



ALS

Aboriginal Legal Service (NSW/ACT) Limited

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Director, Law Enforcement and Crime
Policy, Reform and Legislation Branch
NSW Department of Communities and Justice
GPO Box 31
SYDNEY NSW 2001
via: policy@justice.nsw.gov.au

Dear Director,

Statutory Review of the *Inspector of Custodial Services Act 2012 (NSW)*

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') welcomes the opportunity to provide feedback to the statutory review of the *Inspector of Custodial Services Act 2012 (NSW)* ('the Act').

The ALS is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS currently undertakes legal work in criminal law, children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as referral to further support services.

We provide this brief submission based on our direct involvement with and representation of Aboriginal and Torres Strait Islander people who interact with the justice system. In addition, this submission has arisen from concerns about the disproportionate imprisonment rate of Aboriginal and Torres Strait Islander people in NSW and the particular vulnerability of Aboriginal and Torres Strait Islander people to ill-treatment in places of detention.

Effective monitoring and oversight is critical to ensuring the adequate treatment of people held within places of detention. The *Inspector of Custodial Services ('ICS')* plays a crucial role in providing scrutiny of the conditions, treatment and outcomes for adults and young people in custody throughout NSW.

With the recent ratification of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (OPCAT)*¹

¹ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force

by the Australian Government in December 2017 the ALS considers that it is important to assess the operation of existing inspection processes against the OPCAT core principles. Within NSW, the ICS is currently the best-placed body to fulfill obligations under OPCAT, however there are a number of areas which could be strengthened to ensure that the ICS is fully OPCAT compliant. These key issues are outlined below.

The role of the Inspector of Custodial Service

The ICS is a statutory office established by the Act. The role of the ICS is to inspect adult correctional facilities and juvenile justice centres within NSW, and report to Parliament on the findings of these inspections. Under the Act, the ICS is required to inspect each adult custodial centre at least once every five years and each juvenile justice centre and juvenile correctional centre at least once every three years. The ICS can review any custodial service at any time. In addition, the ICS oversees official visitor programs under the *Crimes (Administration of Sentences) Act 1999* and *Children (Detention Centres) Act 1987*.

The powers of the ICS are broad, and include that the Inspector:

- is entitled to full access to the records of any custodial centre (including health records);
- may visit and examine any custodial centre at any time;
- may require custodial centre staff members to supply information or produce documents or other things relating to any matter;
- may require custodial centre staff members to answer questions relating to a custodial centre's operations;
- may refer matters relating to a custodial centre to other appropriate agencies for consideration or action; and
- is entitled to be given access to persons in custody, detained or residing at any custodial centre for the purpose of communicating with them.²

The ICS is based within the Department of Communities and Justice (DCJ) with administrative and other functional support being provided by the department. The work of the ICS sits alongside a number of other bodies and programs which undertake inspections and oversight functions in NSW including, the NSW Ombudsman, official visitor programs and the Commonwealth Ombudsman and Australian Human Rights Commission.

22 June 2006). At <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> (viewed 19 January 2020).

²*Inspector of Custodial Services Act 2012 (NSW), s7.*

Strengthening oversight and the role of the Inspector of Custodial Services

The ALS welcomed OPCAT ratification as a significant step towards enhancing oversight of Australian places of detention, and improvement of conditions.

Following OPCAT ratification, the Australian Government is now required to create a national system of visits to all places of detention where people are deprived of their liberty. The national system must be established by the end of 2020 and the Australian Government has noted a desire for the National Preventative Mechanism (NPM) to be developed in a way which enables “states and territories to harness and adapt existing inspection mechanisms”.³

In this context, it is important to consider the Act and the role of the ICS against the OPCAT core principles.

Functional independence, adequate resourcing and full access to information

Under OPCAT any inspection mechanism is required to be functionally independent, have full access to the information and be provided with adequate resources from the State to effectively carry out their functions.⁴

The ALS notes that whilst the ICS, importantly, has a statutory mandate, the office still functionally sits within DCJ, the same department within which Corrective Service NSW is housed. In order to provide adequate monitoring and oversight of all custodial settings within NSW, it is important that the ICS has both organisational and functional independence. As a result, the ALS recommends the ICS should sit outside of DCJ to ensure proper independence.

