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STATUTORY REVIEW REPORT: INSPECTOR OF CORRECTIONAL SERVICES ACT 2017

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ACT
Government

Statutory Review Report

Inspector of Correctional Services Act 2017

Justice and Community Safety Directorate

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Executive Summary

This is the report on the statutory review (the Review) of the *Inspector of Correctional Services Act 2017* (ACT) (the Act). The Act commenced operation in 2017 with the object of continuing improvement of correctional centres and services by providing a framework for the independent review and reporting of correctional systems¹ in the wake of the death of Mr Steven Freeman at the Alexander Maconochie Centre (the AMC) in 2016 and the resulting inquiry conducted by Mr Philip Moss AM (the Moss Report),² which highlighted the need for increased oversight in the sector.

The Review was conducted after the Act's fifth year of operation in accordance with section 39 of the Act. The Review was undertaken by the Justice and Community Safety Directorate (JACS) under the direction of the Minister for Corrections of the Australian Capital Territory (ACT). The Review began on 18 May 2023.

Since the commencement of the Act, the Inspector of Correctional Services (the Inspector) has tabled three whole-of-centre reviews (two of the AMC and one of the Bimberi Youth Justice Centre (Bimberi)), three reviews into correctional services (thematic reviews), and 15 critical incident reviews. The Inspector has made approximately 200 recommendations within these reviews, about 95% of which have been agreed or agreed in principle by the Government.³ During its time in operation, the Act and Inspectors have made a valuable contribution to the correctional system and safety of detained people in the ACT.

The aim of the Review was to examine the operation and effectiveness of the Act. JACS was assisted by the submissions of stakeholders who were asked to respond to terms of reference (TOR) and raise any other issues related to the operation of the Act.

The Review identified the following key issues:

- The current structure of the Inspector role, including whether the role should be made an Officer of the Legislative Assembly.
- Complications with the current legislated timelines and frequency of reviews.
- A need for increased flexibility in the form, tabling and commentary requirements of reports.
- Opportunities to improve the current provisions in the Act regarding procedural fairness, the requirements around the implementation of recommendations made under the Act and the protection of people making disclosures to the Inspector.
- The definition of 'critical incident' and whether it accurately captures the appropriate incidents.
- A need to clarify the Act to ensure that the Inspector's functions do not impinge upon the *Coroners Act 1997*.

The identification of these and other issues has resulted in the Review making 12 recommendations, designed to support the legislation in effectively achieving the objects of the Act.

¹ *Inspector of Correctional Services Act 2017* s 6.

² Mr Philip Moss AM, *So Much Sadness in Our Lives: Independent Inquiry into the Treatment in Custody of Steven Freeman* (7 November 2016). The Moss Report is now available at https://www.ics.act.gov.au/__data/assets/pdf_file/0019/1304353/Moss-report.pdf.

³ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 3.

Recommendations

Recommendation 1

Section 18(1)(b) of the Act be amended to remove a specified timeframe for thematic reviews in favour of them being conducted at the Inspector's discretion, and not more often than every two years.

Recommendation 2

Section 27(1) of the Act should be amended to afford the Inspector discretion about the timeframe for tabling reports on critical incidents.

Recommendation 3

Further consultation be undertaken on how the section 27(2) requirements should be amended to reflect the broader purpose of reports and the Act.

Recommendation 4

An amendment to facilitate the tabling of reports outside sitting periods be introduced into the Act.

Recommendation 5

Section 29(2) be amended to better cater to the differing types of draft reports and the operational requirements in providing comment by allowing 'reasonable opportunity' or similar for comment.

Recommendation 6

Section 16 of the Act be expanded to allow the Inspector to delegate their functions under any Territory law.

Recommendation 7

Further policy development and consultation be undertaken to consider the expansion of 'relevant Ministers and Directors-General' as defined within the Act.

Recommendation 8

The title of the Inspector be amended to reflect the expanded scope of the Inspector's oversight responsibilities.

Recommendation 9

Section 26(4) of the Act be expanded to more comprehensively protect against the types of detrimental action which could be taken against detained persons and organisations interacting with correctional centres.

Recommendation 10

A legislative amendment allowing a mechanism for individuals and other entities to receive proposed adverse findings and be afforded a right of reply be included in the Act, subject to consultation regarding what exact form this mechanism should take.

Recommendation 11

The definition of critical incident in section 17(2) of the Act be amended, in consultation with stakeholders, to ensure it is appropriate.

Recommendation 12

Further consultation and policy development should be undertaken with a view to determining what legislative amendments, if any, may assist with functional overlaps between the Act and the Coroner's Act 1997.

Recommendation 13

Further consideration should be given whether amendment is required to sections 62(4) and 105 of the *Corrections Management Act 2007*, noting it is beyond this review to determine whether such amendments are appropriate.

Introduction

The Inspector of Corrective Services was established on 8 December 2017 with the commencement of the Act. Section 39 of the Act provides that the administering Minister must arrange for a review of the operation of the Act as soon as practicable after the end of its fifth year of operation. The Minister must present a report of the Review to the Legislative Assembly within 12 months of commencing the Review.⁴

As the Minister for Corrections is the Minister responsible for the Act,⁵ the statutory review was conducted by JACS under the direction of the Minister for Corrections. The Review commenced on 18 May 2023.

Aim and Scope of Review

The aim of the Review is to evaluate the functioning, operation and effectiveness of the Act's provisions and their interplay with other legislation in the Territory with a view to ensuring the Act facilitates achievement of the object set out at section 6 (to promote the continuous improvement of correctional centres and correctional services).

As part of the consultation process stakeholders were invited to consider the following TOR in their responses:

- a. the legislated structure of the Inspector role
- b. the intersection between the work and role of the Inspector and other oversight mechanisms for correctional centres and correctional services
- c. the extent to which the Act has supported better and more effective oversight of correctional centres and correctional services
- d. the extent to which the examination, review and reporting functions in the Act have helped to promote better practice in correctional centres and correctional services
- e. the interaction of the Act with other ACT legislation, including the *Coroners Act 1997*.

Stakeholders were also encouraged to provide any additional feedback which fell outside of these TOR but was relevant to the functioning of the Act.

Consultation

Thirty-two stakeholders were directly invited to provide submissions to the Review, with an invitation also extended to the broader OPCAT⁶ network in Australia. Of these stakeholders, 25 were independent external organisations with the remaining seven stakeholders being of ACT Government agencies. The Review ultimately received submissions from ten stakeholders. A list of stakeholders that provided a submission to the review is provided at Appendix A. Following receipt of submissions JACS also undertook

⁴ *Inspector of Correctional Services Act 2017* s 39(2).

⁵ See the Administrative Arrangements 2022 (No 1) sch 2, part 2.5; Administrative Arrangements 2022 (No 2) sch 2, part 2.5; Administrative Arrangements 2023 (No 1) sch 2, part 2.5.

⁶ OPCAT refers to the United Nations' Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The OPCAT is an international human rights agreement designed to strengthen state compliance with existing international human rights law.

further consultation with ACT Government agencies and the Office of the Inspector of Correctional Services (OICS) in relation to the issues raised in their submissions.

Background

Establishment of the Act

In November 2016, the ACT Government commissioned a review by Mr Philip Moss AM in response to the death in custody of Mr Steven Freeman at the AMC. The report on the review, *So Much Sadness in Our Lives: Independent Inquiry into the Treatment in Custody of Steven Freeman* was provided to the then-Minister for Corrections on 7 November 2016.⁷

The Moss Report considered the roles of different agencies responsible for independent oversight and investigations at the AMC, and options raised in submissions to the Inquiry to improve the transparency around critical incidents at the AMC. Mr Moss recommended that the ACT Ombudsman have the role of reviewing the response to all critical incidents at the AMC, including serious assaults (recommendation 8). Previous reviews around the time had also endorsed the development of increased oversight of the ACT's correctional facilities.⁸

In its response to recommendation 8 of the Moss Report, the ACT Government indicated its support for strengthening the oversight regime for the AMC and agreed to develop an independent Inspectorate of Custodial Services function to be operational by the end of 2017.

