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Office of the President

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lasc@parliament.qld.gov.au

Dear Committee Secretary

Inspector of Detention Services Bill 2021

Thank you for the opportunity to provide submissions in response to the Legal Affairs and Safety Committee's Inquiry into the Inspector of Detention Services Bill (**the Bill**).

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of members from the QLS Human Rights and Public Law Committee, Access to Justice and Pro Bono Law Committee and First Nations Legal Policy Committee whose members have substantial expertise in this area.

From the outset, QLS acknowledges the importance of establishing a robust legislative framework that protects the rights and freedoms of vulnerable individuals who have been detained. QLS supports the intention of an Inspector of Detention Services (**the inspector**), to promote and ensure the humane treatment and conditions of people detained. We note that the Bill enacts recommendations from a number of reviews into elements of Queensland's criminal justice system which have each recommended an independent inspectorate to oversee adult prisons, youth detention centres and police watch-houses.[1]

We consider that the introduction of an Inspector of Detention Services must be accompanied by adequate and ongoing resourcing. To be able to discharge the obligations of the Bill and

[1] See e.g. the Queensland Parole System Review Final Report (November 2016), available at: https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf; Queensland Review of Youth Detention Centres Report (April 2017) available at: http://www.youthdetentionreview.qld.gov.au/,

achieve the policy intent, the inspector will need to be provided sufficient financial resources and staffing. Accordingly, QLS is of the view that funding to the inspector should be contemplated within the legislation. We note that section 90A of the *Victorian Inspectorates Act 2011* (Vic) provides that the inspectorate's budget for each financial year is to be determined in consultation with the Parliamentary Committee. QLS has no firm view regarding how the Inspector is to be resourced and funded under the Bill. However, it is QLS's view that funding should be contemplated within the Bill to provide some guidance and assurance to the Inspector of Detention Services. This will also ensure that the Inspector of Detention Services is not completely subject to changing governments and political priorities.

1. Purpose

As outlined in clause 3, the purpose of the Bill is to promote the improvement of detention services and places of detention with a focus on:

- Promoting and upholding the humane treatment of detainees, including humane conditions of their detention; and
- Preventing detainees from being subjected to harm, including torture and cruel, inhuman or degrading treatment.

The Bill aims to achieve this purpose by providing a framework for the review of detention services and inspection of places of detention, and independent and transparent reporting.

We consider that the Bill as a whole should be compliant with the Optional Protocol on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**). The objective of OPCAT is to prevent the mistreatment of people in detention by establishing a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty.[2]

To properly give effect to Australia's obligations under OPCAT, we consider that clause 4 of the Bill should expressly state the purpose of preventing torture, cruel, inhuman and degrading treatment *or punishment*.

In our view, the Bill should also promote the human rights of people who are detained by making reference to the basic human entitlements and human rights afforded to people who are detained. For example, the purpose of the *Corrective Services Act 2006* (Qld) (**the Corrective Services Act**) is more robust. Section 3 of the Corrective Services Act provides that the purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders. The purpose of the Act also recognises basic human entitlements and the need to respect an offender's dignity and special needs.

In its current form, the Bill falls short of meeting certain aspects of the standards envisaged by OPCAT, including by significantly limiting the number of places subject to the inspector's jurisdiction. These concerns are expanded upon below.

[2] OPCAT art 1.

2. Definition of 'places of detention'

Clause 6 defines places of detention within the jurisdiction of the inspector to include a community corrections centre, a prison, a watch-house, a work camp and a youth detention centre. In our view, consideration should be given to expanding the range of places subject to inspections to better align with OPCAT.

Article 4 of OPCAT states that 'Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will…'[3]

We note that certain parts of detention facilities including solitary confinement and detention units, safety units, health centres, crisis support units, maximum security units, and remand facilities/areas likely already fall within the jurisdiction of the inspector. However this should be clearly articulated within the legislation, including by highlighting the vulnerability to torture and cruel, inhuman and degrading treatment associated with these aspects of prisons. Similarly, in our view, clause 5(c) should be amended to expressly apply to detainees who are transferred to a health service for treatment.

We note that the Explanatory Notes state that *detention service* does not include those people who are transported or detained for treatment or care under the *Mental Health Act* 2016 (Qld) nor the journey after arrest to a watch-house for processing. Further, consideration should be given to whether the inspector should have oversight over people who have been arrested (and are therefore detained by police), and people held in other types of facilities including mental health facilities and aged care facilities, particularly people who may be subject to restrictive practices.

