



Inspector of Detention Services Bill 2021

Submission to Legal Affairs and Safety Committee

19 November 2021

Summary

1. The Queensland Human Rights Commission (the **Commission**) supports the passage of the Inspector of Detention Services Bill 2021 (the **Bill**). As noted in the Explanatory Notes, the government consulted with the Commission in developing the Bill.
2. However, the Bill misses the opportunity:
 - i. for Queensland to fully participate in Australia's National Preventative Mechanism (**NPM**) under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**) which is due to commence in early 2022; and
 - ii. to clarify the roles and responsibilities of various agencies with oversight functions in Queensland.

The Bill therefore risks adding to the existing oversight arrangements without leading to any substantive improvement of detention services and places of detention, which is the stated purpose of the Bill.

Recommendations

3. In summary, the Committee could seek further information, and consider making recommendations about:
 - How the Inspector of Prisons will interact with other oversight agencies particularly Official Visitors under the Corrective Services Act;
 - How Queensland will meet its obligations under OPCAT to ensure adequate preventative monitoring of all places of detention;
 - Whether the Bill should be amended to better reflect OPCAT requirements and related guidance;
 - Justification for the Inspector being unable to access information that relates to proceedings of Cabinet or a committee of Cabinet.
 - Amending the Bill to require QPS to notify the Inspector if a person aged under 18 is detained overnight in any place of detention used by QPS.
 - Amending the Bill to require the Inspector to develop and maintain specific standards for young people in detention to inform its assessment of conditions of detention.
 - Amending the Bill to provide for the Inspector to investigate critical incidents.

Introduction

4. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).
5. The Commission has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
6. The Commission also deals with complaints of discrimination, vilification and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act. This includes complaints made by prisoners about the conditions of their detention and related concerns.

Existing oversight arrangements

7. The Commission suggests that the Bill must be considered in the context of how the proposed new Inspector of Prisons (the **Inspector**) will interact with existing oversight mechanisms in Queensland, which may include:
 - the Queensland Ombudsman;
 - the Public Guardian;
 - Community Visitors;
 - the (internal) Youth Detention Inspectorate;
 - the (internal) Chief Inspector and Official Visitors under the *Corrective Services Act 2006*;
 - Queensland Family and Child Commission; and
 - Queensland Human Rights Commission.
8. For example, many mechanisms are apparently unchanged by the Bill (other than potentially assisting the Inspector) such as Official Visitors under the *Corrective Services Act 2006*, Community Visitors under the *Youth Justice Act 1992* and *Public Guardian Act 2014*, and the internal inspection services in both youth and adult detention settings.
9. Clause 19 of the Bill addresses this in some ways by requiring the Inspector to ensure the performance of its functions do not delay, interfere with or duplicate the functions of many other agencies. It also provides for the Inspector to enter into arrangements with some agencies. Clause 20 provides for the Inspector to make arrangements with certain entities for referrals.

10. However, the Bill in isolation does not explain how the government intends the Inspector to operate within the existing oversight framework. The Commission agrees an independent inspector is needed, but the efficacy of this role, and the roles of existing oversight agencies, is dependent on legislation, policy and procedure ensuring relevant agencies can work effectively together. The Commission recommends the Committee seek more information from the government about how the Inspector's role relates to existing oversight functions. The Commission would welcome the opportunity to work with government and other relevant agencies to map out a framework about respective roles and responsibilities. The development of such a framework would also ensure there are no oversight or regulatory gaps left after the position and functions of the Inspector are established.
11. The Explanatory Notes state that the Bill is made in response to several reviews into elements of Queensland's criminal justice system including the *Queensland Parole System Review*.¹ That review recommended the establishment of an independent inspector, and that the Inspector should oversee the existing Official Visitor program. Official Visitors, appointed under the *Corrective Services Act 2006*, are 'a statutory role performed by a person who attends prisons as an observer/person to whom prisoners can raise complaints'.²
12. The Official Visitors Scheme is presently coordinated by the Chief Inspector who reports to the Queensland Corrective Services Commissioner. In this way, Official Visitors are currently part of the internal complaints system. The Bill does not appear to adopt the recommendation of the *Parole System Review* as Official Visitors would not report to the new independent Inspector.
13. The role of Official Visitors is particularly relevant to complaints made to the Commission under the AD Act. Presently prisoners must go through a two-step internal complaints process when complaining about prisons or other service providers, which requires complaints to both the General Manager of the prison and the Official Visitor.³ An un-commenced amendment to the *Corrective Services Act 2006* passed last year would repeal the requirement to make a complaint to an Official Visitor.⁴ The Commission is not aware of when the Government intends for that amendment to commence.

