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Submission on the QLD Inspector of Detention Services Bill 2021

Thank you for the opportunity to make a submission on the proposed *Inspector of Detention Services Bill 2021* (the Bill). In addition to providing comment on the Bill, this submission focuses on QLD's obligations under the ratified Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and the Bills compatibility with recommendations made in several past enquiries. This submission is made in an entirely private capacity and all views and recommendations are solely those of the author unless otherwise noted.

The author acknowledges that the Bill has been significantly revised following his submission to the targeted consultation process. The author commends the QLD Government for making suggested changes including:

- The removal of a provision prohibiting the Inspector of Detention Services from entering a prison when a declaration of emergency is in force in accordance with Section 268 of the QLD Corrective Services Act 2006
- Adding a provision stating the Inspector of Detention Services must consider the multidisciplinary composition and representative nature of its staffing.
- Clarifying that the Inspector of Detention Services Annual Report is a separate report to that of the QLD Ombudsman.
- Applying the 'conflict of interest' provisions in the *Ombudsman Act 2001* [Part 7, Division 1, Section 63A and 63B] to the Inspector of Detention Services.

About the Author

Steven Caruana is Coordinator of the Australia OPCAT Network, a coalition of over 200 non-government organisations, academics, statutory officer holders and interested individuals concerned with the effective implementation of oversight to Australian places of detention. Steven is also involved in monitoring designated mental health units in New South Wales as an Official Visitor. Steven was formerly a detention inspector for both the Office of the Inspector of Custodial Services Western Australia and the Office of the Commonwealth Ombudsman as well as a Senior Policy Officer and Senior Quality Assessor with

the Aged Care Quality and Safety Commission. Prior to this Steven worked for the Department of Immigration and Border Protection [Home Affairs] within its immigration detention network. Steven most notably was an Assistant Director at the Yongah Hill Immigration Detention Centre and the Christmas Island Immigration Detention Centre.

In 2018 Steven undertook a Winston Churchill Memorial Trust Fellowship to explore best practice inspection methodologies and implementation experiences under the OPCAT. Steven is an expert member and newsletter co-editor for the External Prison Oversight and Human Rights Network with the International Corrections and Prisons Association, an advisory board member to Deadly Connections Community and Justice Services and the current Australian Ambassador for the Human Rights Measurement Initiative.

The Proposed Inspector of Detention Services Model and its Non-Compliance with Past Enquiries

Part 5 Section 33 of the Bill appoints the QLD Ombudsman as the Inspector of Detention Services. This model of dual appointment is similar to the Tasmanian Inspector of Custodial Services model [Schedule 1, Section 2 (2) of the Tasmanian *Custodial Inspector Act 2016* sets out that the Inspector can hold office in conjunction with holding office in the position of Tasmanian Ombudsman]. While this fact of itself does not raise concern given the QLD Ombudsman is an independent statutory office; it is important to note this decision does not align with the acceptance of recommendations arising from several past reports.

Commencing in 2006, the then Anti-Discrimination Commission QLD raised concerns about the adequacy of the existing correctional oversight model in QLD through its first *Women in Prison* Report arguing that ‘a more robust model similar to that created in Western Australia should be legislated.’¹ Significantly, this same view was reached in 2016 in both the *Queensland Parole System Review* and the *Independent Review of Youth Detention*.

The Parole System Review found ‘...the features of independence in the West Australian model as most important for consideration in Queensland.’² In relation to the QLD Ombudsman, the Parole System Review also found ‘the Queensland Ombudsman, while independent, is not currently established, or I suspect adequately resourced, to conduct routine inspections of prisons and other places of detention.’³ Importantly, the Parole System Review also noted that ‘...If the Queensland Government is minded to consider and adopt my recommended approach regarding the independence of prison inspections, then

¹ Anti-Discrimination Commission Queensland (March 2006] *Women in Prison*, p129. Accessed on the 14 August 2021 from https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0018/5148/WIP_report.pdf

² Sofronoff, W (November 2016) *Queensland Parole System Review*, para 1230. Accessed on the 14 August 2021 from <https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf>

³ Ibid, para 1257

it is important that any changes made accord to the requirements of the NPM framework in OPCAT.⁴ The QLD Government formally accepted these recommendations.

Concurrently, the *Independent Review of Youth Detention* found when looking at the oversight system in place in youth detention that ‘the appropriate solution is to move from the current model and to take immediate steps to replace it with a truly independent, statutory authority, in line with national and international models.’⁵ Significantly, the Independent Review made a specific recommendation for an ‘independent statutory Office of the Inspector of Custodial Services in a similar form to that of Western Australia.’⁶ The QLD Government also formally accepted this recommendation.