It is also important that the ICS is granted full access to information to be able to effectively undertake their work. Currently under the Act it is unclear whether the ICS is guaranteed full access to the records of all custodial centres or provided with the opportunity to undertake *private* interviews with individuals being held in custody. In addition, the Act is currently lacking strong provisions of privilege, confidentiality and privacy for staff or detainees who report on the treatment and conditions of custodial centres. This raises some concerns about the extent to which powers of access to information are provided to the ICS through the Act. The ALS recommends reviewing the Act with a focus on strengthening access to information

³ Australian Human Rights Commission (2017), OPCAT in Australia Consultation Paper, p.8. Accessed 15 January 2019, via <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-2017> (viewed 15 January 2019).

⁴ Article 18.1 of OPCAT notes that national preventative mechanism’s (NPM) must be functionally independent in order to carry out proper oversight of places of detention; Article 20(a) & 20(b) of OPCAT requires full access to information regarding the number of people in detention and the records of treatment and conditions; Article 20(d) of OPCAT provides that NPM should have the opportunity to have private interviews with persons in detention or any other person who may supply relevant information; Article 21.2 of OPCAT guarantees that confidential information collected by the NPM shall be privileged.

and putting in place appropriate safeguards for individuals who provide witness reports on the state of detention conditions.⁵

Previous Inspectors have noted that resource constraints have hampered the ICS' ability to meet legislative obligations, including making the regular site visits and inspections outlined in the Act, and monitoring of progress against recommendations made in previous reports.⁶ Given that the ICS is the primary oversight body for custodial settings in NSW, it must be properly resourced to fulfill its mandate.

Frequency of visits

As noted above, under the existing Act the ICS is required to inspect adult detention facilities at least once every five years and juvenile detention facilities at least once every three years; however they also have the power to inspect a custodial setting at any time. Under OPCAT there is no specific mandate on the frequency of inspections, provided that there is no restriction on frequency. The ALS recommends clarification of the decision-making process whereby additional inspections of custodial settings are undertaken.

The ALS notes that the current legislative requirements around frequency of visits in NSW appears to be quite low, however there have been some reports that indicate the custodial environments are being inspected at a higher rate than what is currently mandated.⁷ The ALS seeks further clarity around the frequency and thoroughness of inspection visits currently being undertaken by the ICS. As highlighted above, it is important that an appropriate balance is struck to ensure that custodial facilities are regularly inspected and that the ICS is also appropriately resourced to meet these obligations.

Response to reports / enforcement

In order for an oversight and monitoring body to be effective, it is important that there is a capacity to have urgent recommendations addressed promptly by the relevant decision-makers, including ministers, departments, agencies and non-government providers. As a result, the ALS proposes that the Act should be amended to include an obligation on authorities to examine the ICS' recommendations and enter into dialogue regarding implementation measures.

Currently, there is a requirement within the Act that draft reports must be provided to the responsible Minister who is to be given reasonable opportunity to make

⁵ Inspector of Custodial Services Annual Report 2014-15, p. 14. Accessed 15 January 2019, via <http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202014-15.pdf> .

⁶ Inspector of Custodial Services Annual Report 2014-15, p. 14. Accessed 15 January 2019, via <http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202014-15.pdf> .

⁷ Commonwealth Ombudsman (2019), Implementation of the Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline of Australia's OPCAT Readiness. Report No. 03/2019. Accessed 15 January 2020 via https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf

submissions.⁸ However, in its finalised form, the report need only be tabled in Parliament meaning that there is no obligation to engage government stakeholders nor for those stakeholders to respond or action the Inspector's report. To improve detention conditions it is critical that Parliament both acknowledge and engage with the report and recommendations of the ICS and their staff.

Effective oversight of all custodial settings in NSW

It is critically important that there is effective oversight of all custodial settings throughout NSW, including court cells and police cells, regardless of which justice agency has responsibility.

