



**ACT Office of the Inspector of Correctional Services
submission to statutory review of the
*Inspector of Correctional Services Act 2017***

September 2023

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Introduction

The ACT the Inspector of Correctional Services (“the Inspector”) welcomes the opportunity to participate in the statutory review of the *Inspector of Correctional Services Act 2017* (ICS Act), which is an opportunity to reflect on the significant work of the office of the Inspector (OICS), and identify where improvements to the legislative framework can be made.

History

The ACT Inspector of Correctional Services was established in 2018 to provide independent oversight of ACT correctional and youth justice facilities, focusing on continual improvement and prevention of ill-treatment. The Inspector was created in response to a number of critical incidents that had occurred at the Alexander Maconochie Centre (AMC), since it opened in 2009. In particular, the tragic death of Mr Steven Freeman, a 25-year-old Aboriginal man at the AMC on 27 May 2016 prompted an independent inquiry to look into his treatment and care. Mr Philip Moss AM was appointed and conducted a review that made a number of recommendations, including setting up independent review of critical incidents. The ACT Government’s response to the Moss review included a commitment to establish an Inspector of Correctional Services.

Although the Moss review was the immediate precursor to the establishment of the Office of the Inspector, stakeholders had previously called for a prison inspectorate, including the ACT Human Rights Commission. The establishment of a preventive oversight entity was particularly timely, given Australia ratified the Optional Protocol to the Convention Against Torture (OPCAT) in December 2017, which requires jurisdictions to establish or designate independent entities to provide preventive oversight of places of detention.

Objects of the Act

The main object of the Act, as set out in s 6, is to “promote the continuous improvement of correctional centres and correctional services” by providing a framework for systematic review and independent and transparent reporting. In OICS view, the objective and approach as currently articulated remain relevant and appropriate.

Role

The Inspector does not handle individual complaints, or conduct advocacy, but works cooperatively with oversight entities that do, in order to identify systemic issues, make recommendations, and work constructively with detaining authorities to address these issues.

The Inspector provides oversight through conducting reviews of ACT correctional facilities and services, and reviewing critical incidents. Initially this was limited to adult correctional facilities and services. However, in December 2019 this expanded to youth justice, including oversight of Bimberi Youth Justice Centre. Additional funding was not initially provided for this expansion. Changes in the 2023-24 Budget has supported OICS conversion of a temporary contract position, previously funded out of OICS operational budget, into a permanent full-time position.

As a public authority under the *Human Rights Act 2004*, OICS must act compatibly with human rights and in making a decision, give proper consideration to relevant human rights. Relevant rights are likely to include the protection from cruel, inhuman or degrading treatment or punishment (s 10), right to humane treatment while deprived of liberty (s 19) and rights of the child (s 11).

Reviews carried out by the Inspector are conducted against the Inspector's [published inspection standards](#), which set out the expectations for treatment and care, and indicators that help assess whether expectations are being met. The standards give OICS an independent tool to assess whether ACT detention facilities and services adhere to the healthy prison test that was developed by the World Health Organization and is used as the foundation for prison and youth detention inspection standards in other jurisdictions.

The Standards are tailored for the ACT's unique conditions: a small jurisdiction, operating under human rights legislation, and at the time of writing, with one adult correctional facility and one youth detention centre that detains both remand and sentenced people, women and men.¹ The ACT Standards have been recognised in academic literature as appropriately applying a human rights lens, in that 'the ACT Standards for Adult Correctional Services provide an excellent model for national guidance that should replace the Guiding Principles [for Corrections in Australia]'².

The methodology for conducting reviews draws on internationally accepted good practice approaches for preventive detention monitoring, as set out in the OPCAT and reflected in guidance of the UN Subcommittee for the Prevention of Torture (SPT).

The Inspector's Review Framework requires engagement with a range of stakeholders including detained adults, detained children and young people, ACT Corrective Services including Corrections Officers, the Community Services Directorate including Youth Detention Officers, Justice Health, other oversight entities, civil society organisations, and others. OICS seeks to engage with a wide range of stakeholders to inform our reviews.

Key Achievements

Since its inception, OICS has completed two Healthy Prison Reviews (HPRs) of the AMC and one Health Centre Review (HCR) of the Bimberi Youth Justice Centre (Bimberi), as well as 14 critical incident reviews, many of them complex and lengthy. The work of OICS has touched upon nearly every aspect of detention across our areas of responsibility. In these reviews OICS has made approximately 200 recommendations, and the Government has agreed or agreed in principle/in part to approximately 95 per cent.

In early 2024 OICS will commence work on the second HCR of Bimberi, which must be tabled in the ACT Legislative Assembly by 7 December 2024.³ This is a whole of centre review and is carried out against OICS ACT Standards for Youth Detention Places.

While the OPCAT informed the development of the ICS Act, there have since been considerable developments in the implementation of the OPCAT in the ACT and Australia. With OPCAT in mind, and based on OICS' experience applying the ICS Act over several years, the Inspector makes several recommendations on how the Act may be improved to meet its objectives.

At the outset, OICS wishes to emphasise the positive practices by staff and detaining authorities highlighted in our reports to date, and acknowledge that staff operate in an environment that is at

¹ Noting that Bimberi is known as a 'youth justice centre'.

² Anita Mackay 'Human rights guidance for Australian prisons: Complementing implementation of the OPCAT' (2020) 46(1) *Alternative Law Journal*.

³ In accordance with the requirements of s18(1)(a) of the ICS Act.

times difficult. The recent impact of COVID-19 has made this work even more challenging. There is a significant commitment across the ACT Government and broader community for an effective, accountable and transparent justice system for those deprived of their liberty.

Even when not explicitly discussed in our reports, OICS is always cognisant of the impact of crime on victims. Further, detained people are often victims of crime themselves both prior to coming into custody and in some cases, during their time in custody. Ultimately, places of detention that humane and where successful rehabilitation of offenders can occur are a critical part of protecting our community into the future.

Recommendations

Legislated Structure

- That in order to fulfil her role appropriately, the Inspector should be an Officer of the Legislative Assembly with commensurate increase in resources.
- The functions of the Inspector be amended to provide greater flexibility and independence as to how the Inspector achieves the objects of the Act. This should include those relevant to preventing torture and other cruel, inhuman or degrading treatment or punishment consistent with obligations of a OICS as a National Preventive Mechanism under the Optional Protocol to the Convention Against Torture.
- The Act provide additional flexibility as to what the Inspector considers to be a ‘critical incident’ requiring a review.
- The Inspector continue to be required to table periodic reviews and formal critical incidents reports in the Legislative Assembly, but not be required to table all reports she produces.
- For those reports that continue to be tabled in parliament, the Act is amended to provide a mechanism for them to be tabled when the Legislative Assembly is not sitting.
- That the Act include greater flexibility in determining timeframes for comments on draft reports such as requiring a ‘reasonable time’ for comment.
- The Act require the Government to formally respond to tabled reports within a specified timeframe.
- The prescribed requirements in s 27(2) are removed and instead the Inspector should be required to ensure that the contents of any report meet the objects of the Act.
- The inspector no longer be required to examine and review correctional services every 2 years.
- The power for the Minister to make guidelines under s 20 of the ICS Act is repealed.
- The types of detrimental actions protected by s 26 of the ICS Act are broadened to include all likely action taken against a detained person, and that the government consider providing an additional civil complaints process for such action.
- The Act be amended to expressly provide that the Inspector cannot be compelled to produce or disclose documents and information received or prepared in the course of performance of the Inspector’s functions, subject to appropriate exceptions.
- If the ICS Act is amended, the exemption in schedule 1.15 of the *Freedom of Information Act 2016* be reviewed to ensure it continues to protect any information held by the Inspector.
- That the ICS Act and related legislation refer to detained people rather than detainee.

- The basis of the Inspector’s appointment should be aligned with other similar statutory office holders on a full-time basis.
- The title of the Inspector be amended to Custodial Inspector.

Extent to which the Act has supported better and more effective oversight

- The ICS Act include reference to the Justice Health Minister and Canberra Health Services Director-General as relevant to the Inspector’s functions.

Interaction of the Act with other legislation

- Provisions in the Corrections Management Act be amended to ensure the Inspector can visit correctional centres without impediment.
- The Corrections Management Act be amended to prevent mail between a detained person and the Inspector being searched.

OPCAT

Since the passage of the ICS Act, Australia has taken steps to implement its obligations under the OPCAT, a United Nations Treaty that aims to prevent torture and ill-treatment in all places where people are, or may be, deprived of their liberty. ‘Places of detention’ is broadly defined, and includes correctional facilities, youth detention facilities, police custody (cells and vehicles), court cells and closed mental health and disability facilities.