Building on these two reviews, the Crime and Corruption Commission QLD also reviewed the existing correctional oversight system as part of *Taskforce Flaxton* which was established to examine corruption and corruption risks in QLD corrective services facilities. In its 2018 report it stated the ‘current QCS prison inspectorate model does not satisfactorily function in terms of independence, performance and transparency and is thus unable to provide adequate oversight of QCS functions and activities. This increases the risk of corruption in Queensland correctional facilities.’⁷ With regard to performance and frequency of visits, *Taskforce Flaxton* noted ‘the inspection cycle comprised of a full-announced inspection with a follow-up inspection 12 months later, meaning inspectors are on site once a year for this purpose. However, in reality, the inspection cycle is less frequent, and in some centres, an inspection has not been conducted for a number of years.’⁸ The Crime and Corruption Commission QLD recommended ‘the establishment of a properly resourced Independent Inspectorate of Prisons.’⁹ Noting the Parole System Review’s previous finding that the QLD Ombudsman was not ‘adequately resourced’, this recommendation is particularly important. The QLD Government again accepted the recommendation and noted it would ‘implement an Independent Inspectorate in line with implementation of the Optional Protocol to the Convention Against Torture (OPCAT).’¹⁰

In August 2019 the QLD Productivity Commission reported on its *Inquiry into imprisonment and recidivism*. The Productivity Commission Report acknowledged the Parole System Review noting it ‘recommended an Independent Inspectorate of Correctional Services, which would report to Parliament on the findings of each review and work collaboratively with the Office of the Queensland Ombudsman... The Government accepted this

⁴ Ibid, para 1254

⁵ McMillan, K & Davis, M. (December 2016) *Independent Review of Youth Detention*, p196. Accessed on the 14 August 2021 from <http://www.youthdetentionreview.qld.gov.au/>

⁶ Ibid, p208

⁷ Crime and Corruption Commission QLD (December 2018) *Taskforce Flaxton An examination of corruption risks and corruption in Queensland prisons*, p49. Accessed on the 14 August 2021 from <https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf>

⁸ Ibid, p50

⁹ Ibid, p53

¹⁰ Flaxton Inquiry Government Response <https://www.publications.qld.gov.au/dataset/e7460a9c-a033-474b-b8f9-427cff6c11a3/resource/67cf3210-7c86-4916-92bc-310e6a7f0ae9/download/flaxton-inquiry-government-response.pdf>

recommendation...¹¹ Given this understanding the Productivity Commission Report simply reiterated that '[t]he Government should establish a properly resourced independent Inspectorate of Prisons as soon as possible.'¹²

Coming full circle, the Anti-Discrimination Commission QLD also published its follow up report to Women in Prison in 2019. The *Women in Prison* Report under the assumption also that the QLD Government was working on the recommendations of the Parole System Review also reiterated that '[t]he Queensland Government has responded that it will establish an independent inspectorate based on the conditions outlined in Recommendation 88 [of the Parole System Review]'.¹³

Turning attention back to the proposed model of dual appointment as opposed to a 'WA Inspector of Custodial Services like model' supported by all the reviews above; Both may meet the requirements for independence but in practice they differ markedly. While placing the Inspectorate within the QLD Ombudsman may create 'synergies' it is important to look at the experience in Tasmania as a stark warning.

The current Tasmanian Inspector has noted in both his 2018-2019¹⁴ and 2019-2020¹⁵ Annual Reports that he 'can only dedicate ten per cent of... time to the inspectorate.' In addition to concerns about time commitments there have long been concerns about resourcing, in his 2019-2020 Annual Report it was highlighted that '[I]t is overwhelmingly apparent that additional staff are required. The inadequacy of staffing is reflected by the long delays between onsite inspections and the publication of reports.' More recently in his *Lockdowns Review 2021*, the Inspector noted again '[r]esourcing constraints have prevented me from undertaking the review. It is only now possible because I was provided with temporary additional staff resources, and could therefore prioritise it.'¹⁶

It is important that this scenario is not repeated in the QLD context as it may also lead to long delays in public reporting and resourcing issues from relying on an existing staffing complement and expecting staff can be re-assigned to the Inspectorate from the Ombudsman as needed [all important issues noted in the reviews above].

