Submission on the QLD Inspector of Detention Services Bill 2021

November 2021

About us

Change the Record is Australia's only First Nations-led national justice coalition. We are comprised of organisations with legal and human rights expertise, and community controlled organisations that deliver essential legal, health and family violence prevention services around the country. Our mission is to end the mass incarceration of, and disproportionate rates of family violence experienced by, Aboriginal and Torres Strait Islander peoples.

The **Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS)**, is a community based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

The **Human Rights Law Centre**, a founding member organisation of Change the Record, uses a combination of strategic legal action, policy solutions and advocacy to support the work of Aboriginal and Torres Strait Islander organisations to help create a fair legal system that is free from racial injustice.

Introduction

We thank the Committee for the opportunity to provide a submission on the *Inspector of Detention Services Bill 2021*. We welcome the decision of the Queensland Government to provide a legislative basis for oversight and monitoring of detention centres and services in Queensland.

It is our view that independent, adequately resourced and culturally competent oversight agencies and inspectorates are a crucial tool in addressing the mass incarceration of Aboriginal and Torres Strait Islander peoples, preventing the unacceptable number of First Nations deaths in custody and reducing and where feasible, totally prevent mistreatment or denial of human rights within places of detention and other custodial settings.

While we understand this Bill does not purport to fulfill the requirements of OPCAT in establishing a National Preventive Mechanism (NPM), we believe it is best practice to adopt OPCAT's key principles of independence, systemic oversight and adequate resourcing if the Inspectorate is to fulfill its purported aims and reduce or totally prevent the risk of harms caused by human rights infractions or mistreatment of detainees and ultimately the risk of First Nations deaths in custody. We have appended nine key principles we believe are essential to ensuring that an NPM fulfills the requirements of OPCAT for the committee's information. We recommend that, if there is an intention to designate the Inspectorate as an NPM in future, its development should have regard to these principles.

We appreciated the opportunity to provide a submission on the draft of this bill earlier this year, and acknowledge positive changes included in the Bill before us:

- Expanded definitions of detention services and places of detention, including transport of detainees to a watch-house from a court in which the detainee has appeared, or from another watch-house or place of detention;
- The removal of a provision preventing the Inspector from visiting a place of detention during a declaration of emergency;
- Providing that the Inspector provide its annual report directly to the parliament, separate to that of the Queensland Ombudsman;
- Addition of a provision stating the Inspector of Detention Services must consider the multidisciplinary composition and representative nature of its staffing;
- Applying the 'conflict of interest' provisions in the Ombudsman Act 2001 to the Inspector of Detention Services.

In our submission below, we set out a number of remaining concerns with respect to the Inspector's financial and operational autonomy, functions and ongoing community consultation.

Summary of recommendations

1. That, when considering the Bill in the context of the requirements of OPCAT, the committee consider whether the Bill fulfils the 'Key principles for an effective NPM' appended to this document.

2. Adopt as expansive a definition of detention services and places of detention as possible to include all custodial environments where people are or may be deprived of their liberty within Queensland's jurisdiction, whether or not someone is detained with a warrant.

3. Amend Section 5(1)(c) to remove any carve-outs for transport to and from watch-houses when a person is in custody, and remove Section 5(2).

4. Reconsider appointing the Queensland Ombudsman as Inspector of Detention Services, and instead create a standalone statutory Inspectorate.

5. Guarantee funding and resourcing for the Inspector (based on the Inspector's own assessment) in legislation, with resources provided by government to be in a single, dedicated budget line item to allow the Inspector to determine its internal budget allocations.

6. If minimum inspection frequencies are to remain in the Bill, amend Part 2 Division 2 Section 8(1)(c) to require that each prison, detention centre, watch-house, court custody centre and lock-up be inspected at least once every 3 years, while retaining the requirement each youth detention centre be inspected at least once a year.

7. Remove Section 8 (1)(c)(iii) from the Bill.

8. Remove Part 3 Section 24 from the Bill.

9. Provide the Inspector with the discretion to refer matters to the Minister without a mandatory 3 day 'show cause period'.