While many oversight and accountability mechanisms for places of detention are reactive, what makes OPCAT unique is the objective to prevent harm before it occurs. This is achieved by establishing a system of visits undertaken by independent international and domestic bodies to places of detention. At the domestic level, these preventive visits are to be carried out by a number of bodies designated by the Commonwealth, State and Territory governments, that are collectively known as the National Preventive Mechanism (NPM). The coordinator for the whole Australian NPM is the Commonwealth Ombudsman. At the international level, Australia is required to permit and facilitate visits by an independent body of international experts - the United Nations SPT - to all places of detention within Australia’s jurisdiction or control.

The Explanatory Statement to the ICS Bill stated that the Bill:

...aims to reflect the requirements and expectations around the establishment of a national preventive mechanism under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

In early 2022, the ACT Government nominated OICS, the ACT Human Rights Commission and the ACT Ombudsman to be the multi-body NPM. OICS is therefore jointly responsible for visiting all places of detention in the ACT, with the aim of strengthening protections against torture and ill-treatment. The ACT NPM has been working constructively together to bring our collective expertise and experience to ensure preventive oversight of places of deprivation of liberty in the ACT consistent with the OPCAT and OICS looks forward to continuing this work.

NPM Powers

An NPM must have the power to:

- regularly examine the treatment of people deprived of their liberty (OPCAT, Article 19(a))
- visit all places of deprivation of liberty (Articles 12(a), 14(c) and 20(c))
- choose the places they want to visit and the people they want to visit (Article 20c)
- make recommendations to the authorities to improve the treatment of people deprived of their liberty (Article 19(b))
- submit proposals and observations concerning existing or draft legislation (Article 19(c))
- conduct private interviews with detained persons and any person they wish to interview (Article 20(d)).

An NPM must also have access to:

- all information regarding people in closed environments, including the number of detained people and their location and the number of places of detention and their locations (Article 20(a))
- all information regarding the treatment of people in closed environments and the conditions of their detention (Article 20(b))
- all places of detention and their installations and facilities (Article 20(c)).

Clear legislative basis for the ACT NPM

While potentially outside the terms of this review, the ACT NPM has identified a need for further amendments to the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* to enshrine the requisite powers, privileges and immunities for all members of the ACT NPM, in accordance with OPCAT. Relevant examples in other jurisdictions include the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Amendment Bill 2022* (NT) and the *OPCAT Implementation Act 2021* (Tas).

The existing legislative powers for each of the three ACT NPM bodies do not provide sufficient clarity, consistency, or delineation from our current jurisdictions. Although each NPM body has powers under their respective Acts to access relevant information, these vary in scope and can only be exercised with respect to existing functions. Critical privileges, immunities and protections against victimisation also apply to existing functions, roles and services, but may not currently extend to ACT NPM activities. For example, some of OICS powers such as the power to require information is linked to an 'examination and review' being on foot whereas OPCAT envisages a system of regular visits with an NPM having the requisite powers and privileges (including access to information) at all times.

Clearly enshrining the ACT NPMs powers in legislation would assist in distinguishing the preventive work of the ACT NPM from other functions of NPM bodies, and clarify its role and powers for stakeholders (including staff in places of detention, directorates, civil society organisations and detained people).

Article 19 of OPCAT requires that the NPM have the power to regularly examine the treatment of detained persons in all places of detention, which is essentially any place where a person is deprived

of their liberty under ACT law.⁴ While the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* provides this access for the UN SPT, the ACT NPM bodies do not collectively have such access.

Given the terms of reference of this review, this submission focuses on legislative amendments to the ICS Act to ensure OPCAT compliance. Nonetheless, the ACT's implementation of OPCAT remains relevant.

Funding

Article 18(3) of OPCAT requires that an NPM is adequately resourced. While potentially outside the scope of this review, funding for the Inspector, including to fulfil their role as part of the ACT NPM, is discussed further below.

Legislated Structure of the Inspector Role

Functions of the Inspector

Independence

Article 18(1) of OPCAT requires the functional independence of NPMs as well as their personnel. The United Nations Office of the High Commissioner for Human Rights has suggested that the appointment process for NPMs may be led by special appointment bodies, parliamentary committees or independent judicial commissions or similar bodies.⁵

Section 9 of the ICS Act provides for the Inspector to be appointed by the Executive, and further provides that 'the appointment [of the Inspector] must be made in accordance with an open and accountable selection process'. However, there is nothing in the Act that precludes a selection process including decision makers from areas of the Executive (Directorates) responsible for the operation of places of detention being oversights (i.e. the Justice and Community Safety Directorate and Community Services Directorate). Similarly, the Executive may end the appointment of the Inspector under s 12.

In contrast, Offices of the Legislative Assembly such as the Auditor-General are appointed by the Speaker after broad party consultation and approval of the relevant Parliamentary Committee, on behalf of the Territory, and are provided explicit independence and complete discretion in the exercise of their functions.⁶ Their appointments are also only ended by the Speaker in specific circumstances, including where a resolution is passed by the Legislative Assembly.⁷ There are differing restrictions across Officers of the Legislative Assembly as to whether they can be reappointed.⁸

⁴ See *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* s 7, which defines a place of detention according to article 4 of OPCAT. That definition is any place under the control of the Territory where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

⁵ United Nations Office of the High Commissioner for Human Rights, *Preventing Torture: The Role of National Preventative Mechanisms – A Practical Guide* (2018) 18.

⁶ For example, *Auditor-General Act 1996* ss 6A, 7 and 8.

⁷ For example, *Auditor-General Act 1996* s 9BC.

⁸ For example, the Electoral Commissioner may be re-appointed (*Electoral Act 1992* s 13), as may the Ombudsman (*Ombudsman Act 1989* s 23).

The Legislative Assembly Standing Committee on Justice and Community Safety has expressed concern about the current arrangements in relation to whether OICS is able to be adequately funded to perform its legislative oversight function. The Committee recommended that in order to ensure adequate funding and resourcing on an ongoing basis, the Inspector should be made an Officer of the Legislative Assembly through legislation.⁹ In its response to the Committee's report, the Government indicated this recommendation would be considered as part of this review.

The Queensland Inspector of Detention Services,¹⁰ and the New Zealand Ombudsman (who performs NPM functions),¹¹ are both examples of similar entities that are officers of parliament.

The Inspector acknowledges the need for her office to be independent from the Executive to the greatest extent possible, and supports in-principle becoming an Officer of the Legislative Assembly.

It is noted that becoming an Officer of the Legislative Assembly would create additional obligations on OICS, particularly in relation to financial management.¹² Therefore, OICS would require a commensurate increase in resources to ensure it can discharge additional responsibilities effectively.

Further, such a change is likely to further entrench the possibility that the Inspector's reports, when tabled in the Legislative Assembly, become inadmissible in legal proceedings. There are advantages and disadvantages to this situation.

Parliamentary Privilege

The Inspector's reports provide evidence of the findings of a statutorily appointed, independent expert in the field of adult corrections and youth detention administration and oversight. These reports fulfil the objects of the Act in several ways including identifying issues for detaining authorities, promoting transparency and accountability, and building public awareness. As the Explanatory Statement to the ICS Bill noted,

These robust mechanisms for transparency and accountability work together to protect the most vulnerable people in the ACT and prevent harm.

However, at present, the admissibility of the Inspector's reports in legal proceedings is uncertain because of parliamentary privilege. In summary, parliamentary privilege attaches to a document where there is a sufficiently close or clear connection between the production of that document and the core or essential business of the Legislative Assembly, such that adducing that document into evidence in a proceeding would impair or inhibit debate or freedom of speech in the Legislative Assembly. Depending on the circumstances, this may include documents presented to parliament, and the preparation of a document for the purposes of or incidental to the transacting of any business of the parliament. A key question that often arises is whether the document was prepared for the Legislative Assembly or instead for another purpose, and then tabled. A document prepared

⁹ Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Annual and Financial Repots 2021-22* (Report 15, 10th Assembly, March 2023), Recommendation 1 and pages 7-8.

¹⁰ Explanatory Notes, Inspector of Detention Services Bill 2021 (Qld) 4.

¹¹ See <https://www.ombudsman.parliament.nz/about-ombudsman/who-ombudsman>

¹² At present, the Justice and Community Safety Directorate assist with various administrative matters including in relation to budget and financial reporting, and human resources.

for a non-parliamentary purpose, such as for the Executive, which later comes to be used in Parliament will generally not be privileged.¹³

A privileged document cannot be tendered in evidence in legal proceedings.¹⁴ Currently, Part 4 of the Act has several features which could be seen as indicating tabled reports by the Inspector may be subject to parliamentary privilege:

- Section 27 is headed 'Inspector to give reports to the Legislative Assembly';
- Section 30 is headed 'Report to the Legislative Assembly' and requires the Inspector to give the report to the Speaker;
- The Speaker must then present the report to the Legislative Assembly within 5 sitting days.