¹¹ QLD Productivity Commission (August 2019). *FINAL REPORT Inquiry into Imprisonment and Recidivism*, p362. Accessed on the 14 August 2021 from <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>

¹² Ibid, p363

¹³ Anti-Discrimination Commission Queensland (2019) *Women in prison 2019: a human rights consultation report*, p48. Accessed on the 14 August 2021 from https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0003/17139/2019.03.05-Women-In-Prison-2019-final-report-small.pdf

¹⁴ Office of the Custodial Inspector Tasmania (October 2019) *Annual Report 2018-2019*. Accessed on 14 August 2021 from https://www.custodialinspector.tas.gov.au/_data/assets/pdf_file/0004/548689/Custodial-Inspector-Annual-Report-2018-19.pdf

¹⁵ Office of the Custodial Inspector Tasmania (October 2020) *Annual Report 2019-2020*. Accessed on 14 August 2021 from https://www.custodialinspector.tas.gov.au/_data/assets/pdf_file/0008/588275/Tasmanian-Custodial-Inspector-Annual-Report-2019-20.pdf

¹⁶ Office of the Custodial Inspector Tasmania (June 2021) *Lockdowns Review 2021*. Access on the 14 August from https://www.custodialinspector.tas.gov.au/_data/assets/pdf_file/0009/615852/Lockdowns-Review-2021.pdf

Recommendation:

The QLD Government should reconsider its decision to appoint the QLD Ombudsman as the Inspector of Detention Services. The QLD Government should instead create a standalone independent statutory entity, like the WA Inspector of Custodial Services, to fulfil the role of Inspector of Detention Services.

Noting the QLD Government's position that the Inspector of Detention Services is designed to be compliant with the OPCAT, the following section will assess areas where the draft Bill could be improved to more align with the requirements of the OPCAT.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Ratified in 2017, The OPCAT treaty imposes an obligation on Australia to create a National Preventive Mechanism (NPM).

The NPM is the domestic visiting body charged with undertaking regular, preventive visits to all places where people are deprived of liberty. Its aim is to work constructively to improve conditions and treatment in detention, including by identifying the risk factors and the root causes of torture and ill-treatment and making recommendations to the authorities on how they can be addressed. Ultimately, the goal of an NPM in Australia is to ensure that violations of human rights like those that were seen at the Don Dale Youth Detention Centre¹⁷ and Oakden Older Persons Mental Health Facility¹⁸ are prevented from occurring in the first place. Although the OPCAT treaty does not prescribe the structure or model for an NPM, there are numerous principles the NPM must satisfy.

An NPM must:

- have functional independence (Article 18(1))
- be composed of multidisciplinary experts, striving for gender balance and adequate ethnic and minority representation (Article 18(2))

¹⁷ Four Corners (2016) *Australia's Shame*. Accessed on the 14 August 2021 from <https://www.abc.net.au/4corners/australias-shame-promo/7649462>

¹⁸ Groves A, Thomson D, McKellar D and Procter N. (2017) *The Oakden Report*. Adelaide, South Australia: SA Health, Department for Health and Ageing.

- be adequately resourced (Article 18(3))
- be safeguarded from reprisal or sanction (including safeguarding anyone assisting it in its functions) (Article 21(1)).

An NPM must have the power to:

- regularly examine the treatment of people deprived of their liberty (Article 19(a))
- make unannounced visits to all places of deprivation of liberty (Articles 12(a), 14(c) and 20(c))
- choose the places they want to visit and the people they want to visit (Article 20(e))
- make recommendations to the authorities to improve the treatment of people deprived of their liberty (Article 19(b))
- submit proposals and observations concerning existing or draft legislation (Article 19(c))
- conduct private interviews with detainees and any person they wish to interview (Article 20(d))
- share information with the Subcommittee on Prevention of Torture (Article 20(f)).

An NPM must also have access to:

- all information regarding people in closed environments, including the number of detainees and their location and the number of places of detention and their locations (Article 20(a))
- all information regarding the treatment of people in closed environments and the conditions of their detention (Article 20(b))
- all places of detention and their installations and facilities (Article 20(c)).

The OPCAT also allows for periodic visits from the United Nations Subcommittee for the Prevention of Torture (UN SPT) to inspect any places where a person is detained or deprived of their liberty.

Purpose of the Act Part 1 Section 3	While the purpose of the Bill clearly articulates the inspection, review, and reporting function of the Inspector of Detention Services, it does not articulate the other functions of an NPM under OPCAT. The UN SPT has provided clear advice on the matter of establishing legislation:
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<p>Functions of the Inspector</p> <p>Part 2, Division 2, Section 8</p>	<p>‘While the institutional format of the national preventive mechanism is left to the State party’s discretion, it is imperative that the State party enact legislation that guarantees a mechanism that is in full compliance with the Optional Protocol and the mechanism guidelines of the Subcommittee... The mechanism’s legal framework should also provide for outward-facing functions of the NPM, such as submitting proposals and observations on existing and draft legislation, advocacy, awareness raising and capacity building, and require a separate budget line in the State budget for the funding of the NPM, in order to ensure its continuous financial and operational autonomy. Moreover, it should outline privileges and immunities of NPM members and those who contribute to the NPM, including experts and civil society, while guaranteeing protection for persons who provide information to the NPM...’¹⁹</p> <p>Linked to this, the UN SPT has emphasised the need for NPM’s to give greater weight to their non-visiting obligations. In its report to the Polish NPM, the SPT stated:</p> <p>‘The Subcommittee emphasizes that the activities of the mechanism should not be limited only to visiting places of deprivation of liberty. Among other functions, the mechanism needs to have a legal competence to submit proposals and observations concerning relevant draft legislation and to undertake other preventive activities.’²⁰</p> <p>Connected to this the UN Office of the High Commissioner for Human Rights notes in its Practical Guide for NPM’s, that:</p> <p>‘In order to increase their institutional visibility, NPMs should develop strategies for making their mandates and work known to the general public and develop simple, accessible procedures through which the general public can provide them with relevant information. NPMs could, for example, produce and distribute further material on their mandates and activities in various languages to a wide range of audiences, including detention personnel, detainees, civil society at large, and professional associations such as those of lawyers and the judiciary.’²¹</p> <p>The Practical Guide for NPM’s also states that:</p>
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¹⁹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (12 December 2019) Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Turkey, CAT/OP/TUR/1, paragraph 21.