The *Inspector of Correctional Services Act 2017* was introduced as part of the implementation of this commitment to ensure that the ACT had an effective preventative measure, owing to the recognition that “[c]orrectional centres by their very nature cause a power imbalance between the people that maintain the environment and the people detained there.”⁹ The Inspector of Correctional Services Bill 2017 (the Bill) received bipartisan support in the Legislative Assembly and the Act commenced operation in December 2017.

Feedback received during the present Review highlighted the benefits that the establishment of the Act has had. For example, the ACT Council of Social Services stated:

“ACTCOSS believes the establishment of the OICS has played an invaluable role in providing independent oversight and monitoring of the ACT's correctional services. [...] Since its inception, the OICS has helped to strengthen transparency around the operations of correctional services and facilities, highlighting a range of issues and providing a raft of recommendations through Healthy Prison Reviews of the Alexander Maconochie Centre (AMC) and a Health Centre Reviews of the

⁷ This report is now known as the Moss Report. The Moss Report is available at <https://www.ics.act.gov.au/__data/assets/pdf_file/0019/1304353/Moss-report.pdf>.

⁸ See the 2016 Justice and Community Safety Standing Committee's Inquiry into the Auditor-General's Report on the Rehabilitation of Male Detainees and the 2016 Morison security review. For a more historical example, please see the 2007 Human Rights Audit of the Operations of ACT Correctional Facilities under Corrections Legislation which occurred prior to the 2009 opening of the AMC.

⁹ Mr Shane Rattenbury MLA, Presentation Speech for the Inspector of Correctional Services Bill 2017 (26 October 2017) at <<https://www.hansard.act.gov.au/hansard/9th-assembly/2017/HTML/week12/4421.htm>>.

Bimberi Youth Justice Centre. In undertaking these reviews, the OICS has been proactive in engaging with a range of stakeholders, including ACTCOSS and other civil society organisations.”¹⁰

The Inspectorate

Appointment of the Inspector

The Act establishes the Inspector of Correctional Services role and regulatory framework. Pursuant to section 9 of the ICS Act, the Inspector is appointed by the Executive through a transparent process for a five-year term.

Powers and Functions

The Inspector’s role is to oversee correctional centres, services and associated critical incidents in the ACT. Correctional centres are defined at section 7 of the Act and include the AMC, as well as other places where people are detained such as the ACT Law Courts Court Transport Unit. ‘Correctional services’ encompasses the management and control of a correctional centre, as well as the security, care, safety, welfare and control of detained people.¹¹ The Act had a staggered introduction with the Inspector’s oversight first being limited to facilities that detained adults in custody, however in December 2019 this oversight expanded to include facilities and services for youth detention.¹²

Part 3 of the Act sets out the Inspector’s functions and powers. Under section 17, the Inspector’s general functions include:

- examining and reviewing correctional centres,
- examining and reviewing correctional services,
- reviewing critical incidents at correctional centres or in the provision of correctional services, and
- reporting to the Legislative Assembly.

Section 17(2) of the ICS Act defines a ‘critical incident’ as any event in a correctional centre or in the provision of correctional services that involves any of the following:

1. the death of a person,
2. a person’s life being endangered,
3. an escape from custody,
4. a person being taken hostage,
5. a riot that results in significant disruption to a centre or service,
6. a fire that results in significant property damage,
7. an assault or use of force that results in a person being admitted to hospital, and

¹⁰ ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 1.

¹¹ *Inspector of Correctional Services 2017* s 8.

¹² With the commencement of s 40 of the *Inspector of Correctional Services 2017* (as notified until 6 December 2019).

8. any other incident identified as a critical incident by a relevant Minister or relevant Director-General.

Section 18 of the Act deals with the Inspector's functions for examination and review. The section provides that the Inspector must review:¹³

- each correctional centre, as defined in section 7, every 3 years (whole centre reviews); and
- correctional services, as defined in section 8, every 2 years (thematic reviews). For these reviews, the Inspector examines an aspect of correctional services across all or part of a particular facility.¹⁴

Section 18(1)(c) also gives the Inspector discretion to review 'critical incidents' as they consider appropriate. A 'critical incident' is an incident which may cause or risk 'significant impact or harm.'¹⁵ These are defined at section 17(2) of the Act as noted above. Critical incidents are explored further later in this report.

The Act requires the Inspector to provide a report on each examination and review, whether whole of centre, thematic or a critical incident review, to the ACT Legislative Assembly within 6 months after completing the examination or review.¹⁶

The Act gives the Inspector a variety of powers to aid in carrying out their functions. The Inspector may enter a correctional centre at any time without notice.¹⁷ While at the correctional centre the Inspector may inspect any part of the correctional centre, documents and records, vehicles and equipment, as well as speak with or privately interview detained people and employees or service providers.¹⁸ It is a requirement of the directors-general of the *Correctional Management Act 2007* and the *Children and Young People Act 2008* to ensure the Inspector is given access to the centre and relevant persons as requested.¹⁹ Any person who obstructs or hinders the Inspector in the exercise of their functions without reasonable excuse is criminally liable.²⁰

Section 22 of the Act allows for the Inspector to require a person to provide them with information, or produce requested documents or things. The Inspector can also require a person to attend an interview to answer questions relevant to the Inspector's examination or review.²¹ A failure to comply with these requirements is a criminal offence, except where the person is a detainee or can provide a reasonable excuse.²²

¹³ *Inspector of Correctional Services Act 2017* s 18(1).

¹⁴ See for example 'Isolation of children and young people at Bimberi Youth Justice Centre' (29 November 2023) Inspector of Correctional Services, or 'The care and management of remandees at the Alexander Maconochie Centre 2018' (21 February 2019). All published thematic reviews are available at < <https://www.ics.act.gov.au/reports-and-publications/thematic-reviews>>.

¹⁵ Explanatory statement for the Inspector of Correctional Services Bill 2017, cl 17.

¹⁶ *Inspector of Correctional Services Act 2017* s 27(1).

¹⁷ *Inspector of Correctional Services Act 2017* s 19(1).

¹⁸ *Ibid*, ss 19(2), 19(3).

¹⁹ *Ibid*, s 21(1).

²⁰ *Ibid*, s 21(2).

²¹ *Ibid*, s 23(1).

²² See for example *Inspector of Correctional Services Act 2017* ss 22(4), 22(5).

OPCAT functions

The OICS comprises part of the ACT's National Preventative Mechanism (NPM) that supports Australia's implementation of the OPCAT.²³ The focus of the OPCAT is on protecting the rights of people deprived of their liberty in places of detention by preventing torture and other cruel, inhuman or degrading treatment or punishment. OPCAT aims to achieve its preventative objective by establishing new mechanisms for proactive, independent oversight.

Under Article 17 of OPCAT, state parties are required to set up, designate or maintain an NPM empowered to visit and independently monitor any place of detention under their jurisdiction and control. The visits are to be undertaken with a view to strengthening, if necessary, the protection of persons against torture and other cruel, inhuman or degrading treatment or punishment.

In January 2022, the Attorney-General designated the OICS, the ACT Human Rights Commission and the ACT Ombudsman as the ACT's NPM. In the establishment phase, the ACT NPM is utilising the existing oversight powers of the three agencies to undertake visits and provide oversight for places of detention in the ACT.

Correctional Oversight in Australia

The Act is one of five similar pieces of legislation in Australia. New South Wales (NSW), Western Australia (WA), Tasmania and Queensland also have independent inspectorates which oversee correctional and detention centres in their state.²⁴ South Australia (SA) and Victoria do not appear to have independent bodies for this function. In Victoria, the Justice Assurance and Review Office within the Department of Justice and Community Safety, reviews deaths in custody and other serious incidents in correctional and detention centres.²⁵ Similar to Victoria, SA's Office for Correctional Services Review is contained within their Department for Correctional Services and encompasses a broader function of correctional services review beyond just oversight, including auditing and intelligence along with investigations.²⁶ In the Northern Territory oversight is carried out by their OPCAT NPM (comprising of the Ombudsman and the Children's Commissioner), with the Review being unable to identify any specialist structure such as the inspectorates.

²³ The other ACT bodies forming the remainder of the ACT's multi-body NPM are the ACT Human Rights Commissions and the ACT Ombudsman.

