How many letters and emails about detainees to and from other agencies, lawyers and detainees' families did you handle?<br>1. None                      2. 1~5 letters and emails                      3. 6~10 letters and emails<br>4. 11~20 letters and emails                      5. 21~ 30 letters and emails                      6. More (write number_____) |  |  |
| 4. How many phone calls about detainees to and from other agencies, lawyers and detainees' families did you handle?<br>1. None                      2. 1~5 calls                      3. 6~10 calls<br>4. 11~20 calls                      5. 21~30 calls                      6. More (write number_____)                                                             |  |  |



**Appendix Q. 4 This question asks about your talks with detainees as an Official Visitor in calendar 2016.**

For each item, select one number for the answer that applies.

|                                                                                                                                                          |                      |                           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|---------------------------|
| 1. Each time you visited the prison, roughly how many detainees <u>who had asked to talk with you</u> did you talk with?                                 |                      |                           |
| 1 . 0~10 detainees                                                                                                                                       | 2 . 11~20 detainees  | 3 . 21~30 detainees       |
| 4 . 31~40 detainees                                                                                                                                      | 5 . 41 detainees~    |                           |
| 2. How long did it usually take from when a detainee asked to talk with you, until you talked with them?                                                 |                      |                           |
| 1 . Under an hour                                                                                                                                        | 2 . On the same day  | 3 . A few days            |
| 4 . About a week                                                                                                                                         | 5 . More than a week | 6 . More than a fortnight |
| 3. Each time you visited the prison, roughly how many detainees did you go to talk with <u>without them having specifically asked to talk with you</u> ? |                      |                           |
| 1 . 0~10 detainees                                                                                                                                       | 2 . 11~20 detainees  | 3 . 21~30 detainees       |
| 4 . 31~40 detainees                                                                                                                                      | 5 . 41 detainees~    |                           |
| 4. On average how long were the talks with detainees in Items 1 and 3 above?                                                                             |                      |                           |
| 1 . ~15 minutes                                                                                                                                          | 2 . 16~30 minutes    | 3 . 31~45 minutes         |
| 4 . 46~60 minutes                                                                                                                                        | 5 . 61~90 minutes    | 6 . 91 minutes~           |

**Appendix Q. 5 This question asks about your consultations with corrections officers as an Official Visitor in calendar 2016.**

For each item, select one number for the answer that applies.

|                                                                                                |                              |                              |
|------------------------------------------------------------------------------------------------|------------------------------|------------------------------|
| 1. During each visit, roughly how many corrections officers did you consult with face-to-face? |                              |                              |
| 1 . 1~3 corrections officers                                                                   | 2 . 4~6 corrections officers |                              |
| 3 . 7~10 corrections officers                                                                  | 4 . 11~ corrections officers |                              |
| 2. On average, how long did you consult face-to-face with corrections officers for?            |                              |                              |
| 1 . ~15 minutes                                                                                | 2 . 16~30 minutes            | 3 . 31~45 minutes            |
| 4 . 46~60 minutes                                                                              | 5 . 61 minutes~              | 6 . Didn't consult with them |
| 3. During each visit, roughly how many individual cases did you ask the prison to investigate? |                              |                              |
| 1 . None                                                                                       | 2 . 1~3 cases                | 3 . 4~6 cases                |
| 4 . 7~10 cases                                                                                 | 5 . More (write number_____) |                              |
| 4. After each visit, roughly how many emails did you send to corrections officers?             |                              |                              |
| 1 . None                                                                                       | 2 . 1~3 emails               | 3 . 4~6 emails               |
| 4 . 7~10 emails                                                                                | 5 . More (write number_____) |                              |
| 5. On average, how long did you write emails to corrections officers for?                      |                              |                              |
| 1 . ~15 minutes                                                                                | 2 . 16~30 minutes            | 3 . 31~45 minutes            |
| 4 . 46~60 minutes                                                                              | 5 . 61 minutes~              | 6 . Didn't write emails      |

**Appendix Q. 7** This question asks about the number of discretionary reports you sent as an Official Visitor in calendar 2016. For each item, select one number for the answer that applies.

|                                                                                                                                                                                                                    |                 |                 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|-----------------|
| 1. How many reports under s.16 of the <i>Official Visitors Act</i> (2012) did you make to the Minister?                                                                                                            |                 |                 |
| 1 . None                                                                                                                                                                                                           | 2 . 1 report    | 3 . 2~3 reports |
| 4 . 4~5 reports                                                                                                                                                                                                    | 5 . 6~9 reports | 6 . 10 reports~ |
| 2. How many reports to the Minister under s.16 of the <i>Official Visitors Act</i> (2012) did you also send to the Director-General, the Public Advocate, or the Official Visitors Board?                          |                 |                 |
| 1 . None                                                                                                                                                                                                           | 2 . 1 report    | 3 . 2~3 reports |
| 4 . 4~5 reports                                                                                                                                                                                                    | 5 . 6~9 reports | 6 . 10 reports~ |
| 3. How many <u>written quarterly reports to the Minister</u> under s.17 of the <i>Official Visitors Act</i> (2012) did you also send to the Director-General, the Public Advocate, or the Official Visitors Board? |                 |                 |
| 1 . None                                                                                                                                                                                                           | 2 . 1 report    | 3 . 2~3 reports |
| 4 . 4~5 reports                                                                                                                                                                                                    | 5 . 6~9 reports | 6 . 10 reports~ |

