

Inspector of Detention Services Bill 2021

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Inspector of Detention Services Bill 2021 (the Inspector Bill).

In my opinion, the Inspector Bill is compatible with the human rights protected by the *Human Rights Act 2019* (Qld) (HR Act). I base my opinion on the reasons outlined in this statement.

Overview of the Bill

International law and Australian law recognise that all persons under detention or imprisonment are to be treated in a humane way. It is recognised that the observance of human rights is the most effective and safe way of managing detention environments. However, because such places are by nature closed institutions, often far from the public eye where one group of people have considerable power over another group, the potential for abuse and ill-treatment is always present.

Independent inspectorates seek to mitigate this potential for abuse and ill-treatment through the review and inspection of detention environments. The primary objective of independent inspectorates is to support the improvement of detention environments with a focus on promoting and upholding the humane treatment and conditions of people detained.

Independent inspectorates ensure accountability and transparency in the way that places of detention, and the people detained within them, are managed by providing the community with insight into detention environments.

In Queensland, there are multiple layers of accountability relating to the operation of places of detention provided by Queensland Corrective Services (QCS), the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) and the Queensland Police Service (QPS). However, there is currently no single body with the primary function of independent oversight of these places of detention, through a system of regular inspections that seek to scrutinise the operations of the environment with a view to promoting and upholding the humane treatment and conditions of the people detained.

Since 2016, there have been a number of reviews into elements of Queensland's criminal justice system that have, as part of their reviews, considered the existing layers of accountability over Queensland's places of detention. These reviews, including the Independent Review of Youth Detention, Queensland Parole System Review, Taskforce Flaxton and the Queensland Productivity Commission (QPC) Report – *Inquiry into imprisonment and recidivism*, have recommended the establishment of an independent inspectorate to oversee adult corrective services facilities, youth detention centres and police watch-houses.

The Inspector Bill establishes the Inspector of Detention Services (the Inspector) in Queensland, with the position to be held by the Queensland Ombudsman, and support for the

exercise of the Inspector's functions to be provided by staff from the Office of the Queensland Ombudsman.

The impetus for an independent inspectorate that promotes a detention environment that upholds the humane treatment and conditions of those detained is further supported by the existence and operation of the *Human Rights Act 2019* (Qld) (HR Act) in Queensland.

The inspectorate model established by the Bill is based on comparable independent inspectorate models, in particular that operating in Western Australia. It is also influenced by the current New South Wales, Tasmania and Australian Capital Territory models.

The Inspector will 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. This will be achieved by providing a framework for the review of detention services and inspection of places of detention, and independent and transparent reporting. The Inspector has a broad power to do all things necessary or convenient for, or in connection with, the performance of the Inspector's functions and to fulfil its preventative, proactive and independent mandate.

It is intended that the Bill will give effect to the Government's commitment to establish an independent inspectorate to oversee the adult corrective services system, youth detention and police watch-houses.

The Inspector has scope to oversee the following places of detention:

- a community corrections centre (defined in Schedule 4 of the *Corrective Services Act 2006* (Qld) (CSA));
- a prison (defined in Schedule 4 of the CSA);
- a watch-house;
- a work camp (defined in Schedule 4 of the CSA); and
- a youth detention centre (a centre established under section 262 of the *Youth Justice Act 1992* (Qld)).

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 HR Act)

In my opinion, the human rights that are relevant to the Bill are:

- Protection from torture and cruel, inhuman or degrading treatment (section 17);
- Freedom of movement (section 19);
- Privacy and reputation (section 25);
- Right to liberty and security of person (section 29);
- Humane treatment when deprived of liberty (section 30);
- Fair hearing (section 31);
- Rights in criminal proceedings (section 32); and
- Right to health services (section 37).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

(a) the nature of the right

Right to privacy and reputation (section 25)

Section 25 of the HR Act protects a person from unlawful or arbitrary attacks on their privacy, family, home or correspondence (written or verbal) and from unlawful attacks on their reputation. The scope of the right is broad, and the underlying value of the right is the importance of protecting a person's freedom from the unjustified involvement of public authorities in their private sphere.¹

The concept of 'privacy' is not defined in the HR Act. It has been interpreted to encompass information privacy, including personal information and health records and correspondence, and extends to an individual's private life, including a person's identity and physical and mental integrity.² Privacy can also include an individual's geographical or spatial privacy and property, which may be affected by the ability of the Inspector to have free and unfettered access to all parts of a place of detention.