¹ Walter Sofronoff QC, *Queensland Parole System Review* (Report, December 2016).

² *Ibid*, 257.

³ *Corrective Services Act 2006*, sections 319E and 319F.

⁴ *Corrective Services and Other Legislation Amendment Act 2020*, s 50.

14. In contrast, in other jurisdictions with independent inspectors, official visitors (or their equivalent) are independent, either working directly under the auspices of the Inspector or in a collaborative way.⁵ For example, the Western Australian Inspector of Custodial Services administers and support the state's Independent Visitors, who in turn 'assist the Inspector to provide advice to the minister and to inform the work of the Office'. The WA Inspector describes Independent Visitors as 'an integral part of the state's accountability mechanisms'.⁶

Recommendation 1: The Committee consider recommending the government publish a framework for how a new Inspector of detention services will interact with existing oversight agencies. This should include how the existing corrective services Official Visitors will operate with the Inspector.

OPCAT

15. The Commission appreciates the Bill is based on recommendations made by several reports to the Queensland Government. These reports include a report by this Commission (then the Anti-Discrimination Commission Queensland) which recommended an independent inspectorate in its reviews of the treatment of women in prison.⁷ During the public briefing for the Bill, departmental officers suggested while the Bill was drafted with OPCAT compliance in mind, the government had yet to make a decision regarding its participation in the NPM arrangements for OPCAT.⁸
16. Nonetheless, the recommendations in several relevant reports were informed by OPCAT, and so the Commission suggests this proposal must be measured against the requirements of that protocol. For example, the Commission's *Women in Prison* report found that the 'establishment of such a body is essential as Australia has now ratified' OPCAT. The Report also noted that 'Queensland is one of a few jurisdictions in Australasia that does not operate an independent inspectorate to oversee and critically examine the operations of the operations of the correctional system'.⁹

⁵ See for example *Official Visitor Act 2012* (ACT), and sections 40 and 41 of the *Inspector of Custodial Services Act 2003* (WA).

⁶ Office of the Inspector of Custodial Services (WA), *Annual Report 2020-21* (Report, 2021) 8.

⁷ Anti-Discrimination Commission Queensland, *Women in Prison* (Report, March 2006), 129. Anti-Discrimination Commission Queensland, *Women in Prison 2019: a human rights consultation report* (Report, 2019), 48-49.

⁸ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, Brisbane, 15 November 2021, 6 (Sakitha Bandaranaike, Director, Department of Justice and Attorney General)

⁹ Anti-Discrimination Commission Queensland, *Women in Prison 2019: a human rights consultation report* (Report, 2019), 48

17. Australia is a longstanding party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**UN CAT**).¹⁰ In 2017, the Australian Government ratified OPCAT, obliging Australia to take further measures to implement CAT including the establishment of an NPM. The NPM is the domestic visiting body charged with undertaking regular, preventive visits to all places where people are deprived of their liberty. The work of the NPM benefits the whole community by working constructively with government to improve conditions and treatment in detention and prevent torture and ill-treatment by identifying risk factors and causes. The NPM makes recommendations on how these practices can be addressed and prevented. Such work promotes several human rights, including the right to humane treatment when deprived of liberty,¹¹ and protection from torture and cruel, inhuman or degrading treatment.¹²
18. In addition to the relevant articles of OPCAT itself, related guidance material from the *Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN SPT)* and other sources has further elaborated on the functions of an effective NPM. While the Bill appears to satisfy many of these, the Commission recommends some further improvements based on these sources as set out below. At a minimum, the Government should confirm that the Inspector is intended to be (part of) Queensland's NPM arrangements.

Recommendation 2: The Committee seek confirmation from the Government that the Inspector is intended to form part of its response to OPCAT.

Terminology

19. While the Bill and explanatory material do not refer to OPCAT in any detail, clause 3 does refer to a main purpose of the Bill to prevent detainees from being subjected to harm, including torture and cruel, inhuman or degrading treatment. Those terms are not defined, but during the public briefing, officials noted those words are reflected in s 17 of the HR Act.¹³ Members of the Committee expressed some concern at the inclusion of the word torture in the Bill and how this might be interpreted.