**Appendix Q. 10** This question asks about the number of meetings you attended as an Official Visitor calendar 2016.

|                                                                                                                             |                              |                  |                  |
|-----------------------------------------------------------------------------------------------------------------------------|------------------------------|------------------|------------------|
| 1. How many meetings of the Official Visitors Board did you attend?                                                         |                              |                  |                  |
| 1 . None                                                                                                                    | 2 . 1 meeting                | 3 . 2 meetings   | 4 . 3 meetings~  |
| 2. How many meetings with collaborating agencies like the ACT Human Rights Commission, or the ACT Ombudsman did you attend? |                              |                  |                  |
| 1 . None                                                                                                                    | 2 . 1~2 meetings             | 3 . 3~4 meetings | 4 . 5~6 meetings |
|                                                                                                                             | 5 . More (write number_____) |                  |                  |
| 3. How many monthly Detainee Delegate meetings did you attend?                                                              |                              |                  |                  |
| 1 . None                                                                                                                    | 2 . 1~2 meetings             | 3 . 3~5 meetings | 4 . 6~9 meetings |
|                                                                                                                             | 5 . 10 meetings~             |                  |                  |

**THANK YOU VERY MUCH FOR YOUR TIME & HELP**

**B8 ACT: Survey – prisoners\***

\*The Likert scale questions in this survey were reversed for reporting purposes

**Survey on the AMC's Official Visitor System (Detainees)**

**\* The questions on this page (Questions 1-1 to 1-3) are for ALL detainees**

**Q. 1-1**

How many times have you asked in writing to talk with an Official Visitor during your current sentence (for example: in a “bluey” form, or a written request to an outside agency, like the Human Rights Commission or the Ombudsman)? Circle one number for the answer that applies.

- |                |                 |               |
|----------------|-----------------|---------------|
| 1 . Never      | 2 . 1~2 times   | 3 . 3~5 times |
| 4 . 6~10 times | 5 . 11~15 times | 6 . 16 times~ |

**Q. 1-2**

How many times have you asked orally to talk with an Official Visitor during your current sentence (for example: by asking a corrections officer, by asking an Official Visitor, or by leaving a phone message for an Official Visitor)? Circle one number for the answer that applies.

- |                |                 |               |
|----------------|-----------------|---------------|
| 1 . Never      | 2 . 1~2 times   | 3 . 3~5 times |
| 4 . 6~10 times | 5 . 11~15 times | 6 . 16 times~ |

**Q. 1-3**

How many times in total have you had a talk with an Official Visitor during your current sentence (including any times when it was the Official Visitor who asked to have the talk, not you)? Circle one number for the answer that applies.

- |                |                 |               |
|----------------|-----------------|---------------|
| 1 . Never      | 2 . 1~2 times   | 3 . 3~5 times |
| 4 . 6~10 times | 5 . 11~15 times | 6 . 16 times~ |

**\* The question on this page (Question 2) is ONLY for detainees who've answered (in Questions 1-1 and 1-2) that they've never asked to talk with an Official Visitor**

**Q. 2**

This question is only for detainees who have never asked to talk with an Official Visitor.

**Why have you never asked to talk with an Official Visitor?** Circle all the numbers for the answers that apply. If you circle the number 11, please also write the reason why inside the brackets.

1. I haven't had a problem important enough to talk about with an Official Visitor.
2. If I've had a complaint, then talking with a corrections officer or an internal appeal has been enough.
3. If I have a human rights complaint, talking with another agency or a lawyer, or suing would be better.
4. It's not right for detainees to give opinions or make demands.
5. I don't want corrections officers or other detainees to think of me as a whinger.
6. It'd be too much trouble.
7. Nothing would change.
8. Corrections officers might find out what I talked to the Official Visitor about.
9. I didn't know I could talk with an Official Visitor.
10. My English isn't good enough.
11. Another reason ( )

**\* Questions 3-1 to 3- 4 are ONLY for detainees who answered (in Questions 1-1 and 1-2) that they have asked to talk with an Official Visitor**

**Q. 3-1**

This question is only for detainees who have asked to talk with an Official Visitor.