10. Include provisions in the bill for the Inspector to directly refer matters of concern to the Parliament, make its findings and recommendations publicly available under its own initiative, and have the power to require a public response from governments and detaining authorities.

11. In developing and implementing the office of the Inspector, commit to serious and appropriate engagement with Aboriginal and Torres Strait Islander peoples, representative bodies, Aboriginal and Torres Strait Islander Legal Services, people with lived experience of incarceration and families in community consultation and co-design processes.

Definitions: detention services and places of detention

Recommendation: Adopt as expansive a definition of detention services and places of detention as possible to include all custodial environments where people are or may be deprived of their liberty within Queensland's jurisdiction, whether or not someone is detained with a warrant.

Recommendation: Amend Section 5(1)(c) to remove any carve-outs for transport to and from watch-houses when a person is in custody, and remove Section 5(2).

We appreciate the expanded definitions of detention services and places of detention in the Bill, including travel to a watch-house from a court in which the detainee has appeared, or from another watch-house or place of detention. We acknowledge that the Bill as drafted has attempted to capture many custodial settings.

However, we are concerned that the revised definitions are limiting. The prescriptiveness of Section 5 (1)(c)(iii) is explicitly so, confining the scope of the Inspector's work to transport between watch-houses, courts and places of detention. The risk of ill treatment of people in custody is acute in the first 24 hours of detention, including during transportation to places of detention. Section 5 (2) excludes conditions where many adults, young people and children are transported by police and correctional officers between places of detention and mental health facilities/hospitals.

We urge the government to adopt as expansive a definition of detention services and places of detention as possible to include all custodial environments where people are or may be deprived of their liberty within Queensland's jurisdiction, whether or not someone is detained with a warrant. We recommend that Section 5(1)(c) be amended to remove any carve-outs for transport to and from watch-houses when a person is in custody, and that Section 5(2) be removed from the bill.

Resourcing

Recommendation: That the government reconsider appointing the Queensland Ombudsman as Inspector of Detention Services, and instead create a standalone statutory Inspectorate.

Recommendation: Guarantee funding and resourcing for the Inspector (based on the Inspector's own assessment) in legislation, with resources provided by government to be in a single, dedicated budget line item to allow the Inspector to determine its internal budget allocations.

Part 5 Section 33 of the Bill appoints the Queensland Ombudsman as the Inspector of Detention Services. We are concerned that locating this new Inspectorate function within the office of the Ombudsman risks inadequately resourcing the Inspector responsibilities. We stress the importance of ensuring the independence and financial and operational autonomy of the office of the Inspector. Key to this autonomy is adequate resourcing. Tying the resourcing of the Inspector to the resourcing of the Ombudsman risks the powers and responsibilities of the Inspector not being adequately

provided for if both offices aren't fully funded and staffed according to their respective identified needs.

The risks of such a "dual appointment" model are demonstrated in Tasmania, where the current Tasmanian Custodial Inspector (who is also the Tasmanian Ombudsman) highlighted resourcing and staffing constraints which were impeding his ability to the perform crucial functions of his office, including conducting onsite inspections and the timely publication of reports.[1] The Tasmanian Custodial Inspector asserted in both 2018-2019 and 2019-2020 Annual Reports that he 'can only dedicate ten per cent of... time to the inspectorate.'[2]

We recommend the government reconsider appointing the Ombudsman as Inspector, and instead create a standalone statutory Inspectorate. We further recommend that funding and resourcing for the Inspector be independently determined by the Inspector based on its assessment of what resources are required to carry out its functions. These resources should be guaranteed in legislation and provided by the government in a single, dedicated budget line item, with the Inspector determining its internal budget allocations according to its own work plan.

Frequency of inspections

Recommendation: If minimum inspection frequencies are to remain in the Bill, amend Division 2 Section 8(1)(c) to require that each prison, detention centre, watch-house, court custody centre and lock-up be inspected at least once every 3 years, while retaining the requirement each youth detention centre be inspected at least once a year.

To be an effective preventative body the Inspector must be empowered and resourced to undertake regular visits to places of detention, and have free and unfettered access to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews.

