



Inspector of Detention Services Bill 2021

Submission to the Legal Affairs and Safety
Committee

November 2021

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About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity and children and young people in out-of-home care or staying at a visitable site.

OPG provides individual advocacy services to children and young people through the following functions:

- child advocacy, which offers person-centred advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them; and
- child community visiting, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities).

OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting and advocacy functions:

- The guardianship function undertakes structured (supported and substitute) decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigation function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to participate and make decisions where possible and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision-makers under an advance health directive or an enduring power of attorney.

Submission to the Committee

Position of the Office of the Public Guardian

OPG welcomes the opportunity to comment on the *Inspector of Detention Services Bill 2021* (the Bill). The views of OPG contained in this submission do not represent the views of the Queensland Government.

This submission and its recommendations address the aspects of the Bill where they relate to the experiences of OPG and the people we support. A summary of OPG's recommendations appears below.

The Office of the Public Guardian recommends:

1. Section 3 of the Bill be amended to clearly state that the Inspector and their functions are the primary oversight mechanism in carrying out the main purpose in the Bill.
2. The minimum visiting frequencies for youth detention centres and high security detention services be increased to reflect the high-risk nature of these environments and the vulnerability of detainees.
3. Subsection 9(3) of the Bill be amended to read:
(3) Without limiting subsection (2), in considering who is a suitable person for the subsection, the Inspector must have regard to—
.....
4. The term "legal guardian" in the Bill be replaced with "substitute decision-maker" when referring to the decision-making arrangements for adults with impaired decision-making capacity.

General comments

Information sharing

OPG understands from the explanatory notes accompanying the Bill that the focus of the Inspector of Detention Services (the Inspector) will be on preventing harm through systems review rather than responding to harm through the investigation of individual complaints. The notes also indicate that the Inspector's review may consider systemic themes that arise from the individual experience of detained individuals or groups of people and/or an issue in one or more places of detention. The free flow of information between the Inspector and those with direct and frequent contact with individual detainees will be essential to allow systemic issues to be recognised. Up-to-date information on detainees' daily experiences will allow systemic issues of concern to be identified and actioned as soon as possible to avoid any unnecessary risks to the rights of detainees.

To facilitate relevant information being provided to the Inspector, OPG recommends streamlined information sharing agreements be put in place between the Inspector and other oversight bodies, and a robust system of referral between oversight bodies should individual complaints indicate a systemic problem warranting review. This will be essential to ensure the Inspector can proactively address systemic issues and prevent harm in places of detention.

OPG's feedback about the Bill is detailed below.

Main purpose (section 3)

OPG has previously expressed support for an independent Inspector of detention services in line with recommendation 8.R1 of the *Independent Review of Youth Detention* report¹(independent review report) which examined the practices, operation and oversight of Queensland's youth detention centres in 2016. Overall, OPG supports the Bill and the broad framework for the introduction of the Inspector.

However, while an Inspector of detention services is a welcome initiative, OPG is concerned that the Bill is unclear on how this additional oversight body for youth detention intersects with current oversight services, which could create additional confusion for children and young people who are in a detention environment. Chapter 8 of the independent review report lists eight oversight bodies in relation to youth detention. The report notes the Queensland Ombudsman's submission to the review which stated that "the net result of these different bodies with different, but at times overlapping responsibility and functions, makes a coordinated response to a particular issue within the youth detention sphere more difficult".² It went on to state that "... none of those bodies has a complete picture of the operation of youth detention and its potential failings"³.

OPG submitted to the independent review that "each oversight body plays a different role in the process of managing child complaints and issues; the investigation and referral processes between each can result in delays, incoherence and confusion for clients (children and young people)... there is no real locus of accountability"⁴.

The independent review report also quotes the *Children's Rights Report 2016*⁵:

"Some jurisdictions have multiple government departments and statutory bodies with responsibilities in the youth justice context. Often, these departments and bodies appear somewhat uncoordinated in their approach. This is concerning because it indicates that, in some jurisdictions, there is no overall mechanism acting in the best interests of children and young people who are in detention. This may also impede the ability for young people to readily identify the key sources of external support and advice".

While the introduction of the Bill implements recommendations 8.R1 and 8.R2 of the independent review report, it does not address the issues arising from multiple agencies continuing to have partial roles in individual and systemic oversight and the issues inherent in relying on information sharing and referral processes. The issue of no clear locus of accountability for incidents, systemic or otherwise, will continue.

While the Inspector is strongly supported, it is recommended that section 3 of the Bill is amended to clearly state that the Inspector and their functions is the primary oversight mechanism in carrying out the main purpose in the Bill. This will assist stakeholders to readily identify the Inspector as the key source of external support and advice when they consider the objectives outlined in section 3(1)(a) and (b) have not been adhered to.

¹ Independent Review of Youth Detention (www.youthdetentionreview.qld.gov.au), December 2016, p. 21

² Ibid, December 2016, p.203.

³ Ibid.