**What issues have you asked to talk with an Official Visitor about?** Circle all the numbers for the answers that apply. If you circle the number 12, please also write the issue/s involved inside the brackets.

1. Health and medical care (like improving detainees' medical care or health, including access to exercise and showers)
2. The AMC as an organization, or corrections officers (like something corrections officers said or did, or not having enough corrections officers)
3. How corrective services are carried out (like better work opportunities for detainees, the privileges system, or rehabilitation programs)
4. Other than meals, property given to detainees, or that detainees get for themselves (like letting detainees have more stuff, or buy more stuff)
5. Meals (including the food and drinks that detainees can buy)
6. AMC buildings or facilities (like renovations or repairs)
7. Official Visitors (like improving procedures for talking with them, or improving how detainees are told about what the Official Visitors do)
8. Prison conditions in the AMC (like the mood among detainees, or fixing overcrowding)
9. Discipline (like segregation, or punishments)
10. Contact with the outside (like restrictions on visits or letters)
11. Reading materials (like better access to current news, or how reading materials are handled by the prison)
12. Another issue ( )

**Q. 3-2**

This question is only for detainees who have asked to talk with an Official Visitor.

**Did you express thanks to the AMC or corrections officers in any of your talks with Official Visitors?** Circle one number for the answer that applies.

- |        |         |
|--------|---------|
| 1 . No | 2 . Yes |
|--------|---------|

**Q. 3-3**

This question is only for detainees who have asked to talk with an Official Visitor.

**Who did you want to help when you asked to talk with an Official Visitor?** Circle all the numbers for any answers that apply.

- |                                                                    |
|--------------------------------------------------------------------|
| 1 . Myself                                                         |
| 2 . Other detainees, even if I would not get anything out of it    |
| 3 . The AMC as a whole, even if I would not get anything out of it |

**Q. 3-4**

This question is only for detainees who have asked to talk with an Official Visitor.

**How have corrections officers usually reacted after you asked to talk with an Official Visitor?** Circle one number for the answer that applies.

- |                  |                  |                            |
|------------------|------------------|----------------------------|
| 1 . Really badly | 2 . Pretty badly | 3 . No particular reaction |
| 4 . Pretty well  | 5 . Really well  |                            |

**\* Question 3-5 is ONLY for detainees who answered (in Question 1-1 or 1-3) that they have actually had a talk with an Official Visitor**

**Q. 3-5**

This question is only for detainees who have actually had a talk with an Official Visitor.

**Do you think there has usually been a positive change of some kind after you've talked with an Official Visitor?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  |                          |

**\* Question 3-6 is ONLY for detainees who answered (in Question 1-2) that they have asked to talk with an Official Visitor**

**Q. 3-6**

This question is only for detainees who have asked to talk with an Official Visitor.

**How long has it usually taken until you've got to talk with an Official Visitor, after you've asked to talk with them?** Circle one number for the answer that applies.

- |                   |                      |                               |
|-------------------|----------------------|-------------------------------|
| 1 . Under an hour | 2 . On the same day  | 3 . A few days                |
| 4 . About a week  | 5 . More than a week | 6 . Never got to talk to them |

**\* Question 3-7 is ONLY for detainees who answered (in Question 1-3) that they actually had a talk with an Official Visitor**

**Q. 3-7**

This question is only for detainees who have had a talk with an Official Visitor.

**Has the Official Visitor usually listened carefully to you when you've been talking with them?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  |                          |

**\* The questions from here to the end (Questions 4-1 to 7) are for ALL detainees**

**Q. 4-1**

**How do detainees get told about what Official Visitors do, and any results from their work?** Circle all the numbers for the answers that apply. If you circle the number 5, please also write the details inside the brackets.

- |                                |                                   |
|--------------------------------|-----------------------------------|
| 1 . A noticeboard              | 2 . Newsletters                   |
| 3 . Official Visitor/s told us | 4 . Corrections officer/s told us |
| 5 . Other ways (               | )                                 |
| 6 . We aren't told             |                                   |

**Q. 4-2**

**Do you think what the Official Visitors do, and any results from their work, are well known in the AMC?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  |                          |

**Q. 4-3**

**How often do you see an Official Visitor visiting the AMC?** Circle one number for the answer that applies.

- |                           |                       |
|---------------------------|-----------------------|
| 1 . 3~4 times a week      | 2 . 1-2 times a week  |
| 3 . 1-2 times a fortnight | 4 . 1-2 times a month |
| 5 . Almost never          | 6 . Never             |

**Q. 5-1**

**What do you think about the Official Visitors' attitude to detainees and corrections officers?** Circle one number for the answer that applies.