For example, aged care facilities can be places where patients/consumers are deprived of their liberty, and reviews, including the Royal Commission into Aged care Quality and Safety, have highlighted the substandard monitoring of such facilities. In our view, these places house persons who may be particularly vulnerable to abuse and should therefore also be the subject of targeted reviews and inspections by the inspector.

3. Mandatory inspections

QLS supports regular liaison visits and monitoring of places of detention. However, we note that the mandatory inspections are subject to a limited scope. Clause 8(1)(c) provides that the inspector is to inspect each youth detention centre at least once every year, inspect each prison that is a secure facility at least once every five (5) years, and to inspect all or a part of a particular place of detention prescribed by regulation at least once every five (5) years.

The facilities subject to mandatory inspections are limited. Inspections will apply to three youth detention centres (Brisbane, Townsville and West Moreton) at least once a year. We consider that there is a need to include a wider range of facilities in the mandatory inspection scheme. In particular, consideration should be given to prescribing mandatory inspections for watch-houses and facilities in regional and remote areas to ensure that the inspector appropriately canvasses

[3] OHCHR | Optional Protocol to the Convention against Torture.

the jurisdiction. Whilst the Bill provides for mandatory inspections, including being able to inspect a particular place of detention prescribed by regulation at least once every five (5) years, we submit that further facilities who ought to be subjected to mandatory inspections should be set out in the Bill itself so there is certainty around the scope of these inspections.

Further, in our view, there is a need for mandatory inspections of secure facilities to be conducted more regularly than at least once every five (5) years. QLS notes that other Australian jurisdictions require regular mandatory inspections every two (2) to three (3) years.[4] Increasing the frequency of regular mandatory inspections of secure facilities is a proactive approach that assists in identifying systematic issues before they arise. Accordingly, QLS submits that the Bill should be amended to provide for more regular mandatory inspections of secure facilities.

Our members have suggested that these mandatory inspections may need to be conducted every 12 to 24 months.

We note that, if passed, the Act will be reviewed in five (5) years. If mandatory inspections of many facilities are only conducted every five years, the review will be unlikely to produce meaningful results. We consider that this factor weighs in favour of more regular inspections at the outset, which may be adjusted following the findings of the review.

4. Conducting inspections

a) The constitution of the inspecting team

Clause 9 provides that an inspector must, if appropriate and practicable, *arrange*[5] a person whom the inspector considers suitable to help the inspector carry out the review or inspection. In considering who is a suitable person, the inspector may have regard to:

- The cultural background or vulnerability of the detainee; or
- 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

In our view, these provisions could be strengthened with an inspecting team comprised of expertise and knowledge of particular cultural backgrounds and vulnerabilities of detainees.

In particular, there should be Aboriginal and Torres Strait Islander representation on the inspecting team. Similarly, the inspecting team should be gender balanced. This will assist in supporting cultural safety and ensure that vulnerable people are supported to reduce the risks of compounding trauma with these processes.

Consideration should also be given to requiring the inspecting team to include people with lived experience of incarceration or lived experience of detention for other purposes.

b) Conduct of inspections

During inspections, support persons, communication aids and other necessary technologies and supports should be provided to people who are detained to ensure they can adequately express themselves and the perspectives of people with disability are adequately represented.

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[4] *Inspector of Correctional Services Act 2017* (ACT) s 18(1); *Custodial Inspector Act 2016* (TAS) s 13; *Inspector of Custodial Services Act 2003* (WA) s

[5] As defined in Clause 9(8).

While sections 15(g) and (h) go some way in allowing an inspector to use equipment and support persons during an inspection, these powers are discretionary. The Bill should be amended to mandate the presence of a support person or the use of communication aids to ensure that detainees can express themselves and the views and experiences of persons with disability are heard.

Further, when detainees are being privately interviewed, any information they provide to the inspector should be de-identified and specifically protected from disclosure to ensure the detainee's safety. We suggest that Clause 28 ought to be extended in this regard and specifically apply to a person engaged to help carry out a review or inspection under clause 9.

Currently, clause 15(b) permits an inspector to speak to or interview a detainee, however, it is not mandatory. While the Bill should not make it compulsory for detainees to talk to the inspector, there should be some obligation on the inspector to attempt to engage with detainees in the course of an inspection. The current drafting of the provision may lead to circumstances where an inspector undertakes an entire inspection by talking only to prison guards and administrators, which may produce an unbalanced view of that place of detention. In our view, the inspector should be required to engage with people in detention, including a range of people to appropriately capture and reflect the social and cultural diversity of that place of detention.