Information can be considered private if the individual has a reasonable expectation of privacy when considering all relevant circumstances. The *Information Privacy Act 2009* (Qld) identifies personal information as being information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. With regard to health information, confidential information is defined as information about a person who has received a public sector health service, and could identify the person (section 139, *Hospital and Health Boards Act 2011* (Qld)).

Privacy as it relates to personal information, including health information, and collection or access to data about an individual, will be limited by the Inspector being able to require and request information about a detention service or place of detention (clauses 12 and 13 of the Bill), including the ability to request health information (clause 13(3) of the Bill). Clause 27 allows for a person to disclose to the Inspector any information, including confidential information, that is relevant to the Inspector performing a function under the Act, which will limit the right to privacy of the individuals to whom the disclosed information relates.

The Inspector or an officer involved in the administration of the Act can disclose or use confidential information about an individual in certain circumstances, including where the disclosure is permitted under another law (clause 30(3)). The Inspector may disclose confidential information to any person or the public in relation to the performance of a function if the Inspector believes on reasonable grounds that disclosing the information is in the interests of any person or otherwise in the public interest (clause 31). The disclosure of confidential information under clauses 30 and 31 will limit the right to privacy of the individual to whom the confidential information relates.

¹ *Director of Housing v Sudi* [2010] VCAT 328 [29].

² *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [619].

The requirement that the Inspector prepare and publish reports under Part 3 may also limit the right to privacy to the extent that reports may contain personal information about an individual.

The Inspector will be able to request or require footage of a search carried out on a detainee (clauses 13 and 15), which will limit that individual's right to privacy with regard to bodily autonomy.

The right to privacy as it relates to a person's spatial privacy will be limited by the power of the Inspector to enter a place of detention at any time to carry out a review or inspection (clause 14), which would allow an Inspector to enter a detainee's personal space, such as a prison cell, at any point in time. The Inspector does not require the consent of the detainee to enter a space where they are detained.

The right to privacy has been interpreted to encompass an individual's name, and disclosure of a name can amount to a limitation of the right.³ As such, the requirement that an officer presents an identity card when performing a function will also limit the right to privacy of the officer (clause 46).

The right protects a person's reputation from being unlawfully attacked, which is an attack that is intentional and based on untrue allegations and is not authorised by a law. In preparing reports, the Inspector may disclose information or set out an opinion that is expressly or impliedly critical of another person or public sector entity (clause 24). At least six weeks prior to giving the report to the Speaker for tabling, the Inspector must give a draft copy of the report to such a person or entity, and the person or entity may provide a written submission in response to the report. While the Inspector is not bound to amend its report based on a submission, the report must include a statement that adequately reflects any submission received. If a report by the Inspector contains an opinion that unlawfully attacks an individual's reputation, the right to reputation will be limited.

The right to freedom of movement (section 19)

The right to freedom of movement provides that every person lawfully within Queensland has the right to move freely within the state. This right can be engaged where a person's movements are restricted, without reaching the threshold of the person being physically detained (which would interfere with a person's right to liberty). The right fundamentally values freedom.

The right to freedom of movement will be limited by the power of the Inspector to require a person to stay in one place to answer questions or produce documents. This is relevant to the Inspector's power in clause 12(2) to require a person who is employed or engaged to provide a detention service at a place of detention to attend before the Inspector and answer relevant questions. The person must comply with this requirement unless they have a reasonable excuse (clause 12(3)). Under clause 15(1)(b), the Inspector may speak to or privately interview: a person who is detainee; a person involved in providing a detention service for the place of detention; an official visitor who is assigned to visit the place of detention under the CSA in the case of a community corrections centre, prison or work camp; or another person at the place of detention, for the purposes of a review or inspection. A person involved in providing a detention service at the place of detention must help the Inspector to carry out a power, including by giving information, unless the person has a reasonable excuse (clause 16). This

³ *DPP v Kaba* (2014) 44 VR 526; [2014] VSC 52 [447].

means that an individual could be penalised if they left an area when the Inspector required them to provide more information.

The right to a fair hearing (section 31); the rights in criminal proceedings (section 32)

The right to a fair hearing provides a person charged with a criminal offence or party to a civil proceeding with the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The privilege against self-incrimination is an integral part of an individual's right to a fair hearing⁴.

An individual's rights in criminal proceedings include that a person cannot be compelled to testify against themselves or to confess guilt when charged with a criminal offence, reinforcing an individual's right to refrain from incriminating themselves.