- |                                                 |                                                  |
|-------------------------------------------------|--------------------------------------------------|
| 1 . They definitely favour detainees            | 2 . They pretty much favour detainees            |
| 3 . They're neutral                             | 4 . They pretty much favour corrections officers |
| 5 . They definitely favour corrections officers | 6 . Don't know                                   |

**Q. 5-2**

**Do you think what the Official Visitors do helps people in the ACT understand how detainees are actually treated?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |



**Q. 5-3**

**Do you think what the Official Visitors do helps people in the ACT understand corrections officers' actual working conditions?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-4**

**Do you think all kinds of detainees talk with the Official Visitors (not just the same few detainees)?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-5**

**Do you think having people in the ACT know about detainees' concerns through the Official Visitors is meaningful for detainees, whether or not something is done?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-6**

**Do you think the Official Visitors being in the prison, doing what they do, means detainees get a say in how the AMC is run?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-7**

**Do you think the Official Visitors being in the AMC, doing what they do, helps stop detainees' human rights being abused?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-8**

**Do you think the Official Visitors being in the AMC, doing what they do, has made the AMC run better?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-9**

**Do you think the Official Visitors being in the AMC, doing what they do, is important for detainees?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-10**

**Do you think the Official Visitors being in the AMC, doing what they do, is important for corrections officers?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**Q. 5-11**

**Do you think Official Visitors being in the AMC, doing what they do, is important for the people of the ACT in general?** Circle one number for the answer that applies.

- |                |                 |                          |
|----------------|-----------------|--------------------------|
| 1 . Definitely | 2 . Pretty much | 3 . Can't say either way |
| 4 . Not really | 5 . Not at all  | 6 . Don't know           |

**\* The last two questions over the page (Questions 6 and 7) are also for ALL detainees**

**Q. 6**

Please write any thoughts you have about the Official Visitors system in the AMC here – especially how the Official Visitor system could be made better.

**Q. 7**

Lastly, please answer some questions about yourself. Circle one number for the answer that applies for each category.

|                                                                                       |                                                                                                                   |
|---------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|
| 1. Nationality                                                                        | 1 . Australian      2 . Other                                                                                     |
| 2. Age                                                                                | 1 . ~25 years      2 . 26~35 years<br>3 . 36~45 years      4 . 46~55 years<br>5 . 56~65 years      6 . 66 years ~ |
| 3. Reason for release                                                                 | 1 . Served full term      2 . Parole                                                                              |
| 4. Have you spent time in an Australian prison where there were no Official Visitors? | 1 . No      2 . Yes                                                                                               |
| 5. Detainee security classification                                                   | 1 . Maximum    2 . Medium    3 . Minimum 1<br>4 . Minimum 2    5 . Minimum 3                                      |
| 6. Do you identify at the AMC as Aboriginal or Torres Strait Islander?                | 1 . No      2 . Yes                                                                                               |
| 7. Roughly how long did it take you to complete this survey?                          | 1 . Up to 30 minutes<br>2 . Over 30 minutes up to 60 minutes<br>3 . Over 60 minutes                               |

**Thank you very much for your help**

## Appendix C Phase 2: Open-Ended Survey Question

### C1 Japan: Codes and weighting metrics - corrections officers

| <i>n</i> = 193                       |                                                                                           |       |      |        |     |
|--------------------------------------|-------------------------------------------------------------------------------------------|-------|------|--------|-----|
| JAPAN CORRECTIONS OFFICERS on NATURE |                                                                                           |       |      |        |     |
| Overseer Performance                 |                                                                                           |       |      |        |     |
| Code                                 | Definition                                                                                | Count | Mean | Median | SD  |
| Engagement                           | Extent to which overseers engage actively in their role                                   | 4     | 3.3  | 3.5    | 2.1 |
| Balance/neutrality                   | Extent to which overseers maintain neutrality/balance concerning prisoners and the prison | 80    | 1.6  | 1      | 1   |
| Overseer Personnel                   |                                                                                           |       |      |        |     |
| Code                                 | Definition                                                                                | Count | Mean | Median | SD  |
| Conditions/resources                 | Extent to which overseer conditions/resources are adequate                                | 12    | 1.6  | 1      | 0.9 |
| Networks<br>/consistency             | Extent to which overseers are adequately networked with peers                             | 2     | 1.5  | 1.5    | 0.7 |
| Pay<br>/tenure                       | Extent to which overseer allowances/budgets/tenure are adequate                           | 6     | 1.7  | 2      | 0.5 |
| Power<br>/independence               | Extent to which overseer power/authority/independence are adequate                        | 5     | 1.2  | 1      | 0.5 |
| Selection/skills                     | Extent to which overseers are skilled/knowledgeable in their role                         | 46    | 1.7  | 2      | 0.6 |
| Overseer Presence                    |                                                                                           |       |      |        |     |
| Code                                 | Definition                                                                                | Count | Mean | Median | SD  |
| Interactions with<br>staff/prisoners | Extent to which the oversight system is visible/accessible to<br>staff/prisoners          | 44    | 1.4  | 1      | 0.6 |