The Inspector should have the discretion and power to determine the frequency of its own inspections, without being directed or limited by legislative requirements or budget constraints. It's our view that legislated minimum requirements for inspection frequency should not be needed to ensure the effective functioning of a well-resourced, independent Inspectorate. We also consider that a minimum inspection frequency on its own is a blunt instrument.

We are also concerned that the Bill as written prescribes inspections at high security prisons and places prescribed by regulation at least once every 5 years. While we recognise the intention is to

[1] Office of the Custodial Inspector Tasmania (June 2021) *Lockdowns Review 2021*. Accessed 15 November 2021 from <https://www.custodialinspector.tas.gov.au/__data/assets/pdf_file/0009/615852/Lockdowns-Review-2021.pdf>

[2] Office of the Custodial Inspector Tasmania (October 2019) *Annual Report* 2018-2019. Office of the Custodial Inspector Tasmania (October 2020) *Annual Report* 2019-2020.

set a minimum expectation of inspection frequency, we are concerned that a 5-year inspection cycle for facilities that are identified as presenting a higher risk of abuse wouldn't be adequate. We would be very concerned if government budget-setting for the Inspectorate were to be based on expectations of such low inspection frequency.

If the government is intent on the Bill specifying a mandatory minimum inspection frequency, we suggest it align its minimum inspection frequency for adult correctional services with comparable legislation in other Australian jurisdictions, and in particular, Western Australia:

- The ACT's *Inspector of Correctional Services Act 2017*[3] requires that a new facility be inspected at least once within its first 2 years of operation, and at least once every 3 years thereafter;
- Tasmania's *Custodial Inspector Act 2016*[4] requires facilities be inspected at least once every three years; and
- WA's *Inspector of Custodial Services Act 2003*[5] requires that each prison, detention centre, court custody centre and lock-up be inspected at least once every 3 years.

Accordingly, if the Bill intends to specify a mandatory minimum inspection frequency, we recommend amending Division 2 Section 8(1)(c) to require that each prison, detention centre, watch-house, court custody centre and lock-up be inspected at least once every 3 years, while retaining the requirement each youth detention centre be inspected at least once a year.

Prescribed places of detention in regulation

Recommendation: Remove Section 8 (1)(c)(iii) from the Bill.

Division 2 Section 8 (1)(c)(iii) requires the Inspector 'to inspect all or a part of a particular place of detention prescribed by regulation at least once every 5 years'. Section 51 provides that 'The Governor in Council may make regulations under this Act.'

Our understanding is that this functionally would mean that the regulations would be set by the executive government. It is our view that empowering the executive government to direct the activities of the Inspector via legislative instrument is contrary to the principles of independence and operational autonomy. We do not believe it's appropriate for the executive government and/or Minister to have discretionary power to direct the actions of the independent Inspector and recommend Section 8 (1)(c)(iii) be removed from the Bill.

[3] Part 3 Section 18, *Inspector of Correctional Services Act 2017*, Australian Capital Territory, <https://www.legislation.act.gov.au/a/2017-47/current/>
[4] Part 3 Section 13, *Custodial Inspector Act 2016*, Tasmania, <https://www.legislation.tas.gov.au/view/html/inforce/current/act-2016-030#GS13@EN>
[5] Part 4 Div.1 Section 19, *Inspector of Custodial Services Act 2003*, Western Australia, <https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_458_homepage.html>

Notice and reporting

We support the position of Inspector being an Officer of the Parliament and for the Inspector to report directly to the Parliament. We welcome changes to the draft Bill clarifying that the Inspector's annual report will be provided directly to the parliament and separate from that of the Queensland Ombudsman.

Recommendation: That Part 3 Section 24 be removed from the Bill.

We remain concerned about Part 3 Section 24 'Draft report to notifiable entities', which provides that the Inspector must provide a copy of a draft report made under section 22(1) or (2) to relevant people and/or entities 6 weeks before submission of reports to the Speaker. We consider this to be an unnecessary restriction on the Inspector's ability to make timely and independent reports and assessments of governments and institutions.