²⁴ See, for example, *Inspector of Custodial Services Act 2012* (NSW), *Inspector of Custodial Services Act 2003* (WA), *Custodial Inspector Act 2016* (Tas) and *Inspector of Detention Services Act 2022* (Qld).

²⁵ See <<https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro#:~:text=Purpose%20and%20Objectives,prisons%20and%20youth%20justice%20facilities.>>.

²⁶ See <<https://www.corrections.sa.gov.au/about/our-people/departments-structure>>.

Issues Identified in the Statutory Review

Structure and Administrative Processes

Legislated Structure and Appointment of the Inspector

The Inspector of Correctional Services is a statutory body. The Inspector is appointed by the Executive,²⁷ and the Act also provides the Executive with power to end the appointment.²⁸ The Inspector must provide their reports to the Legislative Assembly, and must also provide draft reports to the Minister prior to tabling for commentary.²⁹ The Act gives the Minister power to make guidelines about matters the Inspector must review, examine or report on and can refer critical incidents to the Inspector for review.³⁰ The Review notes no ministerial guidelines have been issued since the inception of the Act.

An important and recurring theme within received submissions was debate over whether the Inspector's role should remain as currently provided for under the Act, or whether the Act should be amended to provide that the Inspector is an Officer of the Legislative Assembly. An Officer of the Assembly is a role independent of the government of the day, appointed by the Speaker of the Legislative Assembly, and that reports through the Speaker to the Assembly rather than to a government minister. The following positions are Officers of the Assembly in the ACT: the Auditor-General; the Electoral Commissioner, Commission Chair, and Commission Member (collectively the Electoral Commission); the Ombudsman (who is also the Inspector of the ACT Integrity Commission); and the ACT Integrity Commissioner.

In contrast, statutory roles which are not structured as Officers of the Legislative Assembly in the ACT but which provide substantive and independent oversight across a range of services and policy areas include: the ACT Human Rights Commissioner, the ACT Aboriginal and Torres Strait Islander Children and Young People Commissioner, the Victims of Crime Commissioner, the Public Advocate and Children and Young People Commissioner, the Discrimination, Health Services, Disability and Community Services Commissioner, and the Public Sector Standards Commissioner.

Submissions in favour of the Inspector's position becoming an Officer of the Assembly cited benefits of this approach as increasing the Inspector's independence and promoting the objects of the Act set out at section 6.³¹ For example, the OICS submission indicated that the change would increase both the actual and perceived independence of the office as an oversight body "to the greatest extent possible,"³² akin to the Auditor-General and the Ombudsman. The OICS highlighted that the Inspector is currently appointed by the Executive, but the Act does not exclude decision makers from the Directorates overseen by the Inspector from the appointment processes and contrasts this with the appointment process for Officers of the

²⁷ *Inspector of Correctional Services Act 2017* s 9.

²⁸ *Ibid* s 12.

²⁹ *Ibid* s 29.

³⁰ *Ibid*, ss 20(1),18(1)(c).

³¹ Submissions in favour of this change included the submissions from the Office of the Inspector of Correctional Services and the ACT Council of Social Services,

³² Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 8.

Legislative Assembly.³³ The ACT Council of Social Services (ACTCOSS) submission also recommends the creation of an objective and independent dismissal process within the legislation, suggesting this and the need for further independence from the Executive could both be achieved through restructuring the role of the Inspector into an Officer of the Legislative Assembly.³⁴

In the March 2023 *Inquiry into Annual and Financial Reports 2021-22* the Standing Committee expressed the view that greater separation was needed between the Minister for Corrections and the Inspector to facilitate appropriate oversight and to evaluate the implementation of recommendations, culminating in the Standing Committee recommending that the ACT Government introduce legislation to make the Inspector an Officer of the Legislative Assembly.³⁵ The Government noted this recommendation and agreed to consider it as a part of this Review.³⁶ The ACT Government also agreed to review statutory office holder independence, including whether any additional Officers of Parliament should be appointed in the Parliamentary and Governing Agreement for the Tenth Legislative Assembly.³⁷

Restructuring of the Inspectorate was not engaged with or supported universally in submissions to the Review. Concern was raised that if the Inspector no longer directly engaged with the Minister for Corrections, the opportunities for sharing specialised knowledge and exchanges between the Inspector and the Minister, including on current and emerging issues relating to corrections, may be diminished.³⁸ In addition to the Minister for Corrections, the Inspectorate's work also engages the Minister for Children, Youth and Family Services, in relation to oversight of Bimberi Youth Justice Centre, and several Government Directorates.

A review of comparable oversight directorates in Australia³⁹ indicates different approaches as to how Inspectorates are constituted. In WA, NSW and Tasmania inspectors are appointed by the State's Governor. Inspectorate legislation in WA and Tasmania includes powers for the Minister to make guidelines or similar, as it does in the ACT.⁴⁰ Queensland specifies in section 7(2) of the *Inspector of Detention Service Act 2022* (Qld) that the inspector is an Officer of the Parliament, but it is the only jurisdiction in Australia with this structure. In NSW, the *Inspector of Custodial Services Act 2012* (NSW) provides for the Inspector to be appointed by the Governor however it also requires that the Minister must refer a proposed appointment first the Committee on the Office of the Ombudsman, the Law Enforcement Commission and the Crime Commission.⁴¹ This Joint Committee has veto rights over the proposed appointments for the Inspector role, and additional oversight functions for the inspector themselves.⁴²

³³ Ibid, 7.

³⁴ ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 14-15.

³⁵ ACT Legislative Assembly Standing Committee on Justice and Community Safety, *Inquiry into Annual and Financial Reports 2021-2022* (March 2023), [5.6].

³⁶ ACT Government, *Government Response to the Standing Committee on Justice and Community Safety's Inquiry into Annual and Financial Reports 2021-2022* (July 2023), 4.

³⁷ Parliamentary and Governing Agreement for the 10th Legislative Assembly of the Australian Capital Territory, Appendix 2: Agreed Administrative Reform 5.

³⁸ ACT Corrective Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023) [1].

³⁹ NSW, WA, Tasmania and Queensland.

⁴⁰ *Inspector of Custodial Services Act 2003* (WA) s 17; *Custodial Inspector Act 2016* (Tas) s 28.

⁴¹ *Inspector of Custodial Services Act 2012* (NSW) s 4(2).

⁴² Ibid ss 17, 18.

The Review notes that the object of the Act is to promote the continuous improvement of correctional centres and services through their systematic review and scrutiny as well as independent and transparent reporting. The nature of the office and the explanatory statement for the Bill highlight the importance of the need for the office to be independent of those which the Inspectorate reviews. However, maintaining the Inspector as a statutory office that engages directly with the Minister for Corrections ensures that the Minister has complete visibility and accountability for the entire corrections space in the ACT. It also allows for the Minister to engage with the OICS in response to any complaints or issues which may arise with the Inspector, and to do so more efficiently than would be possible for an Officer of the Legislative Assembly.

Connected to this question is the recommendation of the OICS and the ACTCOSS that the Minister's power under section 20 of the Act be repealed. Section 20 of the Act allows the Minister to make guidelines about matters which the Inspector must review, examine or report on in relation to correctional centres or services. The OICS submission recommends this section be removed as it "arguably impinges" on the independence of the inspectorate.⁴³ The ACTCOSS submission also recommends the removal of section 20, perceiving that the section impedes the operational independence of the Inspector.⁴⁴ However, the OICS submission also recognises that this power has not been used at any time during the operation of the Act, with past and present Ministers preferring to refer matters to the Inspector through correspondence.⁴⁵ The Review considers that the maintenance of this section is important to ensure that Minister for Corrections, can, where necessary, direct the examination and review of issues which may be the cause of community concern.

The Review considers that the current structure of the Inspector's role is functioning effectively and as intended by the Act. The intent of the Act is to oversee the specialised area of custodial facilities and correctional services. By comparison, the current Officers of the Legislative Assembly have a broader remit and oversee many aspects of government and life in the ACT. The concerns raised by stakeholders about impingements to the Inspector's independence reflect theoretical possibilities rather than extant issues. Noting this and, in light of the value of maintaining communication and efficacy in this specialised area, the Review does not recommend that the Inspector be made an Officer of the Legislative Assembly.