¹⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹¹ *Human Rights Act 2019* s 30

¹² *Human Rights Act 2019* s 17

¹³ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, Brisbane, 15 November 2021, 5 (Sakitha Bandaranaike, Director, Department of Justice and Attorney General)

20. The term torture and related terms are also used in UN CAT and OPCAT. Torture is defined narrowly as:

- inflicting severe physical or mental pain or suffering;
- intentionally;
- for a prohibited purpose; and
- being inflicted by or with the consent or acquiescence of a public official or a person acting in an official capacity.¹⁴

21. Acts of cruel, inhuman or degrading treatment or punishment are those that may not amount to torture.¹⁵ This distinction is reflected in the Explanatory Notes to the HR Act:

Subclause (a) prohibits torture, which is understood as acts that intentionally inflict severe physical or mental pain or suffering.

Subclause (b) prohibits cruel or inhuman treatment, which also involves severe pain or suffering, but not necessarily intentionally inflicted.¹⁶

22. As the Explanatory Notes to the Bill state, guidance on the definition of these terms has also been provided by the UN Human Rights Committee.¹⁷

23. In places of detention, the protection in s 17(b) is often contrasted with the right to humane treatment when deprived of liberty, enshrined in s 30 of the HR Act. Section 3(a) of the Bill refers to the purposes of the Act to include promoting humane conditions of detention. The Queensland Supreme Court in *Owen-D'Arcy* considered both s 17(b) and s 30 in a case involving prolonged solitary confinement. The court did not support the Canadian 'abhorrent' community test because there are 'many grey areas in which opinions may honestly differ'.¹⁸ It was preferable for courts to deal with these issues without purporting to assess the national conscience.

In order for s 17(b) to be engaged, the applicant must demonstrate, at a minimum, that the terms of his confinement are of such a nature that they can manifest in bodily injury or physical or mental suffering.¹⁹

¹⁴ UN CAT, art 1

¹⁵ UN CAT, art 16.

¹⁶ Explanatory Notes, Human Rights Bill 2018 (Qld) 19.

¹⁷ UN Human Rights Committee, *General Comment No 20: Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*, 44th sess, UN Doc HRI/GEN/1/Rev.1.

¹⁸ *Owen-D'Arcy v Chief Executive*, QCS [2021] QSC 273, [181]

¹⁹ *Ibid*, [190]

24. If the Committee remains concerned about this issue, it could recommend the Bill be amended to define these terms, potentially with reference to UN CAT, OPCAT, the UN HRC general comment and/or the HR Act.

Coverage

25. The development of this Bill is an opportunity for Queensland to comprehensively embed OPCAT, thereby improving the conditions of detention for all those detained and enhance community safety. The Bill defines places of detention narrowly as those specified under the *Youth Justice Act 1992*, *Corrective Services Act 2006* and watch-houses. In contrast, Articles 1 and 4 of OPCAT refer to any place under the state's jurisdictions where persons are or may be deprived of their liberty. The UN SPT has interpreted the OPCAT mandate as encompassing any place where persons are deprived of their liberty, in the sense of not being free to leave, and in which the State either exercises, or might be expected to exercise, a regulatory function.²⁰ The UN SPT recommends allowing NPMs to visit any such places, including where the NPM suspects a location is a place of deprivation of liberty.²¹ In contrast, the Explanatory Notes suggest that detention service does not include where a person is no longer under the custody of QCS or the journey after arrest to a watch-house for processing as the person is not yet remanded in custody. The Commission suggests the Inspector should be able to visit any place of detention used for a person within the criminal justice system.
26. Further, at present, it appears Queensland lacks an NPM for several places of detention beyond those identified in this Bill, particularly mental health facilities and facilities for people with disability.²² Other places may also emerge as requiring coverage, such as hotels or purpose-built facilities used for quarantining travellers.
27. The Commission does not necessarily advocate that the Inspector created by this Bill should cover all such places of detention, but that the government address this issue as a priority including identifying independent statutory agencies that will be tasked with this function, or

²⁰ 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) [1]-[3].

²¹ 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), [24]-[25].

²² Evidence to Legal Affairs and Safety Committee, Queensland Parliament, Brisbane, 15 November 2021, 3, 6 (Sakitha Bandaranaike, Director, Department of Justice and Attorney General)

creating new bodies to fulfil this role. It is a critical time to undertake such work, with Australia's NPM obligations commencing early in 2022.