| <i>n</i> = 193                       |                                                                                                                        |       |      |        |     |
|--------------------------------------|------------------------------------------------------------------------------------------------------------------------|-------|------|--------|-----|
| JAPAN CORRECTIONS OFFICERS on IMPACT |                                                                                                                        |       |      |        |     |
| Code                                 | Definition                                                                                                             | Count | Mean | Median | SD  |
| Improves operations                  | Extent to which civil oversight system improves prison operations                                                      | 16    | 2.4  | 2      | 1   |
| Improves treatment/human rights      | Extent to which oversight system improves prisoner treatment, including in terms of human rights                       | 9     | 2.8  | 3      | 0.8 |
| Meaningful                           | Extent to which oversight system is in some abstract way meaningful or symbolic                                        | 41    | 3.6  | 4      | 1.1 |
| Public support/accountability        | Extent to which oversight system improves public support for the prison, including as an accountability mechanism      | 26    | 3.2  | 3      | 0.8 |
| Overseer workload                    | Extent to which overseer workload is reasonable (low = heavy; high = light)                                            | 6     | 2.3  | 1.5    | 1.8 |
| Overseer concern for victims/society | Extent to which overseers discharge their duties to victims/society                                                    | 24    | 1.9  | 2      | 1.2 |
| Overseer consistency                 | Extent to which overseer activities and attitudes are consistent between prisons                                       | 4     | 1.3  | 1      | 0.5 |
| Deference                            | Extent to which overseers show a proper level of trust/respect/deference towards the prison                            | 26    | 2    | 1.5    | 1.3 |
| Security/privacy                     | Extent to which overseer activities impact on security/privacy of prisoners/staff (low = jeopardise; high = enhance)   | 2     | 1.5  | 1.5    | 0.7 |
| Corrections officer workload         | Extent to which corrections officer workload related to the oversight system is reasonable (low = heavy; high = light) | 28    | 1.6  | 1      | 0.8 |
| Warden/prison cooperation            | Extent to which warden/the prison respects/engages with overseers                                                      | 13    | 2.5  | 2      | 1   |

## C2 Japan: Codes and weighting metrics - overseers

| n = 47                    |                                                                                                  |       |      |        |     |  |
|---------------------------|--------------------------------------------------------------------------------------------------|-------|------|--------|-----|--|
| JAPAN OVERSEERS on NATURE |                                                                                                  |       |      |        |     |  |
| Overseer Personnel        |                                                                                                  |       |      |        |     |  |
| Code                      | Definition                                                                                       | Count | Mean | Median | SD  |  |
| Conditions/resources      | Extent to which overseers' conditions/resources are appropriate                                  | 20    | 1.6  | 2      | 0.5 |  |
| Independence /networks    | Extent to which overseers have sufficient independence/are networked with other overseers        | 6     | 1.3  | 1      | 0.5 |  |
| power                     | Extent to which overseers' authority/integration into prison governance is satisfactory          | 7     | 1.3  | 1      | 0.5 |  |
| reporting                 | Extent to which overseers' reporting to the public/the Ministry of Justice/elsewhere is adequate | 7     | 1.6  | 2      | 0.5 |  |
| Resources /tenure         | Extent to which overseers' financial resources/allowances/tenure are satisfactory                | 9     | 1.8  | 2      | 0.8 |  |
| Selection/skills          | Extent to which overseer selection is adequate/overseers have necessary skills/expertise         | 22    | 1.4  | 1      | 0.6 |  |
| Overseer Presence         |                                                                                                  |       |      |        |     |  |
| Code                      | Definition                                                                                       | Count | Mean | Median | SD  |  |
| Activities                | Extent to which overseers' activities are satisfactory                                           | 11    | 2.4  | 2      | 1.4 |  |

| JAPAN OVERSEERS on IMPACT |                                                                                             |       |      |        |     |  |
|---------------------------|---------------------------------------------------------------------------------------------|-------|------|--------|-----|--|
| Code                      | Definition                                                                                  | Count | Mean | Median | SD  |  |
| Accountability            | Extent to which oversight system keeps the prison accountable to the public                 | 3     | 2.7  | 2      | 1.2 |  |
| Problem-solving           | Extent to which oversight system solves problems in the prison                              | 12    | 1.8  | 2      | 0.9 |  |
| Safety valve              | Extent to which oversight system acts as a safety valve for the prison                      | 1     | 4    | 4      | 0   |  |
| Overseer workload         | Extent of overseers physical/psychological workload (low value = heavy; high value = light) | 4     | 1.3  | 1      | 0.5 |  |
| Warden/MoJ performance    | Extent to which warden's/MoJ's cooperation/commitment is satisfactory                       | 15    | 1.4  | 1      | 0.8 |  |