Resourcing

Several submissions raised the issue of funding and resource levels for the OICS. A number of submissions indicated concern that the current funding was insufficient to enable the Inspector to properly achieve their functions under the Act.⁴⁶ For example, the ACTCOSS submission recommends that the OICS be resourced to ensure that the Inspector is able to strengthen engagement with the community sector, provide expertise on matters related to the detention of children and be able to discharge their function in a manner that is disability inclusive.⁴⁷ The OICS and ACTCOSS submissions also make recommendations

⁴³ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 15.

⁴⁴ ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 11.

⁴⁵ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 15-16.

⁴⁶ Levels of funding of the OICS were noted as insufficient in the following submissions: OICS, Aboriginal Legal Service NSW/ACT, Winnunga Nimmityjah Aboriginal Health Service, Legal Aid ACT and the ACT Council of Social Services.

⁴⁷ ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 18-21.

that the Inspector's remuneration be amended in line with other statutory office holders.⁴⁸ Submissions supportive of the Inspector becoming an Officer of the Legislative Assembly also indicated that such a change may address resourcing limitations by improving funding and financial autonomy.⁴⁹ The issue of resourcing for the OICS was also raised by the Standing Committee on Justice and Community Safety's *Inquiry into Annual and Financial Reports 2021-22* where the committee expressed "significant concerns regarding the ICS' ability to perform sufficient oversight due to lack of staffing and resources."⁵⁰

Conditions of appointment

The Act stipulates the conditions of appointment are to be agreed between the Inspector and the Executive subject to determinations of the Remuneration Tribunal under the *Remuneration Tribunal Act 1995*.⁵¹ This legislative framework appears appropriate for the current structure of the Inspector role as set out in the Act. It is noted that this approach is consistent with the arrangements for other statutory positions which report to Ministers in the ACT, in particular commission members under the *Human Rights Commission Act 2005*. The detail of the specific remuneration arrangements set through the framework in the Act are, however, outside the scope of this Review.

The Review acknowledges that when considering the Inspector's remuneration in 2023 the ACT Remuneration Tribunal noted that a review of the Inspector's establishing legislation is ongoing, and that consideration of whether a role should be part-time or full time is a policy decision for Government.⁵² Determination 18 of 2023 recognised that it is not appropriate for the Inspector to be remunerated on a per diem basis (akin to a casual position), and altered the conditions to allow payment per annum.⁵³ JACS intends to consider these issues further, separate from this Review.

Timing, form and tabling of reports

The most consistent concern raised by stakeholders in their submissions to the Review was the resourcing outlay required to respond to and comply with the various legislative requirements under the Act.⁵⁴ Submissions raised a range of suggestions about how the Act could be improved to address these issues and better achieve the objects of the Act and facilitate implementation of the Act in practice, as outlined below.

⁴⁸Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 19; ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 14-15.

⁴⁹ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 8; ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 8.

⁵⁰ ACT Legislative Assembly Standing Committee on Justice and Community Safety, *Inquiry into Annual and Financial Reports 2021-2022* (March 2023), [5.6].

⁵¹ *Inspector of Correctional Services Act 2017* s9(5).

⁵² ACT Remuneration Tribunal, Determination 18 of 2023 (22 November 2023), 4. Available at <https://www.remunerationtribunal.act.gov.au/__data/assets/pdf_file/0007/2336245/Determination-18-of-2023-PTPOH.pdf>.

⁵³ *Ibid.*

⁵⁴ Submissions raising this concern include the Office of the Inspector of Correctional Services, ACT Corrective Services, the Community Services Directorate and Canberra Health Services.

Timing of reports

The Act requires the Inspector to produce reports for each examination and review conducted according to the schedule in section 18(1).⁵⁵ As outlined in more detail in the introduction to this report, this includes:

- correctional centre reviews (whole of centre reviews) at least every 3 years;
- correctional service reviews (thematic reviews) at least every 2 years; and
- critical incident reviews as appropriate.

The timing for whole of centre reviews is similar to that set out in other inspectorate legislation, with whole of centre reviews happening every three years in WA, Tasmania and for youth detention centres in NSW. Adult centres in NSW and centres in Queensland are reviewed every five years. For thematic reviews, corresponding legislation in other states does not specify a timing requirement, providing that the reviews may be conducted at any time.⁵⁶

Section 18(1)(b) of the Act requires that a review of correctional services (thematic reviews) be undertaken every two years. The OICS and the Community Services Directorate (CSD) submissions indicate the frequency of mandatory examination and review cycles cause strain on resourcing noting the significant work that goes into the review both by the OICS and those being reviewed.⁵⁷ For the agencies overseeing the centres, the short timeframes between the types of reviews and OPCAT visits is also perceived to limit their ability to implement the Inspector's past recommendations as resources are diverted to meeting the document and witness requirements of the review underway at the time.⁵⁸

Section 8 of the Act defines a correctional service as:

- (a) means—
- (i) the management, control and security of a correctional centre; or
 - (ii) the security, control, safety, care and welfare of a detainee at a correctional centre; and
- (b) includes policies, processes and procedures in relation to the matters mentioned in paragraph (a).

Thematic reviews may accordingly be broad in scope and in the past have covered substantial topics such as isolation practices and the Court Transport Unit.⁵⁹

In light of the resourcing and implementation impacts arising as a result of the current mandated timeframes for thematic reviews the Review recommends progressing an amendment to section 18(1)(b) removing the mandated timing of thematic reviews but maintaining the Inspector's ability to carry out

⁵⁵ *Inspector of Correctional Services Act 2017* s 27(1).

⁵⁶ Queensland, NSW, WA and Tasmania afford discretion to the Inspector to conduct reviews of correctional services at any time (as determined by the Inspector).

⁵⁷ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 15; Community Services Directorate, Submissions to the Statutory Review of the Inspector of Correctional Services Act 2017 (October 2023), 2.

⁵⁸ Community Services Directorate, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (October 2023), 2.

⁵⁹ Past thematic reviews are available on the Inspector of Correctional Services website at <<https://www.ics.act.gov.au/reports-and-publications/thematic-reviews>>.

thematic reviews at their discretion, but not more than every two years. This amendment would promote flexibility to ensure the Inspector is able to appropriately engage with the issues during their reviews without being constrained by resourcing tensions while also ensuring there is sufficient timing in between reviews to allow for the functional implementation of accepted recommendations. It is noted that the Inspector's OPCAT functions will allow the OICS flexibility to conduct visits and produce reports from time to time, as needed.

Recommendation 1

Section 18(1)(b) of the Act be amended to remove a specified timeframe for thematic reviews in favour of them being conducted at the Inspector's discretion, and not more often than every two years.

Form and tabling

Currently, section 27(1) of the Act requires the tabling of a report for 'each examination and review undertaken by the Inspector' within six months of the completion of the review. The OICS submission identifies that this tabling requirement will likely subject all reports produced by the Inspector to parliamentary privilege⁶⁰ (discussed in more detail later in this Review). The current review and reporting requirements also have functional impacts upon OICS resources, with the Inspector noting it is difficult to manage within their current staffing level.⁶¹

The Review recognises the importance of the tabling of reports in the Legislative Assembly as a mechanism to ensure procedural fairness as well as to promote transparency and accountability, and considers the tabling of all reports important to maintain. Notwithstanding this, the Review recognises the resourcing issues identified and considers that greater flexibility in the timing of tabling critical incident reports may assist with any resource strain and, potentially, allow for the larger review reports to take priority, noting that the large whole of centre reports are a mandatory function of the Inspector under the Act.

Recommendation 2

Section 27(1) of the Act should be amended to afford the Inspector discretion about the timeframe for tabling reports on critical incidents.

Section 27(2) of the Act set outs requirements and considerations that each report by the Inspector must address. The requirements are mandatory for all reports and do not differ based on the type of report being progressed. The OICS submission raises concerns that the section 27(2) requirements are not conducive to all types of reports, particularly critical incident reports and recommends that the

⁶⁰ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 10-11.