While of course we are not opposed to relevant entities responding to the contents of the Inspector's reports, it is not appropriate to delay the Inspector's reporting on this basis. It is our view that the determination of policies and procedures for providing an individual, institution, body or government with the opportunity for a right of reply in the case of adverse findings or commentary is a matter for an independent Inspectorate, and that responses to the Inspector's report should be able to be provided after publication and tabling in the Parliament.

Recommendation: Provide the Inspector with the discretion to refer matters to the Minister without a mandatory 3 day 'show cause period'.

We also remain concerned by Section 17 'Referral of relevant matters to the Minister'.

The Bill as written requires the Inspector to give notice to the responsible officer of a place of detention of the Inspector's intention to report a reasonable suspicion of harm and abuse of people in custody to the Minister. The responsible officer then has a 3 day 'show cause period' in which to respond, after which the Inspector may decide to take no further action or refer the matter to the Minister.

These requirements undermine the independence and autonomy of the Inspector. We recommend the Bill be amended to provide the Inspector with the discretion to refer matters to the Minister without a mandatory 3 day delay.

Providing further powers to the Inspector

Recommendation: Include provisions in the bill for the Inspector to directly refer matters of concern to the Parliament, make its findings and recommendations publicly available under its own initiative, and have the power to require a public response from governments and detaining authorities.

It is also our view that referring a matter to the Minister should not be the only course of action available to the Inspector. To effectively fulfil the Inspector's purpose under Section 3 (2) for independent and transparent reporting, further powers should be afforded to the Inspector.. The Inspector should have the ability to directly refer matters of concern to the Parliament, make its findings and recommendations publicly available in the public interest without permission from the government or another institution or agency, and have the power to require a public response from governments and detaining authorities. Affording the Inspector these powers is particularly important if the Inspector may be designated an NPM in future, to ensure consistency with the requirements of OPCAT.

Community Consultation

Recommendation: In developing and implementing the office of the Inspector, commit to serious and appropriate engagement with Aboriginal and Torres Strait Islander peoples, representative bodies, Aboriginal and Torres Strait Islander Legal Services, people with lived experience of incarceration and families in community consultation and co-design processes.

For the Inspector of Detention Services to be effective, particularly as a body designed to prevent harm and human rights abuses in police custody, it must have the trust of the community and people with lived experience of incarceration. We are particularly concerned that Aboriginal and Torres Strait Islander peoples, and people in prison and their families, are consulted with and inform the development of the Inspector's role. Without the trust and confidence of the community that they can approach, inform and interact with the Inspector, it will not be able to fulfill its preventative function.

Governments must commit to seriously and appropriately engaging Aboriginal and Torres Strait Islander peoples, representative bodies, Aboriginal and Torres Strait Islander Legal Services, people with lived experience and families in community consultation and co-design processes to ensure the development of the Inspector and its ongoing activities have the confidence of the community.

We thank the committee for the opportunity to provide this submission, and would welcome the opportunity to engage further.

Yours sincerely,

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Appendix i: Key Principles for an effective National Preventive Mechanism

There are a number of key principles which are essential to ensuring that the NPM fulfills the requirements of OPCAT and is sufficiently independent and robust to have the confidence of those in custody and the broader community.

These principles require that any body that is designated an NPM:

1. Be established with full and transparent consultations with civil society, with Aboriginal and Torres Strait Islander peoples and others as recommended by the Subcommittee on Prevention of Torture (SPT);

2. Includes Aboriginal and Torres Strait Islander representation on all oversight bodies and expert advisory panels to ensure NPMs are established in a culturally safe way, and with the trust of community;

3. Have a statutory basis and be independent of government and the institutions they oversee;

4. Be adequately and jointly resourced by Federal, State and Territory Governments;

5. Make findings and recommendations publicly available and require a response from governments and detaining authorities. These responses should also be made public;

6. Be empowered to undertake regular and preventative visits;

7. Have free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);

8. Have the power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation; and

9. Be afforded appropriate privileges and immunities to ensure there are no sanctions or reprisals for communicating with the NPM.