28. Such agencies must have the necessary independence, powers and expertise to prevent torture and cruel, inhuman and degrading treatment for residents of such places.

Recommendation 3: The Committee seek further clarification from the government about Queensland's NPM arrangements for all places of detention as defined under OPCAT. Such NPM(s) should satisfy all requirements of OPCAT.

Adequate resourcing

29. Clause 33 of the Bill appoints the Queensland Ombudsman as the Inspector of Detention Services. The Commission notes the synergies between the functions of the proposed Inspector and the Ombudsman's current functions, and that the Ombudsman satisfies many of the principles set out in OPCAT for an NPM. This includes being functionally independent from the executive government, providing safeguards from reprisal and powers to regularly examine and visit places of detention.²³
30. Nonetheless, the experience of other jurisdictions emphasises the need to balance these new functions with the existing role of the Ombudsman. For example, the Tasmanian Ombudsman, who is also the Custodial Inspector, has reported that the can only dedicate ten per cent of time to the inspectorate,²⁴ and long delays between onsite inspections and publication of reports due to inadequate staffing.²⁵
31. Both the UN SPT and the Commonwealth Ombudsman have stated that preventative inspection regimes require additional resources to be effective and that 'OPCAT implementation requires more than 'conferring further functions on existing oversight bodies'.²⁶
32. This demonstrates the importance of ensuring that the Inspectorate is adequately resourced and that the Ombudsman's existing functions (such as complaint handling) do not undermine its resources to undertake preventative work. In this regard, clauses 34 and 35 of the Bill are

²³ See in particular Articles 18, 19 and 20 of OPCAT, which also refer to the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (eg the Paris Principles).

²⁴ Office of the Custodial Inspector Tasmania, *Annual Report 2018-2019* (Report, October 2019), 6.

²⁵ Office of the Custodial Inspector Tasmania, *Annual Report 2019-2020* (Report, October 2020), 6.

²⁶ Commonwealth Ombudsman, *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* (Report No 3, 2019), 42 [3.7]

concerning, which imply the Inspector will rely on (existing) resources of the Ombudsman's office to fulfil its functions. The Commission welcomes the commitment in the Explanatory Notes that 'the Inspector will have its own resourcing dedicated to the performance of its functions.'²⁷

Access to information

33. Article 20 of OPCAT requires that NPMs have access to all information concerning the treatment of people deprived of liberty. Clause 28 prevents the Inspector obtaining information that is cabinet-in-confidence. This limitation does not appear to be replicated in other Australian jurisdictions and without further justification, should be removed.

Recommendation 4: The Bill not prevent the Inspector accessing information that relates to proceedings of Cabinet or a committee of Cabinet.

Advice to government

34. The UN SPT has suggested that a NPM's legal framework should provide for outwardly-facing functions of the NPM, in addition to its visiting mandate, such as submitting proposals on legislation, advocacy, awareness raising and capacity building.²⁸ Further, NPMs should

publicize their opinions, findings and other relevant information to increase public awareness of the prevention of torture and ill-treatment.²⁹

35. As currently drafted, sections 21(2)(b) and s 22(3)(b)(ii) of the Bill only explicitly refer to the Inspector providing proposed changes to laws within reports.

Recommendation 5: The Bill make clear the Inspector may at any time submit proposals and observations on existing and draft legislation, and undertake public advocacy, awareness raising and capacity building.

²⁷ Explanatory Notes, Inspector of Detention Services Bill 2021 (Qld) 7.

²⁸ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *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 (12 December 2019), [21].

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, 30

Young people in watch-houses

36. In recent years, the prolonged detention of children in police watch-houses has been a significant human rights issue in Queensland. Watch-houses are not appropriate places of detention for children. The Commission is particularly concerned about the increasing numbers of children in the youth justice system, particularly the over-representation of Aboriginal and Torres Strait Islander children. This is likely to mean more children held in watch-houses for longer periods, due to limited space in detention centres.³⁰
37. The QPS Operational Procedures Manual currently provides for some safeguards regarding the detention of children in watch-houses, including that certain people are notified if a child is to be kept in custody in a watch-house longer than overnight.³¹ In light of the history of this issue in Queensland, the Commission suggests that the Inspector must be kept informed on the numbers of children being detained for prolonged periods. This should be legislated to ensure no erosion in protection over time.