²⁰ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (30 March 2020) *Visit to Poland undertaken from 8 to 19 July 2018: recommendations and observations addressed to the national preventive mechanism*. CAT/OP/POL/RONPM/1. Paragraph 31.

²¹ United Nations Office of the High Commissioner for Human Rights (2018) *Preventing Torture, The Role of National Preventive Mechanisms*, A Practical Guide Professional Training Series No. 21. p 30

	<p>‘The educational and communication function of NPMs includes educational, training and awareness raising programmes. NPMs should publicize their opinions, findings and other relevant information to increase public awareness of the prevention of torture and ill-treatment.’²²</p> <p>While Part 3, Division 1, Section 21 (2) (b) of the Bill enables the Inspector of Detention Services to propose changes in law within the Annual Report and Part 3, Division 2, Section 22 (3) (b) (ii) enables the same in other reports; this power should not be limited to reports alone and should occur at any time.</p> <div style="border: 2px solid black; background-color: yellow; padding: 10px;"> <p>Recommendation:</p> <p>Part 1, Section 3 and Part 2, Division 2, Section 8 should be amended to include the other roles of a National Preventive Mechanism, including the obligation to submit proposals and observations on existing and draft legislation, public advocacy, awareness raising and capacity building.</p> </div>
<p>Frequency of Inspections Part 2, Division 2, Section 8 (c) Access to places of detention Part 2, Division 3, Section 14</p>	<p>The proposed Bill provides the Inspector of Detention Services the capacity to choose the frequency with which he/she visits a place of detention within his/her remit while also mandating visits to places considered ‘more susceptible to abuse’ to ensure they are visited with some frequency.</p> <p>The ability to chose when and where to visit aligns with the intention of the OPCAT. The UN SPT is very clear that ‘the State should allow the NPM to visit all, including any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction ... [and] should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.’²³</p> <p>Article 19 (c) of the OPCAT stipulates that an NPM should have ‘[a]ccess to all places of detention and their installations and facilities.’ This Article does not place any limitations as to when an NPM can visit a place of detention; However, the</p>

²² Ibid

²³ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms* (UN Doc CAT/OP/12/5, 9 December 2010), 10 para 24-25.

UN SPT has continuously also reiterated that ‘National preventive mechanisms should take every precaution to observe the “do no harm” principle’²⁴ in consideration of its work.

While the OPCAT does not prescribe what ‘regular’ means in relation to visits; in their study, *Regularity of OPCAT visits by NPMs in Europe*,²⁵ Hardwick and Murray (2019) found that for the European NPM’s surveyed, regularity ‘...meant different things to different organisations, and regularity was not always equated with frequent.’ Additionally, they found NPM’s ‘take into consideration a number of elements not only in determining the frequency which they visit a particular institution (the size of the team; the availability of resources; the range of places they may have to visit; the different types of visits they may undertake including whether they are announced or unannounced; and any concerns that may have been raised previously or by complaints, for example), and not simply the length of time since the last visit.’

Further, in its Baseline Assessment, the Commonwealth Ombudsman noted²⁶ that ‘[a] number of international NPMs and domestic inspection and oversight bodies use thematic inspections, in which a particular aspect or feature of detention is examined in a range of settings. Thematic reports are generally published and can cover several places of detention, provide in-depth analysis of structural causes and address priority problems.’ It further articulated that ‘[t]he use of a thematic focus that cuts across different places of detention can clarify issues identify commonalities across different places of detention and effectively concentrate the limited resources of inspectorates.’

As articulated in their Guidelines on NPMs²⁷, The UN SPT has stated that: ‘The NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment.’

Recommendation:

²⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Protocol for national preventive mechanisms undertaking on-site visits during the coronavirus disease (COVID-19) pandemic*, (UN Doc CAT/OP/11 10 June 2020), para 9.