⁶¹ Ibid, 10.

requirements should be replaced with a requirement that the Inspector ensure that reports meet the objects of the Act.⁶²

Section 27(2) currently states:

A report must include the following:

- (a) an evaluation of the correctional centre and correctional services that were subject to examination and review;
- (b) an assessment of the delivery of correctional services and the operation of correctional centres that were subject to examination and review;
- (c) an assessment about whether the rights under international and territory law of detainees at a correctional centre subject to review are protected;
- (d) an assessment about whether law, policy and procedures applying to the correctional centre or service subject to review reflect best practice standards;
- (e) any recommendations of the inspector in relation to changes required to the infrastructure at correctional centres, correctional policies and procedures or the law applying to correctional centres or services;
- (f) a statement about a matter that has been referred under section 32 (Inspector may refer matter to investigative entity) or section 34 (Oversight entities may refer matter to inspector);
- (g) a statement about whether any part of the report is to be kept confidential due to public interest considerations against disclosure.

These requirements are exhaustive and clearly applicable to whole of centre reviews. However, depending on the particular incident or corrective service being examined it may be that not every review requires an assessment or evaluation of each of the subheadings in section 27(2).

JACS conducted a jurisdictional review of similar inspectorate legislation and found that the ACT's section 27(2) is unusually prescriptive, with WA, Tasmania and Queensland requiring their Inspectors to include in reports advice or recommendations as they consider appropriate and NSW prescribing no requirements.

In order to promote flexibility and ensure the reports remain effective, the Review recommends amendments to section 27(2) of the Act, subject to further consultation about the form this amendment should take.

Recommendation 3

Further consultation be undertaken on how the section 27(2) requirements should be amended to reflect the broader purpose of reports and the Act.

Section 30 of the Act currently contains the requirements for the Inspector to provide reports to the Legislative Assembly, including that a report must be given to the Speaker. The OICS submission recommends the inclusion of a mechanism for reports to be tabled outside of sitting periods.

⁶² Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 15.

The Review notes that section 30 does not appear to impose a timeframe for the tabling of reports and allows for the Speaker to present the report to the Legislative Assembly within 5 *sitting* days. Whilst on its face section 30 prescribes only when the report must be presented to the Legislative Assembly by the Speaker, rather than when it must be provided to the Speaker by the Inspector, the Review appreciates the provision may benefit from further clarity to remove doubt. It is noted that other Territory legislation such as the *Auditor-General Act 1996* (Auditor-General Act) provides a more clear and direct approach.

The Review recommends an explicit mechanism be introduced to the Act to facilitate the tabling of reports outside of sitting periods.

Recommendation 4

An amendment to facilitate the tabling of reports outside sitting periods be introduced into the Act.

Timeframes for comment on draft reports

Both the OICS and ACT Corrective Services raised concerns regarding the mandated length of six weeks for comments on draft reports provided for at section 29(2) of the Act. The OICS submission suggests that six weeks may be an ‘unduly’ long period of time for comments particularly given some reports, such as critical incident reports, tend to be short documents.⁶³ Their submission ultimately recommended greater flexibility be introduced into the section. In contrast, ACT Government stakeholders have noted that while current timeframes may be adequate for the shorter critical incident reports, they can cause resourcing difficulties for the larger, mandatory such as the Healthy Prison reports.⁶⁴

Similar legislation in other jurisdictions varies in the way they deal with this issue. The ACT’s specified timeframe for comments is unique in that it gives a hard timeframe. In Queensland, the Inspector must give a ‘reasonable period,’ but that period must be at least 6 weeks before the report is provided to the Speaker.⁶⁵ NSW provides for a ‘reasonable opportunity’ for comment on draft reports,⁶⁶ while Tasmania does not specify a requirement for general comment, but provides for reasonable opportunity to comment on adverse findings.⁶⁷

Within the ACT, legislation such as the Auditor-General Act prescribes a timeframe of 14 days for draft comment but retains the ability for the Auditor-General to allow a longer period by notice.⁶⁸ Government stakeholders have advised that due to other processes within the Auditor-General Act and associated regulations engagement with the Auditor-General is more sustained, resulting in commentary generally requiring less resources which facilitates the 14 day response.

The Review considers that amendment to section 29(2) to increase flexibility appears appropriate and recommends that s 29(2) be amended to allow stakeholders the ability to engage in a dialogue about timeframes in order to maximise flexibility in the face of often competing operational requirements. The

⁶³ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 14.

⁶⁴ Agencies include ACT Corrective Services, the Community Services Directorate and Canberra Health Services.

⁶⁵ *Inspector of Detention Services Act 2022* (Qld) s 24(2).

⁶⁶ *Inspector of Custodial Services Act 2012* (NSW) s 14.

⁶⁷ *Custodial Inspector Act 2016* (Tas) s 20.

⁶⁸ *Auditor-General Act 1996* s 18(5).

Review notes that it is to be expected that a provision that includes drafting such as ‘reasonable opportunity’ may be subject to different interpretations and application amongst agencies, but considers that if this recommendation is accepted, it should be applied according to the policy intent of promoting positive engagement and a productive dialogue between stakeholders. Further engagement with stakeholders will be required to determine the most appropriate terminology.

Recommendation 5

Section 29(2) be amended to better cater to the differing types of draft reports and the operational requirements in providing comment by allowing ‘reasonable opportunity’ or similar for comment.

Timeframes for Government Response to tabled reports

The OICS and ACTCOSS have recommended provision be made in the Act to require the Government to respond to tabled reports within a particular timeframe.⁶⁹ This recommendation acknowledges the Government does respond, but demonstrates concern that Government responses to major reports in 2019 and 2022 occurred in seven months and points to the provisions of the Auditor-General Act, which requires the Government to respond to reports within four months.⁷⁰ The submission from the Justice Reform Initiative also recommends legislative amendment to require a Government response by a certain time, noting the importance of the reports and the Government’s requirement to respond to other reports (citing the requirements under the Auditor-General Act).⁷¹

The Review notes that the current approach in the Act is in line with the similar legislation in other jurisdictions, which also do not impose a requirement on the Government to respond to inspectorate reports or to respond within a certain timeframe. The Review accepts there may also be limited circumstances in which the Government is not able to respond for some time due to the complexity of the report or parallel investigations or processes. The Review also notes that in practice to date the Government has responded to the Inspector’s Healthy Prison reports within a timeframe that appears reasonable noting the length and in-depth nature of these reports, and the time required for appropriate consultation and consideration of any response. Noting these considerations, the Review does not recommend amending legislation to mandate a timeframe for government response.

Delegation powers

The OICS raised with JACS a concern about the current breadth of Inspector’s delegation powers under section 16 of the Act. Section 16 currently allows for the delegation of the Inspector’s functions under the Act. Any administrative functions which fall to the Inspector under other laws may not be able to be delegated unless provisions in those law are made, which can cause functional difficulties within the OICS. One example of this is the requirement of the Inspector in section 21(1) of the *Territory Records Act 2002* to make the OICS’s records management program available for public inspection during ordinary working

⁶⁹ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 14; ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 13-14.

⁷⁰ See *Auditor-General Act 1996* s 21(2).

⁷¹ Justice Reform Initiative, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (January 2024), 2.

hours, which is not able to be delegated under that Act. Legislation for some other statutory appointments in the ACT, for example members of the Human Rights Commission⁷² and the Ombudsman,⁷³ provides for delegation of functions under their Act or another Territory law.

The Review considers this amendment an important functional improvement for the operation of the Inspector to allow the appropriate delegation of responsibility throughout their office.

Recommendation 6

Section 16 of the Act be expanded to allow the Inspector to delegate their functions under any Territory law.

Engagement with relevant Ministers and Directorates

Currently various sections of the Act require the Inspector to provide information to the ‘relevant’ Minister or director-general. The Act defines these entities as the persons responsible for administering either the *Corrections Management Act 2007* (the CMA) or the *Children and Young People Act 2008* (the CYPA). The OICS submission recommends the inclusion of the Minister for Justice Health and Canberra Health Services within this definition to enable ease of correspondence and comment on draft report which may concern health services provided within the AMC and Bimberi Youth Justice Centre.⁷⁴ The Inspector has also noted that their work regularly engages other Ministers and directorates, such as the health and education portfolio.