Though the right to fair hearing and rights in criminal proceedings refer to applying when a hearing is underway or an individual has been charged with a criminal offence or is a party to a civil proceeding, case law indicates that the right against self-incrimination is engaged prior to the possibility of a trial or any charges being laid. The issue was considered in *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [162], where it was determined that an individual's right against self-incrimination can be infringed where statements made by the individual prior to any charges being laid are subsequently used in criminal proceedings.

Clauses 12 and 16 require a person to comply with a requirement by the Inspector to provide information or produce a document, or to provide reasonable help to the Inspector to exercise a power, unless the person has a reasonable excuse. Clauses 12(4) and 16(4) explicitly provide that it is not a reasonable excuse for a person to fail to comply with a requirement if complying may incriminate the person or expose them to penalty. This limits an individual's right to a fair hearing and rights in criminal proceedings in relation to the right against self-incrimination.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the proposal is to promote the improvement of detention services and places of detention in Queensland. It does this by establishing the framework for the Inspector to review detention services and inspect places of detention, and to monitor and independently report on detention services and places of detention. In this way, the proposal helps to promote the rights to protection from torture and cruel, inhuman or degrading treatment (section 17) and humane treatment when deprived of liberty (section 30). An individual's right to access to education (section 36) and right to access to health services (section 37) will also be promoted by the exercise of the Inspector's functions to identify systemic issues and make recommendations to ensure that people in detention are given adequate access to health and educational services, where appropriate.

The right to protection from torture and cruel, inhuman or degrading treatment (section 17) is a non-derogable right at international law. The right prohibits three distinct types of conduct:

⁴ *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415; [2009] VSC 381.

torture; cruel, inhuman or degrading treatment or punishment; and medical or scientific experimentation or treatment without consent.

The proposal helps to ensure that the State meets the positive obligations contained in section 17 which compels the State to take steps to prevent and to minimise the risk of occurrence of acts of torture and cruel, inhuman and degrading treatment, even where the acts are committed by persons acting in a private capacity, and to investigate allegations of such conduct by public entities.⁵

The right to humane treatment when deprived of liberty (section 30) recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. It complements the right to be free from torture and cruel, inhumane and degrading treatment or punishment. As with the Inspectorate framework itself, the right is not focused on specific incidents of ill-treatment but on the general conditions of detention. The proposal will assist the State in meeting its obligation of ensuring that detained persons are treated with dignity and humanity, in a similar manner to its promotion of the right to protection from torture and cruel, inhuman or degrading treatment

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The right to privacy and reputation (section 25)

The limitations on the right to privacy related to access to information, footage of searches and access to any part of a place of detention will achieve the purpose by assisting the Inspector to develop a full and accurate understanding of how a place of detention operates. Free unfettered access to a wide range of information that relates to the treatment of people in places of detention, including an individual's health or other records during their period of detention and footage of searches, as well as unfettered access to all parts of a place of detention, will allow the Inspector to make assessments about the adequacy of services being provided to detainees, and the general care, healthcare and education services provided to people being detained. This will assist the Inspector to identify systemic issues that may need to be addressed in order to improve detention environments.

For example, the provision of an individual's health information to the Inspector will limit that individual's right to privacy through the disclosure of their personal information. However, the Inspector may use this information to understand how places of detention manage the health issues of detained people and, in turn, identify systemic issues that require change for the purpose of ensuring the improvement of detention environments which will ultimately promote the right of individuals to humane treatment when deprived of liberty.

The ability of the Inspector to access any part of a place of detention at any time, which limits a detainee's right to privacy in relation to spatial privacy, will allow the Inspector to obtain a full and accurate picture of how a place of detention operates, particularly regarding the conditions of detention. The Inspector will be able to use the information obtained through the exercise of these powers to make recommendations directed at improving the detention

⁵ 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 at [2], [8], [10]–[11] and [14].

services and places of detention, ultimately promoting the humane treatment of persons deprived of their liberty.

The limitation of the right to privacy related to the ability of the Inspector or an officer involved in the administration of the Act to disclose confidential information in limited circumstances helps to achieve the purpose as it will assist the Inspector to promote the transparency and accountability of the management of places of detention.

Similarly, the ability of the Inspector to prepare and publish reports that may contain personal information or opinions that may be critical of an agency or an individual limit the right to privacy but help to improve detention services and places of detention by increasing the accountability and transparency of detention services and places of detention.

The right to freedom of movement (section 19)

Requiring individuals, such as people employed by detention services, to remain in a location to answer questions will limit their right to movement. However, the limitation will achieve the purpose as it will allow the Inspector to gather information efficiently and directly from individuals with direct experience of the place of detention. Receiving information directly from individuals in this way will allow the Inspector to form an accurate view about how a place of detention functions, and of the experiences of detained individuals, including their treatment and the conditions they experience while detained.