²⁵ Hardwick, N & Murray, R. (2019): *Regularity of OPCAT visits by NPMs in Europe*, *Australian Journal of Human Rights*, DOI: 10.1080/1323238X.2019.1588054

²⁶ Commonwealth Ombudsman (2019) *Implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) Baseline Assessment of Australia’s OPCAT Readiness*, p14-15. Accessed on 14 August 2021 from https://www.ombudsman.gov.au/data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf

²⁷ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (9 December 2010) *Guidelines on national preventive mechanisms*, CAT/OP/12/5, paragraph 25.

	<p>If mandatory visits to places that are ‘more susceptible to abuse’ are to remain in the Bill, these should align with the legislation and practice of the WA Inspector of Custodial Services.</p>
<p>Production of an Annual Report</p> <p>Part 3, Division 1, Section 21</p>	<p>The proposed Bill provides the Inspector of Detention Services the ability to produce to create an Annual Report and mandates several items of information which must be included in the Annual Report.</p> <p>Article 23 of the OPCAT states ‘[t]he States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.’ Further the UN SPT Guidelines to NPMs also states ‘[w]hen appropriate, Reports should contain recommendations addressed to the relevant authorities. The Recommendations of the NPM should take account of the relevant norms of the United Nations in the field of the prevention of torture and other ill-treatment, including the comments and recommendations of the SPT.’²⁸</p> <p>The Office of the High Commissioner for Human Rights provides even further guidance in its Practical Guide for NPM’s:</p> <p>‘NPMs should produce annual reports that include:</p> <ul style="list-style-type: none"> • accounts of current challenges to the protection of the rights of persons deprived of their liberty and to the effective execution of the NPMs’ mandates, and strategic short-term and longer-term plans, including with respect to the setting of priorities; • analysis of the most important findings and recommendations and the responses to them by the authorities and other addressees; • follow-up on issues from previously-published reports; • consideration of thematic issues; • accounts of cooperation with other actors on the prevention of torture; • an overview of all their other activities and outcomes; and • an overview of their structures and of the resources made available to them and spent.

²⁸ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (9 December 2010) *Guidelines on national preventive mechanisms*, CAT/OP/12/5, paragraph 36.

	<p>The States parties to the Optional Protocol have a legal obligation to publish and widely disseminate the annual reports of NPMs, which should be presented to and discussed in Parliament and transmitted to the SPT.²⁹</p> <p>The Association for the Prevention of Torture additionally acknowledges that ‘...If the designated NPM is (part of) an existing institution – such as a National Human Rights Institution – the NPM annual report should be published as a separate report, or at the very least, should have a separate chapter in the institution’s general annual report.’³⁰</p> <div style="border: 2px solid black; background-color: yellow; padding: 5px;"> <p>Recommendations:</p> <p>A subsection should be added to Part 3, Division 1, Section 21 of the Bill to ensure the Annual Report is also provided to the UN Subcommittee for the Prevention of Torture and the Commonwealth Ombudsman [as NPM Coordinator] for the purposes of OPCAT.</p> </div>
<p>Administrative support for the Inspector</p> <p>Part 5, Section 35</p> <p>Delegation</p> <p>Part 5, Section 36</p>	<p>As has already been noted in the example of Tasmanian the Inspector of Custodial Services, there is a danger in relying on an existing staffing complement and expecting staff can be re-assigned to the Inspectorate from the Ombudsman as needed. While this may be cost effective, the UN SPT has pointed out that ‘[w]here the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget.’³¹</p> <p>The Commonwealth Ombudsman emphasised in its Baseline Assessment that:</p> <p>‘A regular preventive inspection regime of places of detention, especially in places where there has previously been little or no oversight, will require additional resources to be effective. The journey towards effective OPCAT implementation is not merely a matter of conferring further functions on existing oversight bodies, or renaming existing practices as being in accordance with OPCAT and assuming that these bodies can continue to operate in a business as usual model. In order to</p>

²⁹ United Nations Office of the High Commissioner for Human Rights (2018) *Preventing Torture, The Role of National Preventive Mechanisms*, A Practical Guide Professional Training Series No. 21. p 31

³⁰ Association for the Prevention of Torture (April 2012) *National Preventive Mechanisms: Drafting effective annual reports*, p3. Accessed on 14 August 2021 from https://www.apt.ch/sites/default/files/publications/OPCATBriefing_NPM_reports_en.pdf

³¹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (9 December 2010) *Guidelines on national preventive mechanisms*, CAT/OP/12/5, paragraph 32.