There is a related question as to whether material collected by the Inspector in preparing these reports, once tabled, may also be subject to parliamentary privilege.

The Inspector is aware that the question of the admissibility of her reports has arisen in several proceedings already. For example, the issue arose in recent civil proceedings, *Williams v ACT SC 0233/22* involving the strip search of a female prisoner, which the Inspector had conducted a [Critical Incident review](#) into in 2021. A decision has yet to be published. The possibility that parliamentary privilege impacts the ability for the Coroner to consider critical incident reports has also arisen in recent inquests into death in custody.

It does not appear that parliamentary privilege was an intended feature or key consideration for the Act requiring reports to be tabled in the manner set out in Part 4. Rather, the intention of this part was to ensure accountability and transparency.

This clause ensures accountability and transparency of correctional centres and services by ensuring independent reports about the effectiveness of centres and services are publicly available.

As an aside, while it may be possible to amend the Act to provide a provision explicitly abrogating parliamentary privilege, this may not be considered an acceptable course of action.¹⁵

On balance, the Inspector concludes that the objects of the Act are likely to be further promoted by emphasising her independence from the Executive including by becoming an Officer of the Legislative Assembly. While this would not be determinative of parliamentary privilege attaching to the Inspector's report, coupled with other factors, it may make it more likely reports tabled in the Legislative Assembly are inadmissible in legal proceedings.

However, even if this were to occur, courts and tribunals must of course make their own factual and legal findings, and the Inspector's reports may still be of use in identifying issues for the parties in litigation to explore further.

¹³ *Carrigan v Cash* [2016] FCA 1466 [45].

¹⁴ See *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 24 (3); *Parliamentary Privileges Act 1987* (Cth) s 16.

¹⁵ Parliamentary privilege is an important protection for those who participate in "proceedings in Parliament" from outside interference. The basic protection has been provided since 1689 in the United Kingdom and is incorporated s 49 of the Australian Constitution. It is part of a suite of immunities and powers fundamental to the operation of the Legislative Assembly.

Further, the Inspector suggests that the ICS Act should be amended to provide further flexibility in how she may further the objects of the Act including in fulfilling functions that may not necessarily result in the tabling of reports in the Legislative Assembly. That would allow the Inspector to undertake work, and potentially publish material, that is not subject to parliamentary privilege.

Recommendation: That in order to fulfil her role appropriately, the Inspector should be an Officer of the Legislative Assembly with commensurate increase in resources.

Inflexibility

In 2021, the ICS Act was amended to lengthen the time between mandated “whole of centre” reviews of the AMC and Bimberi from two to three years. This amendment reflected the reality that these whole of centre reviews are very resource intensive for OICS. The frequency of these reviews was difficult to manage with OICS permanent staffing level of 2.8 FTE, particularly given there have been an average of three Critical Incident reviews per year (instead of the one per year envisaged when OICS was established). It also enabled detaining authorities further time to implement recommendations that may take longer (for example, requiring specific funding through the budget bid process).

When read together, sections 17, 18 and 27 of the Act appear to confine the Inspector to the following functions:

- To examine and review the AMC, Bimberi and Court Transport Unit (CTU) every 3 years. The intention of this ‘examination and review’ is a resource-intensive comprehensive review.¹⁶
- From time to time, as determined by the Inspector, review certain specific ‘critical incidents’ as defined in the Act.¹⁷
- Undertake the review of a particular issue in the youth or adult corrections environment (a ‘thematic review’),
- Conduct inspection visits in relation to OICS functions of ‘examination and review’.¹⁸

The Inspector suggests further amendments to her functions are necessary to achieve both the purpose of OPCAT and the objects of the ICS Act. Presently, these functions are unnecessarily narrow and commit the Inspector to the process of conducting and tabling a review before OICS can take certain steps to seek information about the seriousness of an issue. The ICS Act is also silent about the Inspector’s NPM function – it can be assumed from the Explanatory Statement that reviews of correctional centres and correctional services form part of NPM functions, however, NPM functions are broader than conducting reviews as noted below.

Further, the Inspector must give a report on each examination and review conducted by the Inspector to the Legislative Assembly within 6 months of completing the examination and review. Therefore, if parliamentary privilege attaches to the Inspector’s reports, it is likely the examination and review will

¹⁶ If appropriate and practicable, in exercising this function, the Inspector should consult with people, and engage staff suitable to the cultural background or vulnerability of any detained person involved.

¹⁷ Under s 17(2)(h) a relevant Minister or relevant Director-General may also identify an incident as a critical incident, and under s 18(1)(c) may request that the Inspector review a critical incident.

¹⁸ Explanatory Statement, Inspector of Correctional Services Bill 2017 (ACT) 3.

always be subject to parliamentary privilege and therefore likely inadmissible in court and tribunal proceedings.

The Act does not explicitly provide for the Inspector to undertake other functions to achieve the objects of the Act such as:

- Preliminary inquiries to assess if the Inspector should undertake a critical incident review or other type of examination and review;
- Raise matters of concern informally with a detaining authority that arise in the course of the Inspector's work directly and/or informally with detaining authorities or other parts of Government.
- Formally write to a minister or detaining authority to raise a matter of concern without engaging in a specific review and then seeking to table a report in the Legislative Assembly.
- Produce reports or documents not directly connected to 'examination and review' functions.
- Other activities necessary as an NPM (discussed further below).

It should be noted that the Inspector does do some of these things already as a matter of good practice (such as engaging informally with detaining authorities), however the Inspector sees value in articulating broader functions in legislation. As a result, the Inspector's powers in s 22 of the ICS Act, to ask for documents and information, are also only enlivened in narrow circumstances.¹⁹

Definition of critical incidents

A related issue is the definition of critical incidents in s 18 of the ICS Act. As already discussed, the Inspector may review certain specified critical incidents in s 18, being any event in a correctional centre or in the provision of correctional services that involves any of the following:

- (a) the death of a person;
- (b) a person's life being endangered;
- (c) an escape from custody;
- (d) a person being taken hostage;
- (e) a riot that results in significant disruption to a centre or service;
- (f) a fire that results in significant property damage;
- (g) an assault or use of force that results in a person being admitted to a hospital;
- (h) any other incident identified as a critical incident by a relevant Minister or relevant director-general.

The Explanatory Statement explained these definitions:

The definition of a 'critical incident' establishes a high threshold for incidents that occur in a custodial environment. This definition aims to ensure accountability and public transparency of events that may cause significant impact or harm in a custodial setting. It also reflects that there are appropriate existing internal review mechanisms within correctional centres for the oversight of events or incidents which do not cause significant harm.

Perhaps reflecting the history of the ICS Act, which was originally focused only on the oversight of adult corrections, the list of incidents focuses on events relevant to an adult correctional centre.

¹⁹ Along with the protections in s 25.

Arguably, this list does not adequately address the types of incidents that may be particularly traumatic for children and young people in youth detention environments.

Since OICS oversight of Bimberi commenced in December 2019, there have been no critical incidents at Bimberi reported to OICS. It is certainly a positive that these serious incidents have not occurred.

Bimberi has a system of categorizing incidents as 'category 1' (the most serious) and 'category 2' (all others). Category 1 incidents do not align to ICS Act Critical incidents (although there is some overlap):

- Category one incidents include a death in custody, attempted suicide, serious injury, serious health complaint, escape, serious assault.
- Category two incidents are defined as all other incidents such as contagious disease, minor breach of security, assault, fights, significant disturbance to the good order of the Centre, and incidents involving visitors to Bimberi, among other things.

The Inspector sees merit in expanding the definition of critical incident to include a situation reasonably likely to result in significant trauma for the particular effected young person. This is not in order to lower the threshold of seriousness of harm to trigger the Inspector's critical incident review function, rather, to reflect that for a child or young person a range of incidents not described in the ICS Act may be particularly serious.

In terms of adult detained people, there have been examples of serious or significant incidents in correctional settings where the Inspector's critical incident power has not been enlivened. For example, in November 2019 a hole was cut into AMC's external perimeter fence that went undetected for 24 hours, with a package thrown into the jail²⁰. Also in 2019, a male detainee jumped an internal fence and fraternised with a female detained person in an adjacent unit.²¹

In comparison, equivalent legislation elsewhere provides greater flexibility. Under s 6(1)(e) of the *Custodial Inspection Act 2016* (Tas) the Tasmanian Custodial Inspector may report to the responsible Minister or Parliament on any particular issue or general matter relating to the functions of the Inspector if, in his or her opinion, in is in the interest of any person or in the public interest to do so.