This will ensure that the Inspector can obtain a full and accurate picture of how a place of detention operates, which will assist the Inspector in purpose of improving detention service and places of detention in Queensland.

The right to a fair hearing (section 31), the rights in criminal proceedings (section 32)

The Bill allows the Inspector to collect accurate and first-hand information from those working within the detention system. This will provide the Inspector with the ability to obtain a full and accurate picture of how a place of detention operates. Requiring that any requested information must be provided, even where the information may incriminate the individual, allows for full transparency and assists the Inspector in performing its functions to ensure the improvement of places of detention and detention services in Queensland.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

Right to privacy and reputation (section 25)

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill. There are a number of safeguards in the Bill which lessen the extent of the limitation of the right to privacy. To ensure confidentiality of information, clause 30 provides that any person who has acquired or has had access to confidential information through the administration of the Act must not disclose or use the information, except in limited circumstances which are explicitly defined in the Act. A penalty applies where information is disclosed unlawfully. Where the Inspector discloses confidential information to an entity to be dealt with as a complaint, the Inspector must first seek the consent of the individual who would be the complainant prior to disclosing any information to the entity and cannot disclose the information if the individual does not consent (clause 20(5)).

Clause 32 of the Bill applies to confidential information acquired under the Bill and provides that the confidential information, or any confirmation or other thing obtained as a direct or indirect result of that information (being ‘derived evidence’) cannot be accessed under any order, whether of a judicial or administrative nature, and is not admissible in any proceeding. Further, a person cannot be compelled to produce the confidential information or derived evidence, or give evidence relating to the confidential information or derived evidence, in any proceeding or in compliance with a requirement under an Act or legal process.

Further, the Inspector must take into consideration a number of factors when deciding whether to disclose confidential information in the interests of an individual or in the public interest (clause 31). Clause 23(2) outlines specific considerations for the Inspector to take into account when determining whether there is a public interest against disclosing information. For example, there is a public interest against disclosure of confidential information if its release may lead to the identification of an individual or pose a risk to the health and safety of an individual.

Regarding the right to reputation, if the Inspector intends to make an adverse comment about an individual or an entity in a report, the individual or entity must be given an opportunity to make a submission, which the Inspector must adequately reflect in the report (clause 24). This mitigates the extent of the limitation on the right to privacy.

The right to freedom of movement (section 19)

In relation to the limitation on the right to movement identified in circumstances where the Inspector requires a person who is employed or engaged to provide a detention service at a place of detention to attend before the Inspector and answer relevant questions (clause 12), there are no less restrictive or reasonably available ways to achieve the purpose. The power of the Inspector to require an individual to remain in a place to answer questions or provide information allows the Inspector to obtain accurate information directly from an individual without the risk of another individual, such as a supervisor or manager, interfering with an individual’s ability to answer a question truthfully or provide accurate information.

The right to a fair hearing (section 31), the rights in criminal proceedings (section 32)

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill without limiting the rights to fair hearing and the right against self-incrimination. The primary objective of the Inspector is to promote the improvement of places of detention, which is achieved through independent and transparent reporting. If individuals were able to refuse to answer questions or produce documents or information, particularly where such information may incriminate the individual, this would undermine the Inspector’s ability to build a full and accurate picture of a place of detention in order to assess how detainees are being treated.

The Bill contains safeguards which mitigate the extent of the limitation on the right to self-incrimination. Clause 49 states that if an individual gives information to the Inspector in response to a requirement, evidence of the information and any other evidence that may be derived from the information is not admissible in any proceeding against the individual to the extent that it would incriminate the individual or expose the individual to a penalty. However, the information may be admitted as evidence in proceedings about the false or misleading nature of the information (clause 49(3)). This is to facilitate honesty and transparency in the provision of information.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, I consider the importance of the purpose of the Bill which includes promoting the improvement of places of detention and detention services, with a focus on preventing harm by promoting and upholding the humane treatment and conditions of people detained, outweighs the limitation on the rights to privacy, movement, fair hearing and the right against self-incrimination.

I consider that the safeguards mentioned above mitigate the extent of the limitations. After weighing up the purpose and the extent of the limitations on rights, I consider that the importance of the purpose far outweigh the limitations described above.

- (f) any other relevant factors

None.

Conclusion

In my opinion, the Inspector of Detention Services Bill 2021 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

SHANNON FENTIMAN MP

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