Consideration should also be given to enabling an inspector in the conduct of their inspection to engage with persons outside the place of detention including, for example, family and/or community members of detained persons.

5. Implementation of Inspector's recommendations and accountability

The Bill contains provisions concerning the preparation and tabling of reports prepared by the inspector, including proposed recommendations. The provisions largely resemble existing provisions in the *Ombudsman Act 2001* (Qld) relating to adverse comment and natural justice.

However, there is no provision in the Bill that provides for the enforcement or implementation of the inspector's recommendations. We consider that the Bill should expressly provide for robust oversight mechanisms relating to the implementation of inspector recommendations, including outlining how the implementations of recommendations will be monitored and reported on. For example, the Bill might prescribe a requirement that detention facilities report to parliament on the implementation and status of previous inspector recommendations, and departmental responses to those recommendations.

Similarly, ministerial requests and actions taken in response to requests should be publicised in annual reporting. These provisions will ensure transparency.

6. Other recommendations

- QLS supports section 14(2) of the Bill, which provides that the inspector need not notify the person in charge of the place of detention or any other person of the proposed entry. In our view, some inspections should be conducted with no or minimal notice in order to be effective.

- We note from the Explanatory Note that the inspector's functions will not include investigating incidents such as riots, deaths and escapes or specific incidents or

complaints. These investigations will remain within the purview of other relevant agencies or bodies including Queensland Corrective Services, Queensland Police Services, the Department of Children, Youth Justice and Multicultural Affairs, the Crime and Corruption Commission and the State Coroner. In our view however, these matters should be considered by the inspector as they may be indicators of systemic issues or practices of torture and cruel, inhuman and degrading treatment within a detention facility, which are properly within the purview of the Inspector. In this regard, we note that the ACT Inspector has power under section 17 of the *Inspector of Correctional Services Act 2017* to review critical incidents at correctional centres or in the provision of correctional services. The Act relevantly defines critical incident to mean the death of a person, a person's life being endangered, an escape from custody, a person being taken hostage, a riot that results in significant disruption to a centre or service, a fire that results in significant property damage, an assault or use of force that results in a person being admitted to a hospital, and any other incident identified as a critical incident by a relevant Minister or relevant director-general.[6] According to the Explanatory Statement, the insertion of the definition of 'critical incident' aims to ensure 'accountability and public transparency of events that that may cause significant impact or harm in a custodial setting'.[7] QLS submits that similar provisions should be inserted in the Queensland framework to promote accountability and transparency of critical incidents.

- In addition to providing the inspector with the power to seek information or produce documents from the responsible officer of the place of detention or relevant health service, clause 13 of the Bill should provide that the inspector has power to seek information or documents from a third party that provides other services to a place of detention or a detainee, such as a rehabilitation or post-release service. Clause 15(1)(b)(ii) should be similarly amended.

- Clause 17 provides a power for the inspector to refer relevant matters to the Minister. Clause 17(1)(b) refers to circumstances where an inspector suspects that a detainee is being, or has been, subject to cruel, inhuman or degrading treatment at a place of detention. We submit that clause 17(1)(b) should refer to both torture and cruel, inhuman and degrading treatment *or punishment*, to reflect the OPCAT protections in their entirety.

- Further, while clause 17 provides a responsible officer an opportunity to make oral or written submissions and provide evidence about the relevant matter, it does not afford the same opportunity to the detainee or the person or persons who are the subject of the complaint. We consider that procedural fairness should be extended to both the detainee/s that are alleged to be subject to cruel, inhuman or degrading treatment and the person suspected of the mistreatment.

- We consider that clause 17 should include a legal consequence for a finding of cruel, inhuman or degrading treatment. Currently, after cruel, inhuman or degrading treatment is reported to the Minister, there is no further accountability provided for under the Bill.

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[6] *Inspector of Correctional Services Act 2017* s 17(2).
[7] Explanatory Statement, Inspector of Correctional Services Bill 2017 (ACT) 14.

Where the treatment does not meet the criminal burden of proof for torture and/or the elements of a tortious claim, there will be no legal consequence arising from this finding.

- Clause 61 provides that when exercising its functions, the inspector should have regard to the good order and security and the safety of any person at the place of detention. Our members have suggested that clause 61 should include a proportionality analysis that requires the considerations in clause 61 to be balanced against a legitimate purpose.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

Elizabeth Shearer
President