### C3 Japan: Codes and weighting metrics - prisoners

| <i>n</i> = 344            |                                                                                                                                                          |       |      |        |     |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|-------|------|--------|-----|
| JAPAN PRISONERS on NATURE |                                                                                                                                                          |       |      |        |     |
| Overseer Performance      |                                                                                                                                                          |       |      |        |     |
| Code                      | Definition                                                                                                                                               | Count | Mean | Median | SD  |
| Confidentiality           | Extent to which overseers protect prisoners' confidentiality                                                                                             | 3     | 1    | 1      | 0   |
| Engagement                | Extent to which overseers are engaged/dedicated in their role                                                                                            | 54    | 1.3  | 1      | 0.5 |
| Neutrality                | Extent to which overseers are neutral/impartial                                                                                                          | 18    | 1.1  | 1      | 0.2 |
| Overseer Personnel        |                                                                                                                                                          |       |      |        |     |
| Code                      | Definition                                                                                                                                               | Count | Mean | Median | SD  |
| Conditions /resources     |                                                                                                                                                          |       |      |        |     |
| Networks /consistency     | Extent to which oversight practices/outcomes are consistent between prisons/over time at the same prison                                                 | 11    | 1    | 1      | 0   |
| power                     | Extent to which overseers are powerful/effective                                                                                                         | 48    | 1.3  | 1      | 0.7 |
| reporting to public       | Extent to which oversight system serves the public interest by reporting prison conditions                                                               | 15    | 1.3  | 1      | 0.5 |
| Selection /skills         | Extent to which overseers are appropriately selected/skilled                                                                                             | 4     | 1    | 1      | 0   |
| Overseer Presence         |                                                                                                                                                          |       |      |        |     |
| Code                      | Definition                                                                                                                                               | Count | Mean | Median | SD  |
| Visibility                |                                                                                                                                                          |       |      |        |     |
| contact with prisoners    | Extent to which overseers are in contact with/easily contacted by prisoners, including due to the extent/frequency/duration of inspections inside prison | 81    | 1.3  | 1      | 0.5 |
| comprehensibility         | Extent to which oversight system is comprehensible to prisoners                                                                                          | 93    | 1.2  | 1      | 0.4 |
| informing prisoners       | Extent to which prisoners have access to information about what overseers do/achieve in the prison                                                       | 129   | 1.2  | 1      | 0.4 |

| <i>n</i> = 344                  |                                                                                                        |       |      |        |      |
|---------------------------------|--------------------------------------------------------------------------------------------------------|-------|------|--------|------|
| JAPAN PRISONERS on IMPACT       |                                                                                                        |       |      |        |      |
| Code                            | Definition                                                                                             | Count | Mean | Median | SD   |
| Advocacy/voice                  | Extent to which oversight system gives prisoners a voice/advocates for their needs                     | 34    | 1.1  | 1      | 0.6  |
| Comfort/calm                    | Extent to which oversight system comforts/calms prisoners                                              | 6     | 1.3  | 1      | 0.8  |
| Meaningful                      | Extent to which oversight system is in some abstract way meaningful/symbolic                           | 75    | 1.8  | 1      | 1.4  |
| Problem-solving                 | Extent to which oversight system effectively solves problems in the prison                             | 58    | 1.2  | 1      | 0.5  |
| Protects human rights           | Extent to which oversight system protects prisoners' human rights                                      | 28    | 1.4  | 1      | 0.9  |
| Transparency                    | Extent to which oversight system mitigates traditional secrecy between prison-prisoners/prison-society | 48    | 1.2  | 1      | 0.4  |
| Prisoner confidence             |                                                                                                        |       |      |        |      |
| achievability                   | Extent to which oversight system is workable/realistic in prisons                                      | 19    | 1.5  | 1      | 1.2  |
| credibility                     | Extent to which oversight system is credible                                                           | 94    | 1.2  | 1      | 0.7  |
| necessity                       | Extent to which oversight system is necessary                                                          | 22    | 3.8  | 4.5    | 1.6  |
| Prisoner trust                  | Extent to which prisoners express confidence/trust concerning using the oversight system               | 47    | 1.3  | 1      | 0.43 |
| Corrections officer cooperation | Extent to which corrections officers accept overseers' presence/incorporate overseers' perspectives    | 111   | 1.2  | 1      | 0.4  |