As noted above, currently the Act only allows for draft reports to be provided to the relevant ministers and directors-general of the CMA and the CYPA.⁷⁵ No other provision expressly prescribes the ability to provide draft reports to other entities, though Part V of the Act does allow for confined information sharing with some entities for the purpose of cooperation and referral, as defined within that part.

The Review recognises the importance of clarity in relation to the ability of the Inspector to provide draft reports for comment to CHS and to engage with them effectively. While expanding the definition of ‘relevant minister’ or ‘relevant director-general’ may assist, it may create unintended consequences noting the other provisions in the Act which relate to this phrase.⁷⁶ The Review recommends further policy development and consultation be undertaken in order to determine how best to address these issues within the Act. including as considered later in this report in relation to Recommendation 10.

⁷² *Human Rights Commission Act 2005*, section 18F.

⁷³ *Ombudsman Act 1989*, section 32.

⁷⁴ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 24.

⁷⁵ *Inspector of Correctional Services Act 2017* s 29(1).

⁷⁶ See, for example, Inspector of Correctional Services Act 2017 s 21 which provides that the relevant director-general must ensure the Inspector’s access to correctional centres, or s 27(3) which allows the relevant Minister to extend the timeframes for tabling a report in the Legislative Assembly.

Recommendation 7

Further policy development and consultation be undertaken to consider the expansion of ‘relevant Ministers and Directors-General’ as defined within the Act.

Terminology referring to detained persons

The Act uses the terms ‘detainees’ and ‘young detainees’ when referring to persons incarcerated at the centres under the oversight of the Inspector, consistent with other legislation drafted around the time of its introduction.⁷⁷ The OICS submission recommends the language of the Act be amended to use the terms ‘detained people’ and ‘detained young people’, in line with their internal policy, as the terms ‘detainee’ and ‘young detainee’ “can be dehumanising and stigmatising.”⁷⁸ The ACTCOSS submission reflects the same concern, noting that people within the criminal justice system “are among the most stigmatised and marginalised members” of society.⁷⁹

The Act does not define the meaning of ‘detainee’ and ‘young detainee,’ but instead refers to the definitive provisions within the CMA and the CYP. ‘Detainee’ and ‘young detainee’ are widely used across ACT legislation from other oversight mechanisms such as the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (the OPCAT Act), to procedural legislations such as the *Court Procedures Rules 2004* (the CPRs) and the *Administrative Decisions (Judicial Review) Act 1989*. The term is also used in legislation not primarily connected to the corrections space, for example the *Motor Accident Injuries Act 2019*.

The Review recognises the importance of terminology in ensuring vulnerable people are not further marginalised and receive fairness and humanity from the law. While the Review is supportive of the principle underpinning this proposal, amending the Act in isolation is unlikely to achieve the intended purpose and may have unintended implications for the Act and other laws in the ACT. Consideration of the implications of such an amendment in other legislation is outside of the scope of this Review, and therefore replacing the term ‘detainee’ with ‘detained person’ in the Act is not recommended at this stage.

Amendment to the Title of Inspector

The Inspector of Correctional Services title was constructed with the commencement of the Act as it originally related only to adult correctional centres. In 2019, the Inspector’s jurisdiction was expanded to include youth justice centres. The OICS submission recommends amendment of the title of ‘Inspector of Correctional Services’ to ‘Custodial Inspector’ in recognition of this extended scope.⁸⁰

The Review recognises that youth justice centres are considered to be detention centres as opposed to correctional centres. Notably, upon review of comparable inspectorates, JACS has identified that no other

⁷⁷ See, for example, *Monitoring Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018*.

⁷⁸ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 18.

⁷⁹ ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 15.

⁸⁰ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 19.

equivalent body in Australia utilises the term ‘correctional’ within their legislation nor title of the Inspector. Examples in other jurisdictions include ‘Custodial Inspector’ (Tasmania), ‘Inspector of Custodial Services’ (NSW and Western Australia), and Inspector of Detention Services (Queensland). In light of this and given the expansion of the Inspector’s oversight since the role’s inception, the Review recommends the Inspector’s title be amended to ‘Custodial Inspector’ to recognise the scope of custodial services.

Recommendation 8

The title of the Inspector be amended to reflect the expanded scope of the Inspector’s oversight responsibilities.

Intersection with Other Oversight Mechanisms

Functional concerns and lack of clarity between the ICS and OPCAT roles

The Act provides for the functions of the Inspector in the role of the Inspector of Correctional Services. As previously discussed, the OICS together with the ACT Human Rights Commission and the ACT Ombudsman, form the ACT’s NPM to support Australia’s implementation of the OPCAT. The OICS states in their submission that the existing legislative powers for each of the three ACT NPM bodies do not provide sufficient clarity, consistency or delineation from their current jurisdictions, and in particular notes the Inspector’s powers under the Act are operationally and objectively different.⁸¹

The Review notes that the Government has indicated an intention to amend the OPCAT Act to more clearly frame the requisite powers, privileges and immunities of the ACT NPM in accordance with the OPCAT. This will provide greater certainty in relation to these matters for the NPM bodies and those who interact with them. The Government is progressing these amendments in consultation with the ACT NPM bodies. The Review anticipates this will assist in alleviating any lack of clarity or functional concerns relating to the Inspector’s NPM functions without requiring amendment to the Act under Review, however JACS could give further consideration to this as OPCAT amendments progress.

⁸¹ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 5-7.

Oversight and the Contribution to Better Practice

Amendment to offence of taking detrimental action

Section 26 establishes an offence of taking detrimental action, designed to protect those who make disclosures or provide information to the OICS. The OICS submission identifies that the current definition of ‘detrimental action’ in section 26(4) appears to provide greater protection to disclosers in an employment context but does not adequately protect organisations working within centres or the detained persons themselves.⁸² The submission from the ACTCOSS also expresses the concern that organisations working within correctional centres are not adequately protected in the current framing of section 26.⁸³

The Review contrasted section 26 of the Act with similar Territory legislation, notably section 16 of the *Monitoring Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* which protects against reprisals with a broader definition of ‘detrimental action.’⁸⁴

The Review recommends expanding the definition of ‘detrimental action’ to ensure the section better protects all people who may make disclosures to the Inspector. In particular, the definition should be expanded to recognise that for a detained person detrimental action may involve changes in their detention conditions (for example, accommodation unit, privileges, access to visits). Expansion should also include amendment to protect the involvement of organisations working with the correctional centres or providing support to detained persons and their families, where detrimental action may include factors such as limiting access to the centre or detained persons.

Recommendation 9

Section 26(4) of the Act be expanded to more comprehensively protect against the types of detrimental action which could be taken against detained persons and organisations interacting with correctional centres.

Protections against disclosure of documents

Section 37 of the Act strives to give confidence to persons who make disclosures that their information will be protected by ensuring accountability and penalties for the improper use of that information.⁸⁵

⁸² Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 16-17.

⁸³ ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 12-13.

⁸⁴ See *Monitoring Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* s 16(3), where the definition of ‘detrimental action’ includes “change of the conditions of detention.”

⁸⁵ Additionally, the disclosure of information held by the OICS is considered contrary to public interest and is protected from disclosure under schedule 1.15 of the *Freedom of Information Act 2016*.

Sub-sections 37(3) and 37(5) create an exception to these provisions for material to be used or provided for in court proceedings, including where it is necessary to do so to comply with another law of the Territory.

The OICS submission highlights that this exception enables information, evidence and preparatory documents of the OICS to be subpoenaed in court proceedings and recommends that the Act be amended to ensure 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.” They link their recommendation to the Legislative Assembly’s inferred intent for this information to not be made public by the inclusion of the offence provisions in section 37 prohibiting the disclosure of protected information.⁸⁶

A similar recommendation was made in the NSW statutory review of their *Inspector of Custodial Services Act 2012*.⁸⁷ It appears however that as at the finalisation of the Review, this recommendation has not been progressed as the relevant section (section 25) is substantially the same as prior to their review.