Under s 8 of the *Inspector of Detention Services Act 2022* (Qld) the functions of the Queensland Inspector of Detention Services are similar, however the Inspector need only report to the parliament on ad hoc inspections 'as the inspector considers appropriate'.

The *Inspector of Custodial Services Act 2003* (WA) provides that the Western Australian Inspector may inspect or review a place of detention at any time. The Inspector may report to the minister on any matter relating to an inspection or review and give advice or make recommendations as the Inspector considers appropriate.²² Section 27 provides that the "the Inspector has power to do all things necessary or convenient to be done for or in connection with the performance of the Inspector's functions".

²⁰ See <https://www.canberratimes.com.au/story/6672825/hole-in-prison-fence-not-discovered-for-24-hours-due-to-human-error/>

²¹ See <https://www.abc.net.au/news/2019-09-15/canberra-prisoners-tried-to-have-sex-after-man-jumped-fence/11512048>

²² Sections 21-23.

Section 8 of the *Inspector of Custodial Services Act 2012* (NSW) provides that the Inspector has power to all things necessary to be done or in conjunction with, or reasonably incidental to, the exercise of the Inspector's functions.

Additional functions as an NPM

The UN SPT has provided advice on establishing legislation for NPMs.

While the institutional format of the national preventive mechanism is left to the State party's discretion, it is imperative that the State party enact legislation that guarantees a mechanism that is in full compliance with the Optional Protocol and the mechanism guidelines of the Subcommittee... The mechanism's legal framework should also provide for outward-facing functions of the NPM, such as submitting proposals and observations on existing and draft legislation, advocacy, awareness raising and capacity building, and require a separate budget line in the State budget for the funding of the NPM, in order to ensure its continuous financial and operational autonomy.²³

Similarly, the UN Office of the High Commissioner for Human Rights has noted in its Practical guide for NPMs that NPMs should develop strategies for making their work known to the general public.²⁴

In addition, the ICS Act currently refers to the functions of the Inspector being to 'examine and review', whereas the OPCAT uses the term 'visit' to describe the functions of the NPM.

To a limited degree, subject to resources and its statutory role, OICS undertakes OPCAT work. However, given the Inspector's role new role as an NPM, we suggest that the Inspector's functions should explicitly include OPCAT-related functions including to:

- visit places of detention within the Inspector's jurisdiction
- submit proposals and observations on existing and draft legislation
- undertake public advocacy on prevention of torture and ill-treatment and awareness raising
- build capacity of stakeholders, including detaining authorities.

Recommendation: The functions of the Inspector are amended to provide greater flexibility and independence as to how the Inspector achieves the objects of the Act. This should include functions relevant to preventing torture and other cruel, inhuman or degrading treatment or punishment consistent with obligations of a OICS as a National Preventive Mechanism under the Optional Protocol to the Convention Against Torture.

Recommendation: The Act provide additional flexibility as to what the Inspector considers to be a 'critical incident' requiring a review. For example, a critical incident could include any other incident that in the Inspector's view in all the circumstances is sufficiently serious, including in its impact on affected detained people or staff.

²³ 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*, UN Doc CAT/OP/TUR/1 (12 December 2019) [21]

²⁴ United Nations Office of the High Commissioner for Human Rights, *Preventing Torture: The Role of National Preventative Mechanisms – A Practical Guide* (2018) 30

Tabling process

The ICS Act is silent as to whether OICS reports can be tabled when parliament is not sitting, instead simply requiring the Speaker to table them within 5 sitting days of receipt. In comparison, ss 15(6) and 15 (7) of the *Custodial Inspector Act 2016* (Tas) and ss 34 and 35 of the *Inspector of Custodial Services Act 2003* (WA) provide that the relevant minister/speaker/president has 30 days to “lay” a report before parliament and provides that if parliament is not sitting when the 30-days period expires, that person may transmit a copy of the report to the Clerk.

The statutory review of the *Inspector of Custodial Services Act 2012* (NSW) recommended that the NSW Act be amended to allow reports produced under s 6(1)(d) of the Act to be tabled in Parliament while Parliament is not sitting.

The ACT Inspector is required to give a draft copy of a report to the relevant Minister and relevant director-general at least 6 weeks before giving the report to the Legislative Assembly in order to give them an opportunity to provide comments in relation to the draft report. This is an important natural justice function. However, in the Inspector’s view, a 6 week period may be unduly long particularly for shorter Critical Incident reviews (it has not been uncommon for these to be less than 20 pages).

The NSW Inspector is required to give the Minister a ‘reasonable opportunity’ to make submissions, either orally or in writing, in relation to a draft report.²⁵ The ACT Human Rights Commission must similarly not include an adverse comment in relation to a person in a report unless the commission has given the person a reasonable opportunity to respond.²⁶ The ACT Auditor General is required to give a 14 day period for comment²⁷.

Further, while it is current practice for the government to formally respond to tabled reports by the Inspector, this is not required in the Act. In contrast, the minister must respond to a tabled report by the Auditor-General within 4 months.²⁸ In the case of the two Healthy Prison Reviews of the AMC in 2019 and 2022, the Government response was tabled 7 months after the review was tabled.

Recommendation: The Inspector continue to be required to table periodic reviews and formal critical incidents reports in the Legislative Assembly, but not be required to table all reports she produces.

Recommendation: For those reports that continue to be tabled in parliament, the Act is amended to provide a mechanism for them to be tabled when the Legislative Assembly is not sitting.

Recommendation: That the Act include greater flexibility in determining timeframes for comments on draft reports such as requiring a ‘reasonable time’ for comment.

Recommendation: The Act require the Government to formally respond to tabled reports within a specified timeframe.

²⁵ *Inspector of Custodial Services Act 2012* (NSW) s 14.

²⁶ *Human Rights Commission Act 2005* (ACT) s 83.

²⁷ *Auditor-General Act 1996* (ACT) s 18(5).

²⁸ *Auditor-General Act 1996* (ACT) s 21.

Prescribed requirements for reviews

The requirements in s 27(2) of what must be contained in a report does not sit well for the type of critical incident reports listed in s 17(1)(c). The previous Inspector noted that “while the requirements of s 27 have relevance to the conduct of a review of a correctional centre or a correctional service some have little or no relevance to the review of a critical incident”²⁹. Consistent with the need for the Inspector to operate independently and with greater flexibility, the prescribed requirements should be removed.

Recommendation: The prescribed requirements in s 27(2) are removed and instead the Inspector should be required to ensure that the contents of any report meet the objects of the Act.

Mandated periodic thematic reviews

In addition to the mandated periodic reviews of the AMC and Bimberi, s 18 of the ICS Act requires that the Inspector must examine and review correctional services at least once every 2 years. A correctional service means -

- the management, control and security of a correctional centre (including Bimberi); or
- the security, control, safety, care and welfare of a detainee at a correctional centre; and
- includes policies, processes and procedures in relation to those matters.

During 2023, OICS commenced a thematic review of segregation and isolation practices at Bimberi. This review also serves as an OICS pilot NPM visit under the OPCAT. Previous thematic reviews include of the Court Transport Unit in 2021 and people on remand at AMC in 2019.

The Inspector suggests that in light of its role as an NPM, including the need for regular visits, and unannounced visits to places of detention, mandated thematic reviews are no longer required. They unnecessarily divert the limited resources of the Inspector, and limit the Inspector’s flexibility as an NPM to determine the key issues and the appropriate approach to raising issues (for example, an informal engagement with detaining authorities vs a full review to be tabled in parliament).

Recommendation: The inspector no longer be required to examine and review correctional services every 2 years.

Inspection guidelines

Section 20 of the ICS Act provides that the Minister may make guidelines about a matter the Inspector must review. A guideline is a notifiable instrument. This power has not been used and arguably impinges on the Inspector’s independence as it requires the Inspector to undertake a review as directed by the Minister, or specify how the Inspector undertakes a review. That is reflected in the Explanatory Statement, which suggests:

This enables the Government to implement a corrections standards or framework the Inspector must consider when exercising its functions.

²⁹ ACT Office of the Inspector of Correctional Services, *Assault of a detainee at the Alexander Maconochie Centre on 23 May 2018* (2019) 6.

The Minister has previously referred critical incidents to the Inspector in correspondence, and we suggest this is the more appropriate process for such a referral to ensure the Inspector's independence.