Recommendation 6: The Bill require QPS to notify the Inspector if a child aged under 18 is detained overnight in any place of detention used by QPS.

Standards for young people in detention

38. The Bill lists the functions of the Inspector to include ‘prepare and publish standards in relation to carrying out inspections’. While not a statutory requirement, the Commission notes that the Western Australian, New South Wales and Australian Capital Territory inspectorates have all developed specific standards for young people.
39. In light of the risk of overcrowding in youth detention centres and the special protection children enjoy under the HR Act (s 26), informed by the United Nations Convention on the Rights of the Child, the Commission

³⁰ The number of children in the youth justice system has increased significantly over the previous 12 months. See for example Cloe Read, “Custody doesn’t solve everything”: State’s detention centres at or near full’, *Brisbane Times* (online, 18 November 2021) <<https://www.brisbanetimes.com.au/national/queensland/custody-doesn-t-solve-everything-state-s-detention-centres-at-or-near-full-20211118-p59a4c.html>>

³¹ Queensland Police Service, ‘Operational Procedures Manual Issue 84.2 Public Edition’ (Effective 8 November 2021), Chapter 16, 55-56.

recommends the Bill require the Inspector to develop specific standards for young people in detention.³²

Recommendation 7: The Bill require the Inspector to develop and maintain specific standards for young people in detention to inform its assessment of conditions of detention.

Critical incidents

40. The Bill is silent as to the Inspector holding functions in relation to critical incidents. In contrast, the ACT Inspector of Correctional Services can investigate such issues, and has made recommendations concerning serious fires and riots.³³
41. The Explanatory Notes suggest that functions of this kind including the investigation of riots, deaths and escapes are not in scope, because they will continue to be investigated through internal mechanisms. The Explanatory Notes do not explain why the Inspector, if it chose to, should not be able to investigate such incidents and why it is preferable for internal investigation options only. Crucial insights can be gained by closely scrutinising the response to critical events, as often these are tension points where the human rights of those incarcerated must be weighed up against competing priorities including the good order and security of the prison or detention centre.

Recommendation 8: The Inspector's functions under the Bill include the ability to investigate critical incidents.

Compatibility with human rights

42. The rights of staff and detainees must be considered in assessing the Bill and in how the Inspector discharges its functions.
43. As discussed in the Statement of Compatibility, the Bill limits several human rights including the right to privacy (s 25 of the HR Act) in allowing the Inspector to obtain material including confidential information, and enter any part of a place of detention. The Bill also limits the right against self-incrimination for a person required to provide information or answer

³² These standards should also consider other relevant international rules such as the United Nations Standard Minimum Rules of Prisoners (the Nelson Mandela Rules) and United Nations rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules).

³³ *Inspector of Correctional Services Act 2017 (ACT)*, s 17. See also ACT Inspector of Correctional Services, *Summary of all critical incident review recommendations and government responses*, (Report, 2021).

questions of the Inspector (limiting the right to fair trial (s 31) and rights in criminal proceedings in s 32).

44. As noted during the public briefing, the rights of staff are also relevant to the work of the Inspector. As a public entity under the HR Act, the Inspector must give proper consideration to human rights of all individuals, including staff. The safety of officers under the right to life (s 16) and right to security (s 29) would be particularly relevant.
45. As observed by the former Commonwealth Ombudsman, OPCAT is premised on the notion that ‘torture and ill-treatment can be prevented through a collaborative, construction and forward looking dialogue between detaining authorities and the national mechanism’. Further, that ‘it recognises that prevention is as much about staff safety and environmental safety as it is about detainee treatment and conditions.’³⁴
46. This is reflected in the work of other inspectors around Australia. For example, the Western Australian Inspector’s *Revised Code of Inspection Standards for Adult Custodial Services* notes basic principles of inspection include that ‘every person in prison is safe and secure, including prisoners, staff, service providers, and visitors’.³⁵
47. The Commission anticipates that the Queensland Inspector would adopt a similar approach.

Conclusion

48. Thank you for the opportunity to comment on the Bill, which the Commission supports subject to the above recommendations.

³⁴ Commonwealth Ombudsman, ‘Implementing OPCAT in Australia – an update from the Commonwealth Ombudsman’ (Speech, 7th Annual Prisons Conference, Melbourne, 2 August 2018)

³⁵ Office of the Inspector of Custodial Services (WA), ‘Revised Code of Inspection Standards for Adult Custodial Services’ (December 2020) 7.