Currently under section 3 of the Act a 'custodial centre' is defined as:

- (a) a correctional centre (including a juvenile correctional centre, a managed correctional centre and a periodic detention centre),*
 - (b) a residential facility,*
 - (c) a transitional centre,*
 - (d) a juvenile justice centre*
- but does not include any police station or court cell complex that is not managed by Corrective Services NSW or Juvenile Justice.*

If the ICS is not responsible for the oversight of any police cells and court-cell complexes which are not managed by Corrective Services NSW or Juvenile Justice, it must be clear exactly which agency is responsible. The ALS recommends that consideration be given to whether sufficient powers and responsibilities currently exist for the oversight of places of detention operated by NSW Police, including police cells.

In addition, the ALS notes that it is important that the Act enables the ICS to provide external scrutiny to the standards and operational practices of all custodial settings, regardless of whether they are publicly or privately operated. The NSW Government has previously publicly noted that throughout the State, whether managed directly by Corrective Services NSW or contracted out to a private operator, the accountability and oversight of places of detention should lie with Corrective Services NSW.⁹ It is important that this accountability is clearly reflected in the Inspector's oversight scope. The ALS recommends that the Act's definitions be reviewed and amended where necessary to ensure this.

Representation of ethnic and minority groups

⁸ *Inspector of Custodial Services Act 2012 (NSW)*, s12 & s14.

⁹ *NSW Government's Response to the Parklea Correctional Centre and other operational issues report no. 38 (2019)*. Accessed 15 January 2020 via:
<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2470/Parklea%20and%20other%20operational%20matters%20-%20NSW%20Government%20response.pdf>

The OPCAT core principles require that any NPM ensure that ‘the experts of the NPM have the required capabilities and professional knowledge’ and there should be a gender balance and adequate representation of ethnic and minority groups on all oversight bodies. The ALS proposes that the Act specifically make provision for the adequate representation of Aboriginal and Torres Strait Islander people, ethnic and minority groups. Further, Aboriginal and Torres Strait Islander people are clearly over represented within the NSW criminal justice system. This could include representation in the role of Inspector itself, the staff of the ICS and/or any advisory bodies connected to the work of the ICS.

Building trust between Aboriginal and Torres Strait Islander people in detention and the ICS is vital to facilitating open communication and transparency throughout the inspection process, including interviews with people in detention. In addition, increasing the representation of ethnic and minority groups on the Inspector’s staff would heighten the likelihood of culturally appropriate services and interactions between those in custody and inspecting staff.

Importance of providing space for the voice of young people

In recognition that the needs and rights of children and young people are different to those of adults, it is important to tailor the inspection framework to ensure children and young people’s voices are heard throughout the process.

Currently Aboriginal and Torres Strait Islander children make up 44.3% of children in NSW prisons.¹⁰ Aboriginal and Torres Strait Islander children will often experience difficulties trusting adults of authority. As a result, it is critical that the Act facilitates a safe and constructive atmosphere for Aboriginal and Torres Strait Islander children to engage with the ICS and their staff.

There are currently a number of other statutory bodies in NSW which focus on promoting the wellbeing and participation of children and young people. For instance, the NSW Advocate for Children and Young People (ACYP) conducts, promotes and monitors research into issues affecting children and young people. Despite this, the ACYP does not have a formal independent inspection role, and thus it is important that the ICS works in tandem with other agencies in NSW to develop child-friendly inspection processes.

¹⁰ NSW Bureau of Crime Statistics and Research (2019), NSW Custody Statistics: September 2019, Accessed 23 January 2020, via: <https://www.bocsar.nsw.gov.au/Documents/custody/NSW%20Custody%20Infographic.pdf>

Conclusion

The ICS plays a critical role in providing scrutiny of the conditions, treatment and outcomes for adults and young people in custody throughout NSW. However the ALS has identified a number of areas where the existing legislation could be strengthened to ensure the breadth and scope of the ICS' role enables thorough and independent oversight of all custodial settings in NSW. In particular, the ALS believes that the role of the ICS would be strengthened by a consideration of the Act against the OPCAT core principles.

In particular the ALS recommends that the Act be reviewed with a focus on considering how to enhance the functional independence of the ICS, ensuring full access to information alongside appropriate safeguards for witnesses and clarifying the scope and breadth of the ICS' work. In addition, consideration should be given to developing child-friendly inspection processes and increasing the representation of Aboriginal and Torres Strait Islander people, and other ethnic and minority groups, in the ICS staff and advisory bodies associated with the work of the ICS.

Yours faithfully,



Karly Warner
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