Recommendation: The power for the Minister to make guidelines under s 20 is repealed.

Reprisal

Article 21(1) of OPCAT requires that the NPM be safeguarded from reprisal or sanction (including safeguarding anyone assisting it in its functions). The UN SPT suggests that legislation establishing an NPM "should outline privileges and immunities of NPM members and those who contribute to the NPM, including experts and civil society, while guaranteeing protection for persons who provide information to the NPM..."³⁰

Section 26 of the ICS Act creates an offence of taking detrimental action. Arguably, the definition of detrimental action in s 26 (4) does not cover all the potential action that could be taken, particularly against a person at a detention place. Currently the provision states detrimental action is action that involves -

- (a) discriminating against a person by treating, or proposing to treat, the person unfavourably in relation to the person's reputation, career, profession, employment or trade; or
- (b) harassing or intimidating a person; or
- (c) injuring a person; or
- (d) damaging a person's property.

For example, the appropriateness of the following action taken in response to a detained person speaking to a monitoring body may not be covered:³¹

- Removing privileges or access to services or visits for a detained person;
- Subjecting a detained person to increased surveillance or additional requirements such as searches of the detained person, their cell or mail;
- Transfer of a detained person to a different part of a facility;
- Reprisals against an organisation, for example losing access to a facility or government funding.

In comparison, under section 36 of the *OPCAT Implementation Act 2021* (Tas), a person must not - (c) do any act that is, or is likely to be, to the detriment —of the person. Similarly, section 51(4) of the Northern Territory's consultation draft *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Amendment Bill 2022* includes, in the definition of detrimental actions, a 'change of the conditions of detention' and 'other disadvantage or prejudice of any kind'.

The Inspector is also concerned that a criminal offence has a high standard of proof, and suggests consideration be given to providing civil protection, such as a through a complaints process.

³⁰ 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*, UN Doc CAT/OP/TUR/1 (12 December 2019) [21]

³¹ And not for any other legitimate and lawful purpose.

Recommendation: The types of detrimental actions protected by s 26 of the ICS Act are broadened to include all likely action taken against a detained person, and that the government consider providing an additional civil complaints process for such action.

Material requested or required from Inspector

Appropriately, schedule 1.15 of the *Freedom of Information Act 2016* provides that information in the possession of the Inspector that has been obtained or generated in relation to an examination or review conducted under s 18 is taken to be contrary to the public interest to disclose. Section 37 of the ICS Act similarly creates an offence for the inappropriate use or disclosure of information obtained by the Inspector.

The statutory review of the *Inspector of Custodial Services Act 2012* (NSW) noted that the intention of the NSW Parliament in passing the Act was to protect informants, confidential information and provide effected individuals and agencies with procedural fairness before requiring reports be made public. It concluded that it was inconsistent with the statutory regime created by the Act for the NSW Inspector to be required to produce or disclose information received or prepared by the Inspector in the course of her functions as a result of a subpoena or other compulsory process. The NSW Inspector identified that, based on past experience when responding to subpoenas and other requirements to produce documents, there have been difficulties in ensuring that information produced is not made public.

The Review recommended that the Act be amended to expressly provide that the Inspector cannot be compelled to produce or disclose documents and information received or prepared in the course of performance of the Inspector's functions, subject to appropriate exceptions.

The Review considered that this would ensure persons in custody, agencies and their staff and third parties have confidence their conversations or correspondence with the Inspector are protected and that documents received or prepared in the course of the Inspector's functions remain confidential and will not be produced or admissible in evidence in legal proceedings.

The ACT Inspector suggests the Legislative Assembly had the broad intention to provide confidence to people who provide information to the Inspector with the passage of the ICS Act, particularly reflected in s 37 of the Act which makes it an offence for the Inspector and other persons to use or divulge information. However, that confidence may be somewhat reduced given that ss 37(3) and (5) create exemptions in some circumstances for information used or divulged under territory law or in a court proceeding. The Inspector suggests similar amendments to those recommended in NSW be made to the ICS Act.

Recommendation: The Act be amended to expressly provide that the Inspector cannot be compelled to produce or disclose documents and information received or prepared in the course of performance of the Inspector's functions, subject to appropriate exceptions.

Recommendation: If the ICS Act is amended, the exemption in schedule 1.15 of the *Freedom of Information Act 2016* be reviewed to ensure it continues to protect any information held by the Inspector.

Terminology

OICS has elected to use the terminology of ‘detained people’ and ‘young detained people’. This is inconsistent with Act, which instead refers to ‘detainee’ and ‘young detainee’. However, we note these terms, and similarly words such as prisoner, can be dehumanizing and stigmatising.³²

Recommendation: That the ICS Act and related legislation refer to detained people rather than detainee.

Basis of appointment

The unusual arrangements and conditions of appointment of the Inspector are not well suited to the realities of the role. The Explanatory Statement to the *Inspector of Correctional Services Bill 2017* noted:

Clause 11 requires the Inspector not have paid employment or engage in unpaid activity that is inconsistent with their functions. The inclusion of this clause acknowledges the role of the Inspector **may be exercised in a part-time or per diem capacity depending on the workload requirements to ensure the efficient and effective function of the Act**. It allows the person appointed as the Inspector to engage in employment or unpaid work, as long as there is no inconsistency with their functions as the Inspector. (emphasis added)

Both the inaugural inspector Mr Neil McAllister, and the current inspector do not consider it appropriate to regard the role as part-time either when it commenced in 2018 or at any time after. The drafters of the Bill may have envisaged that the workload of a ‘one-jail’ jurisdiction would not be onerous but, if there was such a perception, it did not take into account the intense workload of whole of prison / centre reviews, the addition of oversight of Bimberi in 2019, the unanticipated number of Critical Incident Reviews conducted between 2018 and 2023 and the Inspector’s OPCAT responsibilities which commenced in 2022.

Further, it remains unclear to OICS how the Inspector’s original remuneration was calculated or developed, including to which ACTPS executive level it is based.

The inspector’s conditions of appointment are the conditions agreed between the Executive and the inspector that are stated in the instrument of appointment, subject to any determination under the *Remuneration Tribunal Act 1995*.

The Inspector’s remuneration and related matters are determined are currently set out under Determination 13 of 2022. The Determination covers a large number of appointments to numerous boards and committees where, in most cases, members attend meetings in part-time capacities. For example:

- Animal Welfare Advisory Committee
- Architects Board
- Board of Senior Secondary Studies
- Brand Strategic Advisory Board

³² See, for example, Tran N T et al, ‘Words matter: a call for humanizing and respectful language to describe people who experience incarceration’ (2018) 18(1) *BMC International Health and Human Rights* 41.

- Cultural Facilities Corporation Board
- Defence Industry Advisory Board
- Disability Reference Group
- Diversification and Sustainability Support Fund Advisory Board

This focus on committee duties results in:

3.2 A Part-time Holder of a Public Office in an authority shall be paid a daily fee in respect of such period, not less than three hours, on any one day on which he or she attends a formal meeting of an authority, and/or is engaged on business of the authority.

The result of this arrangement is that effectively, the Inspector is engaged on a ‘casual’ basis, based on time recorded in timesheets that must be submitted, with a maximum cap on payment. The Inspector does not receive any ACTPS employment “benefits” other than employer superannuation contributions. The Inspector is not remunerated for periods of leave, including personal (sick) leave.

The Inspector’s role is akin to many other *full-time* statutory office holders, particularly fellow ACT NPM members - Commissioners of the Human Rights Commission and the ACT Ombudsman. The current basis for remuneration limits the capacity of the Inspector to effectively fulfil her functions, particularly when she has only 2 other staff within her office. It is unrealistic to expect that a ‘normal’ year for the Inspector would see them operate at part time (with maximum time that can be worked commensurate with working being about 80% of a full-time capacity) with no access to leave entitlements.

Recommendation: The basis of the Inspector’s appointment should be aligned with other similar statutory office holders on a full-time basis.

Title of Inspector

From 2019 the Inspector became responsible for Bimberi, as well as AMC. The title of ‘Inspector of Correctional Services’ does not necessarily resonate with young people or reflect the role of the Inspector in relation to youth justice matters.

Recommendation: The title of the Inspector be amended to Custodial Inspector.

Intersection between Inspector and oversight mechanisms

OICS works collaboratively with other oversight agencies including the ACT Human Rights Commission, ACT Ombudsman, Official Visitors and the recently established Office of the Aboriginal and Torres Strait Islander Children and Young People Advocate (soon to be Commissioner).

As well as regular meetings, OICS has also worked with the ACT Human Rights Commission to deliver training to new correctional officer and youth detention officer recruits.