Another example can be found at section 53 of the *Inspector of Custodial Services Act 2003 (WA)*, which states:

Any document that is sent to the Inspector or the Inspector’s staff or by the Inspector or the Inspector’s staff —

(a) in the course of, or for the purposes of, the performance of a function of the Inspector; and

(b) that was prepared specifically for the purposes of the performance of the function,

is privileged and is not admissible in evidence in any proceedings other than proceedings for perjury or for an offence under this Act alleged to have been committed in relation to the performance of the function.

This WA provision demonstrates a blanket privilege upon documents gathered or produced by the Inspector, which in the context of protecting disclosures made to an oversight body is the surest of protections.

The Explanatory Statement for the Act clearly identifies that section 37 is intended to ensure the protections of an individual’s right to privacy and the maintenance of the security of correctional centres.⁸⁸ However, the Explanatory Statement also clearly communicates the intent for information to be able to be exchanged or shared in court proceedings and in accordance with other Territory laws.⁸⁹ Under ACT legislation, any subpoenas to the OICS would be subject to the usual protections and requirements of the *Court Procedures Rules 2004* which allow for subpoenas to be set aside or limited where the Court considers appropriate on application of parties, as well as and importantly, the person or entity subject to the subpoena.⁹⁰

⁸⁶ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 17.

⁸⁷ NSW Government, Report of the Statutory Review of the Inspector of Custodial Services Act 2012 (May 2021), 26.

⁸⁸ Explanatory statement for the Inspector of Correctional Services Bill 2017, cl 37.

⁸⁹ Ibid.

⁹⁰ See *Court Procedures Rules 2004*, Part 6.9.

In this context the Review does not consider it appropriate to amend section 37 in the manner proposed. The current legislative framework allows for the courts to consider whether subpoenas are made for a legitimate forensic purpose, and then balance that with any protection sought from disclosure to ensure that the justice process remains transparent and effective.

Procedural fairness

Section 29 of the Act requires that the Inspector provide the draft report to the relevant Ministers and directors-general for comment. This is an important mechanism for procedural fairness given reports may make adverse findings about organisations and systems, as well as ensuring the accuracy of information and data contained within reports. The Act does not make any provision for the report to be provided, either by mandate or discretion, to other entities or persons who may have an interest. The Review received submissions from ACT Corrective Services and Canberra Health Services (CHS) which identified a need to strengthen aspects of procedural fairness afforded to individuals and entities involved in the Inspector's investigations.⁹¹

CHS recognises the difficulty for staff involved in investigations where a death has occurred, knowing that they will be required to give evidence at a later date as part of a coronial inquest.⁹² CHS has identified that in such situations, procedural fairness would be strengthened through provision of transcripts of evidence and clearly identified opportunities to formally respond to adverse findings⁹³ CHS also recognises the need for their staff to be provided with legal assistance in such processes.⁹⁴ CHS have advised the Review that improvements have been made to existing processes by all parties and these should continue to be effective.

The Review notes that as of March 2024 the Inspector has published a policy relating to the collection and release of information obtained during interviews, which is publicly available on the Inspector's website.⁹⁵ This policy clearly details the Inspector's approach to its information gathering powers, and the supports provided to people who are required to provide information to the Inspector.

The submission from ACT Corrective Services echoes concerns about the making of adverse findings, lack of formal process for the individual to be made aware about the proposed finding and the individual's right to respond.⁹⁶ Their submission raises questions about the appropriateness of those findings in circumstances where the object of the Act is to promote systemic investigation, and any findings may interfere with other employment and oversight processes specific to the individual.⁹⁷ The ACT Corrective Services submission also notes it is only in exceptional circumstances that their provided commentary or concerns on draft

⁹¹ ACT Corrective Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023) [2], [3]; Canberra Health Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023) [1], [3].

⁹² Canberra Health Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023) [1], [3].

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Available on the Inspector of Correctional Services website at

<https://www.ics.act.gov.au/_data/assets/pdf_file/0016/2414302/Collection-and-release-of-information-policy-Ver-1.0.pdf>.

⁹⁶ ACT Corrective Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023) [2].

⁹⁷ Ibid.

reports are included or result in amendment of the Inspector's final report as contemplated by section 29(3) of the Act.⁹⁸ However, ACT Corrective Services acknowledges that more recent engagements with the Inspector have reflected a greater receptiveness to consider and incorporate feedback provided by ACT Corrective Services, while reports providing recommendations for service improvement are less prescriptive in nature and allow for flexible solutions that provide greater utility and benefits to detainees, staff and/or other stakeholders.

The Inspector indicated to the Review that they have adopted practices that extend natural justice and procedural fairness opportunities to individuals and entities beyond those defined as 'relevant' under the Act. The Inspector indicated that feedback provided on draft reports is considered and may often be quoted in final reports. In relation to interview processes, the Inspector also reported that persons proposed to be interviewed are invited to have a support person attend with them.

While the Act does not make provision for draft reports or adverse findings to be made available for comment beyond the relevant minister and director-general, other Territory legislation allows for such a mechanism. One example is section 18 of the Auditor-General Act which allows for the Auditor-General to give all or part of a draft report to anyone they consider has a direct interest, and if they do so allows that person or entity at least 14 days notice to provide written comments. These comments must then be taken into consideration and included in the final report.⁹⁹ Other variations can be found in section 84(2) of the *Human Rights Commission Act 2005*, which requires that the Commission not include an adverse comment within a commission-initiated report unless the person has been given "reasonable opportunity to respond to the proposed comment," or section 55 of the Coroners Act which states the Coroner must not include in findings "a comment adverse to a person identifiable from the finding or report" unless reasonable steps have been taken to provide that person a copy of the proposed comment and provided them an opportunity to make a submission or written statement. The *Human Rights Act 2004* also requires public authorities in the Act to act consistently with the human rights protected by that act.¹⁰⁰

Inspectorate legislation in other jurisdictions includes the ability for the Inspector to provide findings or reports to individuals and entities in certain circumstances. Section 20(1) of *Custodial Inspector Act 2016* (Tas) requires that the Inspector not make a report containing adverse or derogatory comments about a person unless the person has been given a reasonable opportunity to appear before them, or provide written or oral representations. In NSW, section 14(2) of the *Inspector of Custodial Services Act 2012* (NSW) provides that the Inspector must not make a report that provides an opinion critical of a person (whether expressly or impliedly) or entity (other than an opinion critical of Corrective Services NSW or Juvenile Justice) unless that person or entity has been afforded the opportunity to make written or oral submissions on the matter. Queensland's legislation also contains a similar provision which allows the right of reply for the relevant individuals but mandates that the responding comments must be reproduced in the Inspector's final report.¹⁰¹

The Review considers the current section 29 provisions suitably afford procedural fairness to relevant Ministers and directors-general, however notes the lack of legislative ability for the Inspector to provide

⁹⁸ Ibid [3].

⁹⁹ *Auditor-General Act 1996* (ACT) ss 7, 17(2), and note at s 18(5).

¹⁰⁰ *Human Rights Act 2004* s 40B.

¹⁰¹ See the *Inspector of Detention Services Act 2022* (Qld) s 24.

draft reports or findings to other individuals and entities which may be engaged in correctional centres.¹⁰² This is undesirable where an adverse finding may be made about an individual, but the individual may not be notified until the relevant directorate is made aware. Given the relevant directorate may also be that individual's employer, this may create difficulties for that individual's employment in circumstances where they have not been afforded an ability to respond prior to their employer being notified of an adverse finding. The Review recommends that a mechanism allowing for this be included in the Act with a corresponding right of reply in order to provide those individuals and entities with procedural fairness.

The Review recommends the inclusion of a mechanism for individuals to respond to proposed adverse findings similar to the provisions in the Tasmanian or NSW legislation.

Recommendation 10

A legislative amendment allowing a mechanism for individuals and other entities to receive proposed adverse findings and be afforded a right of reply be included in the Act, subject to consultation regarding what exact form this mechanism should take.

Functions, Examination and Implementation for Better Practice

'Critical Incident:' Definition and Operative Provisions

A number of stakeholder submissions raised significant concern with the current definition of 'critical incident' under section 17(2) of the Act and the functional elements of critical incident provisions.¹⁰³ Currently, a 'critical incident' is defined as:

- (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 critical incident provisions have their foundation in the Moss Report, which recommended that the oversight body (at the time the ACT Ombudsman) "have the role of reviewing the response to all critical

¹⁰² For example, community organisations providing services to detained people.