	<p>have an effective and regular preventive inspection regime, bodies will require new or expanded methods of operation. These will need commensurate increases in resourcing over time in most, if not all, jurisdictions.³²</p> <p>In looking at other jurisdictions resourcing, the Commonwealth Ombudsman’s Baseline Assessment additionally noted:</p> <p>‘When considering resourcing, in the 2017–18 financial year the Office of the Inspector of Custodial Services (Western Australia) employed 20 staff at a cost of \$3.659 million to oversee 17 prisons, five prison work camps, one juvenile detention centre and all court custody centres and police lock-ups that are prescribed court custody centres. The New South Wales Office of the Inspector of Custodial Services has a budget of \$2.824 million, with 13 staff to oversee 40 correctional centres, six transitional centres and residential facilities, six juvenile justice centres, 12 24-hour court cell complexes, 64 court cell locations, 113 escort vehicles and 25 detainee transport vehicles.’</p> <p>Further, in its report entitled <i>OPCAT in Victoria</i>, the Victorian Ombudsman’s estimated that:</p> <p>‘an NPM conducting regular inspection of all primary places of detention in Victoria should comprise approximately 12 Full Time Equivalent staff and have an operating budget of approximately \$2.5 million.’³³</p> <p>The UN SPT have also provided guidance that ‘[a] request for the national preventive mechanism budget should be drafted by the mechanism itself, on the basis of the mechanism workplan, and submitted to the State authorities and/or legislative power...’³⁴</p> <p>In its 2021 report to the UK NPM the UN SPT stated that ‘...the Optional Protocol is unequivocal on the need for the State party to allocate specific resources to national preventive mechanism (art. 18 (1) and (3)), so as to guarantee the</p>
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³² Commonwealth Ombudsman (2019) *Implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) Baseline Assessment of Australia’s OPCAT Readiness*. Accessed on 14 August 2021 from https://www.ombudsman.gov.au/data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf

³³ Victorian Ombudsman (September 2019) *OPCAT in Victoria: a thematic investigation of practices related to solitary confinement of children and young people*. p30 para 304. Accessed on the 14 August 2021 from <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/opcat-in-victoria-a-thematic-investigation-of-practices-related-solitary-confinement-of-children-and-young-people/>

³⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (22 March 2016) *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/57/4, Annex paragraph 13.

	<p>operational independence of the mechanism, and that the Subcommittee guidelines on national preventive mechanisms indicate explicitly that the mechanism should enjoy complete financial and operational autonomy.’³⁵</p> <p>The Australian Human Rights Commission in its OPCAT Paper additionally notes the importance of establishment funding stating, ‘[t]he Commission considers that properly resourcing the establishment phase— when new NPM responsibilities are assigned—is critical to OPCAT’s success. Several stakeholders submitted that special funds, resources and training need to be made available in the first few years after ratification to help bodies fulfilling NPM functions to become OPCAT compliant.’³⁶</p> <div style="border: 2px solid black; background-color: yellow; padding: 5px;"> <p>Recommendation:</p> <p>Part 5, Section 35 should be removed from the Bill and Part 5, Section 36 should only be used on an as needed basis. The QLD Government should provide the Inspector of Detention Services the resources it requires for its staffing and administrative support. This resourcing and staffing should be separate from that provided to the QLD Ombudsman for its existing functions.</p> </div>
<p>Matters not covered by the Bill</p>	<p>Unannounced Visits</p> <p>Although the proposed Bill provides the Inspector of Detention Services the ability to make unannounced visits [Division 3, Section 14 (2)] it does not in any way suggest that its visits should be unannounced nor should it.</p> <p>In its Baseline Assessment, the Commonwealth Ombudsman noted ‘[a]nnounced visits by NPMs can benefit both the inspection mechanism and the facilities being inspected. For example, if an inspecting body seeks to view large quantities</p>

³⁵ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to the United Kingdom of Great Britain and Northern Ireland undertaken from 9 to 18 September 2019: recommendations and observations addressed to the State party Report of the Subcommittee* (UN Doc CAT/OP/GBR/ROSP/1, 25 May 2021, 9 para 45

³⁶ Australian Human Rights Commission (2020) *Implementing OPCAT in Australia*, p37. Accessed on the 14 August 2021 from https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opcat.pdf