OICS also augments its own expertise through engaging contractors with diverse experiences and expertise including lived experience. This includes engaging health practitioners and disability and LGBTIQ+ experts, as well as Aboriginal and Torres Strait Islander organisations.

The Inspector has also participated in various collaborative meetings regarding OPCAT NPM functions including at the national level and with other ACT NPM agencies.

Closer relationship with Official Visitors

While OICS does not at this time recommend any amendment to the ICS Act or related legislation, there is merit in considering closer working arrangements between OICS and Official Visitors (OV) responsible for visiting places of detention within OICS' jurisdiction. OICS particularly acknowledges the unique perspective OVs bring in regularly visiting places of detention, and often identify systemic issues of concern.

Other jurisdictions have legislated to create a formal relationship between OVs and inspectorates. For example, under Part 6 of the *Inspector of Custodial services Act 2003 (WA)* the Western Australian Inspector administers the independent prison visitors service, and assists in the appoint of visitors. The WA inspector has noted that independent visitors are “an integral part of the State’s accountability mechanisms” and “assist the Inspector to provide advice to the minister and to inform the work of the office”.³³ Similarly, the functions of the NSW Inspector of Custodial Services include overseeing the Official Visitor Program for adult corrections and the youth justice system.

OICS acknowledges that the ACT’s current model for official visitors, who work collaboratively across several “visitable” jurisdictions (eg housing, mental health, disability, etc), would not lend itself well to this sort of arrangements. Nonetheless, OVs should have adequate resources and budget to ensure they may collaborate and share information sharing with OICS as collaboration is important in assisting OICS identify systemic issues, and avoiding duplication of oversight functions (a current requirement under Part 5 of the ICS Act)

Extent to which the Act has supported better and more effective oversight

OICS is driven by several key values and principles which contribute to better and more effective oversight:

Independence and impartiality: we act with integrity and strive for a balanced and objective assessment of correctional and youth detention centres and services. We contribute to and promote evidence-based practice in correctional and youth detention settings.

Transparency: we seek to bring transparency to closed environments and apply the same values to our own practice by reporting publicly on all examinations and reviews and publishing our own key documents including our standards and framework.

Research: we draw on current research and innovative approaches to inform our reviews and assess what good practice looks like. We approach our own research work with rigour in order to contribute to an evidence base to measure continual improvement of ACT correctional and youth detention centres and services.

Constructive engagement: we seek to engage constructively with stakeholders, to understand diverse perspectives, and collaborate in solutions. A key part of this approach is identifying and highlighting strengths and good practices in addition to areas requiring attention.

³³ <https://www.oics.wa.gov.au/about-oics/what-we-do/>

Respect for the rights of all: our oversight is centred on the experiences of people in custody including particularly vulnerable groups and promoting equality of outcomes for all. We recognise the key role that staff play in a healthy prison and youth detention environment and the challenging nature of this work. We recognise and value the diverse experiences and perspectives of stakeholders including detained people, detained young people, staff, family and friends, professionals, community organisations and others.

These values and goals, along with a range of related activities, underpin all of our work and support better and more effective oversight.

Collaborating with other agencies

OICS attends bimonthly oversight meetings for the AMC and Bimberi. The AMC meetings are called the ACTCS Oversight Agencies Collaborative Forum which are chaired by the Commissioner for Corrections, or an Assistant Commissioner. The Bimberi oversight meetings are held bimonthly and are chaired by the Executive Branch Manager, Child and Youth Protection Services. Both these meetings are attended by various representatives from ACTCS or Bimberi, Justice Health, Custodial Mental Health, oversight agencies and others.

Prior to the AMC Collaborative Forum there is an AMC Oversight Agencies meeting attended by oversight entities (ACT Human Rights Commission, ACT Ombudsman, OICS, and Corrections Official Visitors) and has been chaired by the President of the ACT Human Rights Commission. OICS provides secretariat functions for this group, and the meeting provides an opportunity for information sharing, referral of matters, and identification of systemic issues. This meeting assists in reducing duplication of functions by the oversight entities.

Following the departure of the President and Human Rights Commissioner of the ACT Human Rights Commission in July 2023, the Inspector of Correctional Services will take over chairing the AMC Oversight Agencies meetings.

The Inspector's role also provides opportunities to engage with similar bodies interstate. For example, OICS has participated in training and workshops with equivalent inspectors in other jurisdictions including as part of the National NPM Network led by the Commonwealth Ombudsman as Central Coordinating NPM. This has included, for example, discussions with the NPM from Norway, the United Kingdom and New Zealand, and experts from Aboriginal Community Controlled Organisations, leading Australian academics and experts by experience, and international organisations focused on detention oversight. OICS has also visited places of detention interstate as part of the review team, or as a visitor to observe and share experiences with other similar bodies, as well as sharing standards and materials.

Engagement with detained people and staff

Engaging with detained people and staff and places of detention is critically important to our work.

Article 14 of OPCAT explicitly recognises the need for an NPM to be able to privately interview detained persons. The Association for the Prevention of Torture (APT), drawing on the reports of the SPT, has noted that interviewing detained people 'lies at the heart of the preventative monitoring

process', and that 'such interviews enable the monitoring team to build up an accurate picture of the risks of torture and other ill-treatment in the place of detention concerned'.³⁴

OICS work has been recognised in the context of the significance of and challenges related to capturing the voices of people who are currently serving time or have served time in prison.³⁵

OICS regularly engages with detained people and staff onsite through informal conversations, focus group discussion, surveys and pre-arranged meetings, for example, where relevant to critical incident reviews. OICS also has a 'whitelisted' email address that enables detained people at AMC to contact OICS without it being reviewed by ACT Corrective Services. As OICS does not have powers to follow up individual queries or investigate individual complaints from detained people, when these do arise, the complaint is referred to an appropriate independent body such as an Official Visitor or the ACT Human Rights Commission. In this way, the role of OICS can also indirectly assist with resolving issues and support better oversight.

Feedback from detained people provided to OICS has been supportive. Written feedback from detained people has included:

"I have just finished reading the report. It felt so nice this morning to wake up and feel that my voice was heard. I want to thank you both for all your hard work and for everything you do to improve outcomes for prisoners and the community. Well done."

"Who knows, maybe it's that people are feeling a little more positive after reading the HPR and are less inclined to bring things to your attention as they're feeling somewhat validated."

"Loved the video you included, it's so great that your taking steps to include those with literacy issues."

"I just had a good read. On behalf of detainees, their families and the community, thank you and your office for your efforts to bring about a positive change. Well done."

Engaging with staff is also important. The 'Healthy Prison / Healthy Centre' concept recognises that staff have a right to feel safe, and be treated with respect at work. Further, the working conditions of staff of places of detention have a direct impact on the conditions and treatment of detainees. For example, APT suggests that NPMS 'should be able to interview staff in places of deprivation of liberty'. In relation to embedding the principles of OPCAT:

staff of places of detention are responsible for the care and custody of persons deprived of their liberty and, thus, will be deeply involved in OPCAT implementation at the institutional level. Staff knowledge of and respect for the OPCAT and involvement in ratification and implementation, especially if this starts at the very beginning of the process, greatly enhances the effectiveness of NPMS' work.³⁶

As well as engaging with relevant unions, particularly during reviews, OICS also engages with staff informally during visits and through the delivery of training. OICS is also establishing a stand alone

³⁴ Association for the Prevention of Torture, *Optional Protocol to the UN Convention against Torture: Implementation Manual*, 158.

³⁵ Doyle, C; Gardner, K and Wells, K, 'The Importance of Incorporating Lived Experience in Efforts to Reduce Australian Reincarceration Rates' (2021) 10(2) *International Journal for Crime, Justice and Social Democracy* 83, 88.

³⁶ Association for the Prevention of Torture, *Optional Protocol to the UN Convention against Torture: Implementation Manual*, 203.

post office box for OICS mail only, to provide greater confidence to staff and others who may wish to write directly to the office.

Written feedback from staff has included:

“It would be good to have regular open forums with staff to build better relationship and understanding of the OICS for staff.”

“Your ideas and recommendations are good BUT don't appear to be implemented at ground level.”

“I think the healthy prison reviews are such a great initiative and I hope there are some positive changes in response to your report.”

NPM coordination

The Inspector’s office auspiced the role of NPM Coordination Director from 3 October 2022 to 21 July 2023, to establish, coordinate and implement the ACT NPM function. The Inspector suggest there was considerable benefit in this work, which could unfortunately not be continued due to the cessation of the Commonwealth funding.