⁴ Office of the Public Guardian, *Submission to Independent Review of Youth Detention*, December 2016, p.8.

⁵ Queensland Human Rights Commission, *Children's Rights Report 2016*, p.95.

Recommendation 1

Section 3 of the Bill be amended to clearly state that the Inspector and their functions is the primary oversight mechanism in carrying out the main purpose in the Bill.

Functions (Section 8)

A significant area of focus for OPG is the impact that the Bill will have on children and young people in youth detention. Under section 8(c)(i) of the Bill, the Inspector is only required to inspect each youth detention centre a minimum of once a year. OPG questions the effectiveness of this function given the low number of required inspections. As there are only three youth detention centres in Queensland and given the vulnerabilities of detained children and young people, OPG strongly encourages a higher minimum visiting frequency for youth detention centres. A higher minimum inspection frequency will provide a more robust picture of the operation of these sites, and better support the achievement of the main purpose of the Act outlined in section 3 to promote the improvement of detention services and places of detention. This is particularly important given the focus on “promoting and upholding the humane treatment of detainees, including humane conditions of their detention”.

OPG also queries the efficacy of a five-year minimum inspection frequency for high security detention services, as such a low frequency is unlikely to support genuine oversight by the Inspector of ongoing systemic issues in detention services and places of detention. Detainees, especially those with cognitive or psychosocial disability, are an inherently vulnerable cohort that can be placed in long periods of solitary confinement because of behaviours associated with their disability. The OPG recommends that the minimum visiting frequency for high security detention facilities be increased to at least once a year, which would better align with the approach taken for youth detention centres and promote the improvement of these sites.

Recommendation 2

The minimum visiting frequencies for youth detention centres and high security detention services be increased to reflect the high-risk nature of these environments and the vulnerability of detainees.

Arranging for suitable person to help carry out review and inspection (Section 9)

OPG supports the provisions under section 9 that require consideration of who would be a suitable person to help the Inspector when carrying out an inspection at a place of detention. As reflected in the Bill, this is particularly important when a detainee identifies as an Aboriginal or Torres Strait Islander person or is a child who has experienced trauma.

OPG has a concern about subsection 9(3), which states:

(3) Without limiting subsection (2), in considering who is a suitable person for the subsection, the Inspector may have regard to—

- (a) the cultural background or vulnerability of the detainee; or*
- (b) any views or wishes expressed by the detainee about who may be a suitable person to help the Inspector carry out the review or inspection.*

OPG considers it more appropriate for the Bill to mandate a requirement for the Inspector to have regard to the two factors at paragraphs 9(3)(a) and (b) by replacing the phrase “may have regard to” with “*must* have regard to”. It must be a priority for the views and wishes of a detainee to be considered in this context as a fundamental human right for a person already in a position of vulnerability by virtue of their detention.

OPG therefore recommends this section be amended to read as follows:

(3) Without limiting subsection (2), in considering who is a suitable person for the subsection, the Inspector must have regard to—

.....

Recommendation 3

Subsection 9(3) of the Bill be amended to read:

(3) Without limiting subsection (2), in considering who is a suitable person for the subsection, the Inspector must have regard to—

.....

Confidentiality and the term “legal guardian” (Section 30)

OPG notes use of the term “legal guardian” in relation to the disclosure or use of confidential information under section 30 of the Bill. Subsection 30(4)(a)(ii) reads as follows:

Also, the inspector or a relevant officer of the ombudsman may disclose or use the confidential information—

(a) for confidential information about a person who is an adult—

(i) with the person’s consent; or

(ii) if the person is unable to consent—with the consent of a legal guardian of the person; or

....

“Legal guardian” is a term commonly used for children. It is not typically used in relation to adults with impaired decision-making capacity who may be unable to consent to the disclosure of information. The *Guardianship and Administration Act 2000* uses the term “substitute decision-maker” when referring to a person exercising a power for an adult with impaired capacity. Under section 9 of the *Guardianship and Administration Act*, a substitute decision-maker includes several roles, including guardian, attorney, or informal decision-maker (the adult’s existing support network). Use of the term “legal guardian” in the Bill may unintentionally exclude this range of decision-makers for a person who is unable to consent to the disclosure of confidential information. OPG recommends references to a “legal guardian” in the context of adults with impaired decision-making capacity in the Bill be replaced with “substitute decision-maker” to reflect the other types of decision-makers in a person’s life beyond that of a guardian. This amendment would be consistent with terminology in the *Guardianship and Administration Act*.

Recommendation 4

The term “legal guardian” in the Bill be replaced with “substitute decision-maker” when referring to the decision-making arrangements for adults with impaired decision-making capacity.

Conclusion

OPG welcomes the Bill and considers it to be a step towards greater compliance with the Optional Protocol to the Convention against Torture (OPCAT) in Queensland. OPG is optimistic that the Inspector will provide a valuable level of oversight to Queensland’s detention services, with a focus on independence, transparency, and accountability.