	<p>of records before or during an inspection, sufficient notice is required for the information to be gathered.³⁷ However, The Office of the High Commissioner for Human Rights Practical Guide for NPM's states that '[t]he visits should be primarily unannounced in order to help ascertain the real situation of persons deprived of their liberty. They should also be carried out at various times of the day, including during the night.'³⁸ This position is also supported by stakeholders to the Australian Human Rights Commissions OPCAT Consultations.³⁹</p> <p>The UN SPT in its report to the Tunisian NPM reiterated that 'unannounced visits give a better idea of the true conditions in places of deprivation of liberty, including police custody facilities, and allow day-to-day operations to be observed.'⁴⁰</p> <p>Some NPM's opt for a mixture of announced and unannounced visits. The Norwegian NPM takes an interesting approach using 'a predominantly semi-announced approach to its visits, notifying institutions that they will be visited within a certain period but not advising of the exact date (usually advising the institution they will be visited within a two-month period). The [Norwegian Parliamentary] Ombudsman then requests and obtains all necessary information it needs from the institution.'⁴¹</p> <div data-bbox="582 766 2004 957" style="background-color: yellow; border: 2px solid black; padding: 10px;"> <p>Recommendation:</p> <p>The QLD Government should encourage, but not mandate, the Inspector of Detention Services to undertake predominantly unannounced inspections to places of detention within its remit.</p> </div>
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³⁷ Commonwealth Ombudsman (2019) *Implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) Baseline Assessment of Australia's OPCAT Readiness*, p13. Accessed on 14 August 2021 from https://www.ombudsman.gov.au/data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf

³⁸ United Nations Office of the High Commissioner for Human Rights (2018) *Preventing Torture, The Role of National Preventive Mechanisms*, A Practical Guide Professional Training Series No. 21. p 21

³⁹ Australian Human Rights Commission (2020) *Implementing OPCAT in Australia*, p28. Accessed on the 14 August 2021 from https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opcat.pdf

⁴⁰ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (11 August 2017) *Visit to Tunisia undertaken from 11 to 14 April 2016: observations and recommendations addressed to the national preventive mechanism*, CAT/OP/TUN/2, paragraph 18.

⁴¹ Caruana, S (9 July 2018). *Enhancing Best Practice Inspection Methodologies for Oversight Bodies with an Optional Protocol to the Convention Against Torture Focus*, Winston Churchill Memorial Trust Fellowship, p28. Accessed on 14 August 2021 from <https://churchilltrustapp.secure.force.com/api/services/apexrest/v1/image/?Id=0697F00000krawLQAQ&forceDownload=Yes>

Formalised Relationships with Civil Society

In its Baseline Assessment, the Commonwealth Ombudsman noted:

‘The work of the NPM network is likely to be informed by the views of civil society and by lived experience of detention. NPMs may seek to apply civil society’s knowledge and expertise. Once NPMs are established, they may wish to consider whether relevant civil society representatives could inform their inspection regimes, such as through the establishment of formal advisory committees, or informal ad hoc advice or submissions. It may also be appropriate in some circumstances for civil society representatives to participate in inspections.’⁴²

The Australian Human Rights Commission also pointed out in its OPCAT paper that, ‘...the SPT has recommended strong and formal relationships be established with the NPM and civil society organisations. In some other jurisdictions, formal cooperation agreements between the NPM bodies and civil society organisations set out both how civil society organisations can feed into the inspection process and how the NPM bodies can rely on civil society expertise.’⁴³

Although the OPCAT treaty does not explicitly state NPM’s need to establish formal partnerships with civil society, there is ongoing recognition from the UN SPT that this is best practice. On review of some of the SPT’s concluding observations to State parties and NPMs over the years it is noted:

- NPM’s should be developed by a public, inclusive, and transparent process of establishment, including civil society⁴⁴;
- NPM’s should explore creative ways of strengthening the human resources at its disposal by, for example, engaging external expertise, setting up internship programmes or partnering with universities and civil society⁴⁵;
- State authorities should encourage dialogue and better connectivity between the NPM and civil society⁴⁶; and

⁴² Commonwealth Ombudsman (2019) *Implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) Baseline Assessment of Australia’s OPCAT Readiness*. p43. Accessed on 14 August 2021 from https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf

⁴³ Australian Human Rights Commission (2020) *Implementing OPCAT in Australia*, p11. Accessed on the 14 August 2021 from https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opcat.pdf

⁴⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SPT Observation Report to Sweden, CAT/OP/SWE/1 (2008)

⁴⁵ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SPT Report to the NPM of Germany, CAT/OP/DEU/2 (2013)

⁴⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SPT Observation Report to New Zealand, CAT/OP/NZL/1 (2017)

- NPM's should take necessary steps to effectively increase its interaction with civil society in the performance of its work.⁴⁷

Unsurprisingly, where an NPM has a formalised partnership with civil society, the UN SPT has noted this positively. In its report to the NPM of Hungary for example, the UN SPT welcomed the '...cooperation established between the national preventive mechanism and civil society organizations.'⁴⁸

Recommendation:

While Part 2 Division 2, Section 9 of the Bill enables the Inspector of Detention Services to arrange for a suitable person to assist with inspection and reviews; The QLD Government should consider also including a section in Part 2, Division 4 of the Bill enabling the Inspector of Detention Services to enter into arrangements with other entities including civil society organisations should it wish to.