The extensive work completed by the NPM Coordination Director assisted all members of the ACT NPM undertake more effective oversight. A dedicated coordinator also energised the work of all NPMs by creating links with other domestic and international NPMs, developing shared resources and capacity through expert training and seminars, and contributing to joint submissions. The Justice and Community Safety Directorate was provided a report on deliverables which demonstrated the considerable achievements of this role.

OICS continues to meet with the other members of the ACT NPM on a bimonthly basis to discuss how to work together and fulfil OPCAT requirements.

Justice Health Services

The ICS Act contemplates the Inspector assessing the provision of health services to detained people. For example, s 19 provides that the Inspector may inspect a health record and speak to a health worker providing a health service to a detainee. Section 7 also gives a health facility as an example of a place where detained people may be held and within the definition of ‘correctional centres’ for the purposes of the Inspector’s oversight jurisdiction.

OICS works regularly and constructively with health service providers as issues arise. Part 5 of the ICS Act provides for cooperation and referral between the Inspector and other entities, including the Human Rights Commission. OICS works collaboratively with the Health Services Commissioner, who has specialist expertise in handling complaints about health services including health services provided by Justice Health. The Inspector may refer complaints to the Health Services Commissioner, who may also undertake her own commission-initiated reviews of matters of concern.

Where relevant, ACT OICS will also engage experts with a background in clinical health to assist with reviews. Experts utilised to date have had a background in custodial medicine, custodial nursing, clinical psychology, and an expert in Aboriginal and Torres Strait Islander mental health. OICS reviews include recommendations to Canberra Health Services.

However, the arrangements for health care in correctional centre in the ACT whereby Justice Health provides health services independently of detaining authorities is not contemplated by the ICS Act.³⁷ In particular, the relevant ministers and relevant directors-general for the Act are defined as only:

- For a correctional centre under the Corrections Management Act 2007 or a correctional service provided in relation to a correctional centre—the Minister responsible for administering that Act; or
- For a detention place under the Children and Young People Act 2008 or a correctional service provided in relation to a detention place—the Minister responsible for administering that Act.

Therefore, for example, under s 29 the Inspector must only provide a draft report to these ministers and directors-general.

This does not prevent the Inspector seeking comment directly from Justice Health Services or any other person mentioned in the report, particularly taking into her account her obligations under the HR Act and principles of procedural fairness and natural justice. Nonetheless, the Inspector suggests the Act could provide greater clarity on this point.

Recommendation: The ICS Act include reference to the Justice Health Minister and Canberra Health Services Director-General as relevant to the Inspector’s functions.

Resources

The Inspector is proud of the considerable body of work completed the small team since the establishment of the office. Those achievements are also due to the collaborative and constructive approach of colleagues across the ACT NPM and oversight agencies, service providers and civil society.

Nonetheless, at current funding levels, OICS is unable to effectively carry out its mandate as envisaged under the OPCAT. Article 18(3) of OPCAT requires that an NPM is adequately resourced.

The original budget allocation for OICS included a line provision, without explanation or details, for one Critical Incident Review per year. OICS has instead reviewed on average approximately three Critical Incident Reviews per year. To date, eleven further incidents were referred to the Inspector as meeting the criteria of a critical incident but based on OICS critical incident review criteria, a decision was made not to review.

Recently, OICS conducted its first NPM visit to Bimberi Youth Justice Centre, accompanied by a medical expert. The visit was unannounced and was an opportunity to develop and test our methodology, cost an NPM visit and increase awareness and understanding amongst staff, management and detained children and young people of our mandate under OPCAT. It was also a ‘review of a correctional services’ mandated under s 18(1)(b) of the ICS Act so was also part of OICS pre-NPM obligations.

To date, funding allocated to the ACT NPM has been limited to the Commonwealth Government’s one-off amount of \$143,000 over two years. We understand that the ACT Government agreed to match this amount (in its [Agreement with the Commonwealth](#)), and that the ACT Government took

³⁷ The Inspector supports this arrangement, which is consistent with international standards.

the view that pre-existing funding for OICS satisfied this matching arrangement. Dedicated funding for the ACT NPM has not been provided by the ACT Government and the Commonwealth funding has now ended.

Therefore, while potentially outside the terms of this review, the Inspector notes the challenges presented by current funding levels.

Extent to which the examination, review and reporting have helped to promote better practice

The vision of OICS is a transparent and accountable ACT correctional and youth detention system where the rights, interests and wellbeing of adult and young detained people are upheld, staff are safe and are valued, and everyone is treated with dignity and respect. We work to achieve this vision by promoting the continuous improvement of ACT correctional centres and services for adults and youth detention centres and services for young detained people, and in doing so increasing transparency, the protection of rights of all and the prevention of ill-treatment, mismanagement, unfairness and corruption.

We seek to highlight positive practice whenever possible and acknowledge the difficult and challenging environment in which staff work.

Since its inception, OICS has undertaken significant work to promote better practice including completing two Healthy Prison Reviews (HPR) of the AMC and one Health Centre Review (HCR) of Bimberi. Additionally, OICS has completed 14 critical incident reviews, many of them complex and lengthy. OICS standards and whole of centre reviews touch upon virtually every aspect of detention, and critical incident reviews have considered:

- Deaths in custody
- Escape
- Assault
- Hostage situation
- Fire
- Use of force
- Riot

In addition, COVID-19 impacted on the work of OICS and posed new and significant challenges to places of detention.

Effectiveness of recommendations

OICS is committed to developing other ways to promote better practice. For example, OICS recently took on a Masters of Social Research Methods student intern through the Australian National University's Australian National Internship Program (ANIP) to undertake an analysis of OICS' recommendations to government. This work will involve quantitative analysis of recommendations arising from OICS reviews, including responses to recommendations by the ACT government and implementation of accepted recommendations. It will also involve a comparative analysis of other inspectorate's approach to recommendations and implementation.

The Inspector will use this analysis to further refine her work, and the impact of recommendations.

Examples of working with government to promote better practice

There are many instances of OICS working collaboratively with the government to embed positive change. For example, in HCR20 of Bimberi, OICS identified that the room in which young detainees were strip searched had a CCTV camera, raising concerns that a strip search could be recorded, and seen from the master control room. The government responded in a timely way by repositioning the camera so it was directed at the staff member conducting the search. This change still allows Bimberi management to protect staff members conducting the search from unfounded allegations, but in a way that does not unreasonably limit the right to privacy and humane treatment of young detainees.

In a critical incident review into a use of force, OICS recommended that ACT Corrective Services expedite the procurement of body scanner technology to provide options for less restrictive ways than strip searching to search detainees.³⁸ This response was agreed, including the purchase of one additional scanner. These scanners are now operational, reducing the need for strip searches.

OICS also welcomes changes that have been made in response to HPR19 of AMC including:

- The development of a [new Incentive and Discipline policy](#) for detained people at AMC.
- ACTCS began a comprehensive electrical safety “test and tag” program, and has developed an operating procedure to ensure the program is maintained.
- After a period of no established fire warden at AMC, the ACTCS Senior Director of Operations has now assumed the role of Chief Fire Warden. A Fire Protection Manager was also appointed on 24 October 2019 to manage firefighting facilities and equipment and act as a liaison for fire monitoring.
- Creation of a new designated female position in the Indigenous Services Unit to work with female Aboriginal and Torres Strait Islander detained people.
- Addition of a privacy mask to the CCTV cameras in the AMC Crisis Support Unit to ensure toilets can be used with dignity.
- Naloxone is a drug that can temporarily reverse opioid overdose and could be lifesaving in case of a drug overdose. Following OICS recommendation, the Government has made Naloxone available at AMC, and ACTCS has partnered with the Canberra Alliance for Harm Minimisation and Advocacy to run training for staff in administering the drug.
- Changes to the email software system have been made to allow detained people to have unmonitored email communication with legal contacts.
- ACTCS policy now focuses more on needs of older detainees as reflected in the Corrections Management (Support for Detainees and Offenders with Additional Needs) Policy 2022.

OICS looks forward to tracking the implementation of the accepted recommendations in HPR22.

Engagement with civil society

OICS values the input of the community sector to our work. In particular, we recognise the valuable role that community organisations play providing services and support to detained people and young

³⁸ Office of the Inspector of Correctional Services, *Use of force to conduct a strip search at AMC on 11 January 2021* (2021).

detained people. We also recognise the important role of the CPSU in supporting correctional centre and youth justice centre staff.

OICS attends and presents at a range of forums and meetings, including the ACTCOSS Justice Reform Group forum, which brings together a range of civil society organisations, academics, and others to share information relating to the justice sector.