#### C4 ACT: Codes and weighting metrics - corrections officers

| <i>n = 21</i>                       |                                                                                                                                                                    |       |      |        |     |  |
|-------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|------|--------|-----|--|
| ACT CORRECTIONS OFFICERS on NATURE  |                                                                                                                                                                    |       |      |        |     |  |
| Overseer Performance                |                                                                                                                                                                    |       |      |        |     |  |
| Code                                | Definition                                                                                                                                                         | Count | Mean | Median | SD  |  |
| Balance/neutrality                  | Extent to which overseers maintain neutrality/balance their attention to different prisoner categories (Indigenous/non-Indigenous) and staff ranks (junior/senior) | 10    | 2    | 1.5    | 1.4 |  |
| Deference/respect                   | Extent to which overseers are appropriately deferential/compliant/considerate/respectful towards COs                                                               | 11    | 1.7  | 1      | 1   |  |
| Overseer Personnel                  |                                                                                                                                                                    |       |      |        |     |  |
| Code                                | Definition                                                                                                                                                         | Count | Mean | Median | SD  |  |
| Skills/expertise                    | Extent to which overseers demonstrate appropriate expertise/professional skills/judgment/discretion                                                                | 15    | 1.9  | 2      | 1.2 |  |
| Overseer Presence                   |                                                                                                                                                                    |       |      |        |     |  |
| Code                                | Definition                                                                                                                                                         | Count | Mean | Median | SD  |  |
| Times/places                        | Extent to which the times/places at which overseers are present in the prison are satisfactory                                                                     | 5     | 1.6  | 2      | 0.5 |  |
| Visibility for corrections officers | Extent to which overseers are appropriately visible to/make contact with staff                                                                                     | 10    | 1.4  | 1      | 0.5 |  |

| ACT CORRECTIONS OFFICERS on IMPACT |                                                                                      |       |      |        |     |
|------------------------------------|--------------------------------------------------------------------------------------|-------|------|--------|-----|
| Code                               | Definition                                                                           | Count | Mean | Median | SD  |
| Advocacy                           | Extent to which overseers advocate for prisoners                                     | 1     | 4    | 4      | 0   |
| Comfort / calm                     | Extent to which overseers calm/comfort prisoners                                     | 1     | 1    | 1      | 0   |
| Problem-solving                    | Extent to which overseers solve problems in the prison                               | 2     | 1    | 1      | 0   |
| Supports prison                    | Extent to which oversight system supports the prison                                 | 1     | 5    | 5      | 0   |
| Overseer workload                  | Extent of overseer workload (low value = excessive; high value = light)              | 1     | 1    | 1      | 0   |
| Security                           | Extent of overseer impact on security (low value = jeopardise; high value = enhance) | 2     | 1.5  | 1.5    | 0.7 |

**C5 ACT: Codes and weighting metrics - prisoners**

| <i>n</i> = 344                   |                                                                                                                                                          |              |             |               |           |
|----------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|-------------|---------------|-----------|
| <b>JAPAN PRISONERS on NATURE</b> |                                                                                                                                                          |              |             |               |           |
| <b>Overseer Performance</b>      |                                                                                                                                                          |              |             |               |           |
| <b>Code</b>                      | <b>Definition</b>                                                                                                                                        | <b>Count</b> | <b>Mean</b> | <b>Median</b> | <b>SD</b> |
| Confidentiality                  | Extent to which overseers protect prisoners' confidentiality                                                                                             | 3            | 1           | 1             | 0         |
| Engagement                       | Extent to which overseers are engaged/dedicated in their role                                                                                            | 54           | 1.3         | 1             | 0.5       |
| Neutrality                       | Extent to which overseers are neutral/impartial                                                                                                          | 18           | 1.1         | 1             | 0.2       |
| <b>Overseer Personnel</b>        |                                                                                                                                                          |              |             |               |           |
| <b>Code</b>                      | <b>Definition</b>                                                                                                                                        | <b>Count</b> | <b>Mean</b> | <b>Median</b> | <b>SD</b> |
| Conditions /resources            |                                                                                                                                                          |              |             |               |           |
| Networks /consistency            | Extent to which oversight practices/outcomes are consistent between prisons/over time at the same prison                                                 | 11           | 1           | 1             | 0         |
| power                            | Extent to which overseers are powerful/effective                                                                                                         | 48           | 1.3         | 1             | 0.7       |
| reporting to public              | Extent to which oversight system serves the public interest by reporting prison conditions                                                               | 15           | 1.3         | 1             | 0.5       |
| Selection /skills                | Extent to which overseers are appropriately selected/skilled                                                                                             | 4            | 1           | 1             | 0         |
| <b>Overseer Presence</b>         |                                                                                                                                                          |              |             |               |           |
| <b>Code</b>                      | <b>Definition</b>                                                                                                                                        | <b>Count</b> | <b>Mean</b> | <b>Median</b> | <b>SD</b> |
| Visibility                       |                                                                                                                                                          |              |             |               |           |
| contact with prisoners           | Extent to which overseers are in contact with/easily contacted by prisoners, including due to the extent/frequency/duration of inspections inside prison | 81           | 1.3         | 1             | 0.5       |
| comprehensibility                | Extent to which oversight system is comprehensible to prisoners                                                                                          | 93           | 1.2         | 1             | 0.4       |
| informing prisoners              | Extent to which prisoners have access to information about what overseers do/achieve in the prison                                                       | 129          | 1.2         | 1             | 0.4       |