The scope of OPCAT

The OPCAT Treaty does not explicitly describe what 'places of detention' are. The UN SPT in elaborating on this point affirms that:

'[T]he preventive approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism [and] therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function.'⁴⁹

⁴⁷ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SPT Report to the NPM of Spain, CAT/OP/ESP/2 (2018)

⁴⁸ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SPT Report to the NPM of Hungary, CAT/OP/HUN/2 (2017)

⁴⁹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Annex Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms* (UN Doc CAT/C/57/4 March 22, 2016), 19 para 1-3.

	<p>The UN SPT is very clear that ‘the State should allow the NPM to visit all, including any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction ... [and] should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.’⁵⁰ Despite this, the Commonwealth Government has chosen to take an incremental approach to the work of the NPM; limiting the NPM’s mandate to the Commonwealth Government’s self-determined ‘<i>primary places of detention</i>.’⁵¹ This decision presents an entirely unprecedented situation among all States that have ratified the OPCAT.</p> <p>Commenting on this, the former UN Special Rapporteur on Torture, Manfred Nowak has noted that: ‘...the Australian restriction to “primary places of detention”, although from a pragmatic point of view is understandable, might be considered as violating OPCAT.’⁵² This sentiment is also supported by the Australian Human Rights Commission in its OPCAT Paper which argues that ‘...the best approach for Australia is simply to adopt an inclusive approach, consistent with Articles 1 and 4 of OPCAT. That is, the Australian Government should ensure that OPCAT applies to all places where people are or may be deprived of their liberty, and all places of detention should be subject to inspection by an NPM.’⁵³</p> <p>The Commonwealth Government also places temporal limitations to some facilities. For example, closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment (where people are held for equal to, or greater than, 24hrs).⁵⁴</p> <p>The temporal limitation of ‘equal to, or greater than, 24 hours’ is inconsistent with the intent of the OPCAT and ignores the well documented fact that risk of harm is greatest in the first hours of detention. In relation to police custody, for example, a joint statement by UN Special Rapporteur on Torture, Nils Melzer, and three former special rapporteurs on torture, Juan Méndez, Manfred Nowak and Theo van Boven, emphasised that: ‘It is well-known that the risk of torture and other ill treatment is significantly greater during the first hours of police custody. To prevent torture during this</p>
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⁵⁰ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms* (UN Doc CAT/OP/12/5, 9 December 2010), 10 para 24-25.

⁵¹ Senator George Brandis (Canberra, 9 February 2017), *2017 DFAT-NGO Forum on Human Rights*. Accessed on 14 August from www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcatannouncement

⁵² UWA Public Policy Institute (16 December 2019), *OPCAT series: Australia’s obligations under OPCAT: The challenging task of establishing an effective NPM in a federal state*. Accessed on 14 August from <https://www.news.uwa.edu.au/archive/2019121611779/uwa-public-policy-institute/opcat-series-australia-s-obligations-under-opcat-challengi/>

⁵³ Australian Human Rights Commission (2020) *Implementing OPCAT in Australia*, 44. Accessed on 14 August from https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opcat.pdf

⁵⁴ <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId8-PortfolioId5-QuestionNumber50>

heightened period of risk, safeguards must be put in place and implemented in practice ... We call on every State to invest in safeguards to prevent torture and other forms of illtreatment.’⁵⁵

The Australian Human Rights Commission’s OPCAT Paper, also emphasised that ‘...there is no temporal limitation on the concept of detention in OPCAT. Therefore, places where people are routinely detained for periods of less than 24 hours, should be included in the places open to inspection by NPMs.’

Recommendations:

The QLD Government should publicly announce if the Inspector of Detention Services will be designated an NPM for the purposes of OPCAT.

The QLD Government should adopt the expansive definition of ‘place of detention’ which is consistent with the intention of the OPCAT and ensure its NPM(s) have coverage of all places within its jurisdiction and control where someone is or may be deprived of their liberty.

The QLD Government should urge the Commonwealth Government to remove its ‘24 hours or more’ limitation with respect to ‘primary places of detention.’ This definition ignores expert research and experience that regards the first 24 hours of custody as the most critical to torture prevention. Further, this limitation does not conform with the obligations set out in the OPCAT.

The QLD Government should urge the Commonwealth Government adopt the expansive definition of ‘place of detention’ which is consistent with the intention of the OPCAT and ensure its NPM(s) have coverage of all places within its jurisdiction and control where someone is or may be deprived of their liberty.

⁵⁵ Nils Melzer et al (26 June 2017) *Invest in Safeguards to Prevent Torture*. Accessed 14 August 2021 from www.apt.ch/content/files/OpenLetter_26June_UN_SRTs_InvestinSafeguardstoPreventTorture_EN.pdf

Thank you for the opportunity to make this submission. If you would like any further information or discuss the submission, please do not hesitate to contact me



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[Redacted contact information]