During Healthy Prison and Healthy Centre Reviews, the OICS has hosted consultation forums to gather input from community stakeholders. OICS also put out a call for submissions resulting in a number of submissions received from community organisations, academics, advocates, legal services and family and friends of people involved in the criminal legal system. We also meet bilaterally with other community organisations.

Aboriginal peoples and Torres Strait Islander peoples

OICS engages in several ways with Aboriginal peoples and Torres Strait Islander peoples and community organisations. For example, the Inspector meets regularly with the Winnunga Nimmityjah Aboriginal Health and Community Services and has engaged with Gugan Gulwan youth centre and the Dhurrawang legal service at Canberra Community Law. The Inspector has recently met with the Aboriginal and Torres Strait Islander Advocate and looks forward to continuing engagement with the Aboriginal and Torres Strait Islander Children's Commissioner when appointed.

Further, the ICS Act provides:

'...the Inspector must, if appropriate and practicable, consult with people, or use staff, suitable to the cultural background or vulnerability of any detainee involved in a matter being examined or reviewed.'

One of the Critical Incidents reviews undertaken by OICS involved a use of force to conduct a strip search of an Aboriginal woman at the AMC. OICS received an independent expert opinion on cultural and health considerations from Dr Elizabeth McEntyre who is a Worimi and Wonnarua First Nations Woman, and a Mental Health Social Worker in disability and criminal justice. In the HCR of Bimberi, Mr Brendan Church was engaged to provide expertise in the review in relation to cultural supports and services and education. As part of the HPR22, OICS also engaged Deadly Connections, an Aboriginal Community-led, not for profit organisation to provide input on the treatment of and access to culture for Aboriginal and Torres Strait Islander detained people at the AMC.

Interaction of the Act with other legislation, including Coroners Act 1997

Coroner's Act

As already noted, the Inspector may undertake reviews into certain specific critical incidents including a death in custody. Under sections 3C, 13(1)(i) and 34A(2) of the *Coroners Act 1997* ("the Coroners Act") a coroner is obligated to investigate a death in custody and is obliged to conduct a public hearing in relation to such a death.

To date, the Inspector has tabled one critical incident review into a death in custody, the death of a detained person at the AMC on 1 February 2022, tabled in the Legislative Assembly on 3 August 2022. The review made 5 recommendations. At the time of writing, the matter was before the Coroner.

The Inspector sees value in her role including the ability to review a death in custody as a critical incident, including the ability to identify pressing issues in a timely way and the specialised knowledge of her office in relation to correctional and youth justice settings.

The Inspector recognises the critical incident review function to review a death in custody under the Act and provisions of the Coroners Act allow the Inspector and Coroner to engage in overlapping reviews and inquests into the same death in custody. It may not have been anticipated when the Act was drafted that overlap may have the potential to create complexity for family members and require those involved to be reinterviewed. These issues may be compounded by a lack of clarity over the extent to which material collected,³⁹ and reports tabled by the Inspector,⁴⁰ are admissible in other legal proceedings including the coronial process.

Under s 31(1)(f) of the ICS Act, the Inspector is also required to ensure the exercise of her functions in a way that does not delay or unnecessarily duplicate the exercise of functions by a coroner.

Nonetheless, the roles of the Coroner and Inspector can be complementary, particularly given the longstanding role that coroners play in establishing the manner and cause of death, and the Inspector's specialist expertise in oversight of correctional centres and services.

The ICS Act provides that the Inspector may enter into an arrangement with the Coroner to avoid unnecessary delay and unnecessary duplication, or efficiently manage the interactions of the Inspector and the Coroners' statutory functions (s 31(2)). Under s 35 of the ICS, the Inspector and Coroner may share relevant information.

To address the potential issues arising from the current legislative provisions, the Inspector and Coroner are discussing further cooperation and information sharing. The Inspector hopes she can still assist the Coroner through an inquest process without impeding the Coroner's important functions. However, in light of the issues identified above with the inspector's report likely being subject to parliamentary privilege, the challenges in the joint jurisdiction of the Inspector and the Coroner are likely to remain without legislative amendment. For example, the recommendations already made concerning the Inspector having more flexibility in how she achieves the objects of the Act would clarify that she can at least undertake functions that do not result in her reports having to be tabled in the Legislative Assembly and therefore being privileged.

Corrections Management Act

Appropriately, s 62(1) of the CM Act requires that the CM Act is construed and administered in a way that is consistent with an inspection law, unless the contrary intention appears in the CM Act or that law. An inspection law means an Act that provides for the entry and inspection of premises, or the search of people or premises and the ICS Act is provided as an example. However, s 62(4) states

A person exercising a function under an inspection law in relation to a detainee or correctional centre must exercise the function in accordance with any direction by the director-general in relation to—

- (a) the safety of anyone at the correctional centre; or

³⁹ Particularly material compelled under s 22 of the ICS Act.

⁴⁰ See discussion of parliamentary privilege above.

(b) security or good order at a correctional centre.

OICS appreciates the cooperative approach that ACTCS takes in providing OICS staff access to AMC including outside business hours. While to date ACTCS has not refused entry to OICS on the s 62 grounds, they are potentially very broad. It would be preferable if there was an objective assessment of these risks, such as the CM Act requiring that there be a *reasonable* risk to the safety of someone, or *reasonable* risk to the security or good order of the centre.

Further, there are some inconsistencies between the Acts that may cause confusion, particularly in relation to NPM functions. While the ICS Act is clear in providing the Inspector a mandate to visit a correctional centre, the CM Act provides a slightly different framework for all accredited people. Accredited people are defined to include the Inspector.

Sections 12 deals with the ability for accredited people to visit detained people, but requires only that the director-general must ensure, *as far as practicable*, that detainees have reasonable opportunities to receive visits from accredited people. This caveat is not appropriate for the Inspector or the ACT NPM generally.

Similarly, s 50 deals with contact between accredited people and detainees, and allows the director-general to give directions denying or limiting a detainee's contact with an accredited person if the director-general suspects on reasonable grounds that the contact may:

- (a) undermine security or good order at a correctional centre or
- (b) circumvent any process for investigating complaints or reviewing decision under this Act.

Recommendation: The Corrections Management Act be amended to ensure the Inspector can visit correctional centres without impediment.

Children and Young People Act

Access to therapeutic places

Chapter 16 of the *Children and Young People Act 2007* (CYP Act) currently provides a framework for therapeutic protection of children and young people including the potential confinement of children and young people at therapeutic protection places. The *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023*, currently before the Legislative Assembly, would significantly change that framework. This includes introducing a new Intensive Therapy Order, and establishing minimum standards for intensive therapy places, to be used only where necessary as a last resort.

If Chapter 16 remains unamended, then to ensure OPCAT compliance, s 577 requires amendment, which only requires an operating entity for a therapeutic protection place to ensure, *as far as practicable*, children and young people have reasonable opportunities to receive visits from accredited people.

In OICS' submission to the Legal Affairs and Community Safety Committee's Inquiry into the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023, the Inspector noted that:

- In contrast to the current CYP Act, the Bill did not include the Inspector in the list of accredited persons who could visit an intensive therapy place.

- The Bill did not provide unfettered access for NPM bodies to visit intensive therapy places as required by OPCAT.

Appropriately, the Bill did include within the definition of accredited person: a commissioner exercising functions under the *Human Rights Commission Act 2005*, reflecting that the HRC is part of the ACT NPM and that the Children and Young People Commissioner and Public Advocate has relevant oversight functions and expertise.

In its report, the Legal Affairs and Community Safety Committee recommended that the ACT Government amend the Bill to explicitly provide that the ACT National Preventive Mechanism bodies, including the Office of the Inspector of Correctional Services, have unfettered access to intensive therapy places, in accordance with OPCAT.

Monitoring protected mail

Mail between detained people and the Inspector is generally protected, however s 105 of the CM Act provides that the director-general may open and search protected mail in the detainee's presence if the director-general suspects on reasonable grounds that the mail contains:

- a) Something that may physically harm the addressee; or
- b) A prohibited thing.

However, the director-general must not read the detainees protected mail without the detainee's written consent.

In contrast, s 25 of the *Mental Health (Secure Facilities) Act 2016* states that the director-general of such a facility may not search the mail of a patient in such circumstances, if it is received from an accredited person.

Recommendation: The Corrections Management Act should be amended to prevent mail between a detained person and the Inspector being searched.

Conclusion

Thank you for the opportunity to participate in this review. The material in this submission demonstrates that the Inspector has been effective at achieving the objects of the ICS Act and that with relatively minor legislative and other changes, can continue to work with government to promote the continuous improvement of correctional centres and correctional services.

OICS looks forward to working with the government further on potential amendments.