| <i>n</i> = 344                  |                                                                                                        |       |      |        |      |  |
|---------------------------------|--------------------------------------------------------------------------------------------------------|-------|------|--------|------|--|
| JAPAN PRISONERS on IMPACT       |                                                                                                        |       |      |        |      |  |
| Code                            | Definition                                                                                             | Count | Mean | Median | SD   |  |
| Advocacy/voice                  | Extent to which oversight system gives prisoners a voice/advocates for their needs                     | 34    | 1.1  | 1      | 0.6  |  |
| Comfort/calm                    | Extent to which oversight system comforts/calms prisoners                                              | 6     | 1.3  | 1      | 0.8  |  |
| Meaningful                      | Extent to which oversight system is in some abstract way meaningful/symbolic                           | 75    | 1.8  | 1      | 1.4  |  |
| Problem-solving                 | Extent to which oversight system effectively solves problems in the prison                             | 58    | 1.2  | 1      | 0.5  |  |
| Protects human rights           | Extent to which oversight system protects prisoners' human rights                                      | 28    | 1.4  | 1      | 0.9  |  |
| Transparency                    | Extent to which oversight system mitigates traditional secrecy between prison-prisoners/prison-society | 48    | 1.2  | 1      | 0.4  |  |
| Prisoner confidence             |                                                                                                        |       |      |        |      |  |
| achievability                   | Extent to which oversight system is workable/realistic in prisons                                      | 19    | 1.5  | 1      | 1.2  |  |
| credibility                     | Extent to which oversight system is credible                                                           | 94    | 1.2  | 1      | 0.7  |  |
| necessity                       | Extent to which oversight system is necessary                                                          | 22    | 3.8  | 4.5    | 1.6  |  |
| Prisoner trust                  | Extent to which prisoners express confidence/trust concerning using the oversight system               | 47    | 1.3  | 1      | 0.43 |  |
| Corrections officer cooperation | Extent to which corrections officers accept overseers' presence/incorporate overseers' perspectives    | 111   | 1.2  | 1      | 0.4  |  |

## Appendix D Phase 3: Explanatory Data Collection

### D1 Japan: Interview questions - policymakers

#### 最終聞き取り調査 - 参加者への質問

質問にお答えいただくお時間を割いていただきありがとうございます。この聞き取り調査では日本とオーストラリア首都特別地域の刑事施設における市民監視の歩みについて、政策責任者としての独特の見識を伺います。

問一 刑事施設における市民監視制度にこれまでどの様に関わってきましたか？

問二 この制度を採用する最初の決断の背後にあった重要考慮事項は何だったと思われますか？

問三 どのような考えがこの制度の(1)法的枠組みと(2)運用の詳細の構築を推し進めましたか？

問四 この制度に関して当時、政策決定者にとって重圧になったものは何だと思われますか？

問五 この制度が導入され運営が始まってからの最初の時期にどのような実施問題が上がりましたか？

問六 日本では、これまでにこの制度に施された最も重要な調整は何だと思われますか？

問七 この制度が時間とともに得られた成果は何だと思われますか？

問八 日本では、刑事施設における市民監視の制度的、文化的、または政治的限界をどのように感じますか？

問九 実際にこの制度の運用を見てきて、何か違う方法でしておけば良かったと思うことはありますか？

問十 他に何か日本での刑事施設における市民監視について研究者として理解しておくべきことはありますか？

## **D2 ACT: Interview questions - policymaker**

### **Final Interviews – Questions for Participants**

Thank you for your time in considering these questions. This interview seeks your distinctive insights as a policymaker into the trajectory of civil prison oversight in your jurisdiction.

**Q1.** How have you been involved in the civil prison oversight system in your jurisdiction over time?

**Q2.** What, in your view, were the key considerations behind the initial decision to adopt the system?

**Q3.** What ideas drove the design of the (i) legislative framework and (ii) operational details of the system?

**Q4.** What, in your view, were the pressures on policymakers concerning the system at the time?

**Q5.** What implementation issues arose in the early years of the system as it was rolled out and began its work?

**Q6.** What do you consider the most important adjustments made to the system in your jurisdiction so far?

**Q7.** What in your view have been the achievements of the system over time?

**Q.8** What do you feel are the institutional, cultural or political limits of civil prison oversight in your jurisdiction?

**Q9.** Is there anything you think should have been done differently given how the system has worked in practice?

**Q.10** Is there anything else I should understand about civil prison oversight in your jurisdiction?

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<sup>1</sup> Citations and references in this thesis have been prepared in accordance with OSCOLA2 (4<sup>th</sup> ed). However, the style has been adapted for an international, interdisciplinary readership.

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