¹⁰³ Submissions included: the OICS, ACT Corrective Services, Canberra Health Services and the Community Safety Directorate.

incidents at the AMC, including serious assaults.”¹⁰⁴ Mr Moss made this recommendation informed by the model of the UK Prisons and Probation Ombudsman which at the time investigated serious assaults and deaths in custody.¹⁰⁵ The Explanatory Statement for the Bill indicates that the critical incident definition was to be a ‘high threshold’ and was intended for the investigation and accountability of events which may cause ‘significant impact or harm.’¹⁰⁶ Submissions to the Review highlighted concerns with the critical incident framework at section 17, including that the current list of critical incidents is not sufficient to address the different custodial settings in which the Inspector operates, and that it has given rise to what appears to be unintended consequences. In particular, a number of submissions highlighted the challenges which arise between the exercise of the Inspector’s functions, and the exercise of the Coroner’s functions under the *Coroners Act 1997* where a death in custody has occurred.

The Review understands from submissions and consultations that overlap in the information-sharing process and separate inquiries of the two offices, can have a significant impact in practice in terms of the admissibility of evidence collected by the Inspector in Coronial proceedings, and the flow on effects to witnesses involved in these proceedings, including trauma caused to witnesses who must participate in duplicate processes.¹⁰⁷

Submissions also raised issues relating to other aspects of section 17. For example, the OICS submission highlighted that the definition of ‘critical incident’ was formulated at the inception of the Act and prior to the inclusion of youth detention centres in the Inspector’s remit.¹⁰⁸ Accordingly, in the OICS view, the list of circumstances better relate to adult facilities and do not appropriately cover situations which may occur specifically in youth detention,¹⁰⁹ but the submission does not elaborate on what inclusions would better reflect incidents occurring in youth detention. The OICS recommends the definition be amended to allow greater flexibility and discretion to the Inspector to determine what is a critical incident. The OICS has also previously developed and published criteria which determines whether or not the Inspector will exercise their discretionary power to review an incident, with the evaluation based on factors such as seriousness, the importance of public reporting, and prevention.¹¹⁰

CHS also identify difficulties with the current definition in their submission. CHS highlights that due to arrangements between ACT Health and the AMC, a person can be administratively ‘admitted’ to hospital in order to conduct further clinical investigations rather than due to treatment requirements. However, due to the current definition, this administrative admission may trigger a ‘critical incident’ which may then be considered by the OICS,¹¹¹ creating flow on resourcing effects for all stakeholders involved.

¹⁰⁴ Philip Moss AM, “So much sadness in our lives: Independent Inquiry into the Treatment in Custody of Steven Freeman” (7 November 2016), Recommendation 8, 73.

¹⁰⁵ Ibid.

¹⁰⁶ Explanatory statement for the Inspector of Correctional Services Bill 2017, cl 17.

¹⁰⁷ Submissions concerned with this issue included: Canberra Health Services, Winnunga Nimmityjah Aboriginal Health Service and the ACT Coroner’s Office.

¹⁰⁸ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 11.

¹⁰⁹ Ibid, 11-12.

¹¹⁰ Office of the Inspector of Correctional Services, ‘Death in custody at the Alexander Maconochie Centre on 1 February 2022’ (Report of a review of a critical incident, 3 August 2022), 8.

¹¹¹ Canberra Health Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023) [2].

JACS has conducted a review of similar Inspectorate legislation across Australia and determined that the critical incident scheme is unique to the ACT. Other legislation instead contains broad powers to investigate correctional services occasionally and at any time, including where services relate only to an individual detainee.¹¹² The Review recognises there are current difficulties with the interaction of the Act and the *Coroner's Act 1997* arising from the inclusion of deaths in custody within the definition of critical incident. This is explored in greater detail in the later section of this report focussing on the interaction of the Act with the Coroners Act. This challenge does not appear to be present in other jurisdictions where the broader concept of 'occasional specific reviews' have been adopted.

The Review considers the effective operation of the critical incident provisions to be vital to the Act and recommends legislative amendment to the definition, however, does not recommend the broad approach of other jurisdictions. A specific definition of critical incidents allows for certainty for both Inspector and the agencies they oversee as where and when oversight should begin. The Review acknowledges the challenges raised by stakeholders in relation to the cross-over of functions in the case of critical incidents where multiple agencies are involved, such as where a death in custody occurs. Noting the important role the Inspector's systemic review function could play in these circumstances however, it is not recommended that death in custody be removed from the list of critical incidents, but rather that other amendments are made to Part 5 of the Act to remove the risk of overlapping functions where possible, as discussed below.

Recommendation 11

The definition of critical incident in section 17(2) of the Act be amended, in consultation with stakeholders, to ensure it is appropriate.

Monitoring of Implementation

Currently, the Act does not facilitate a mechanism which allows for the Inspector to formally monitor or comment upon the implementation of their recommendations once tabled. Implementation is tracked by the Inspector informally or through their later examination and review functions.

Concerns about the tracking of implementation was raised in stakeholder submissions.¹¹³ For example, ACTCOSS identify in their submission that some past OICS recommendations have yet to be implemented, and recommend increased reporting on implementation along with the establishment of additional mechanisms to increase accountability.¹¹⁴ The submission from Legal Aid ACT highlights that there may be limitations in the ability of the Inspectorate to promote better practice while there is a structural lack of an implementation mechanism, though attributes this to resourcing rather than a deficiency in the Act.¹¹⁵ While not directly commenting on an implementation mechanism, the submission from the Justice Reform

¹¹² See, for example, Inspector of Custodial Services Act 2003 (WA) s 22.

¹¹³ Submissions include Legal Aid ACT, the Justice Reform Initiative, the ACT Council of Social Services

¹¹⁴ ACT Council of Social Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (February 2024), 21.

¹¹⁵ Legal Aid ACT, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 2-3.

Initiative also notes that the Act is silent about what should occur with the Inspector's reports once tabled and raises the incongruity of this with the significant resourcing which goes into the reviews.¹¹⁶

Tasmania's is the only similar legislation which provides for some monitoring of an inspector's recommendations after tabling. Sections 21(2) and (3) of the *Custodial Inspector Act 2016* (Tas) state:

(2) If the Inspector makes a recommendation to the responsible Secretary, he or she may request the responsible Secretary to notify him or her, within a specified time, of the steps that have been or are proposed to be taken to give effect to the recommendation, or, if no such steps have been or are proposed to be taken, the reasons why they have not been taken or, as the case may be, are not proposed to be taken.

(3) Where it appears to the Inspector that no appropriate steps have been taken within a reasonable time, he or she may, after considering any written comments made by or on behalf of the responsible Secretary to whom the recommendation was made, send to the Premier and the responsible Minister a copy of the recommendation together with a copy of any such comments.

However, similar Territory legislation such as the Auditor-General Act does not include mechanisms for the monitoring of implementation.

The Review considers that the introduction of a legislative mechanism for implementation monitoring is not necessary, noting that the Inspector currently monitors and comments on implementation in practice. An example of this can be found in the *Healthy Prison Review of the Alexander Maconochie Centre 2022* where, in considering progress made since the 2019, it was noted that the status of a number of recommendations considered 'completed and closed' by ACT Corrective Services was contested by the Inspector.¹¹⁷ Noting the example of Tasmania and the current practice, the Review does not consider that a legislative mechanism would provide any additional, meaningful oversight of implementation.

Interaction with Other Territory Legislation

Part 5 of the Act prescribes the parameters for cooperation and referral between the Inspector and other entities. Section 31 is designed to facilitate cooperation, stating that the Inspector must strictly ensure that their functions are exercised in a manner which does not "delay or unnecessarily duplicate" the exercise of functions by entities such as the Auditor-General, the ACT Human Rights Commission, the Ombudsman, Official Visitors, police and the Coroner.¹¹⁸ Section 31 also allows for the Inspector to make arrangements with other entities to ensure functions are not delayed or duplicated and the functions of both parties are efficiently managed.¹¹⁹

¹¹⁶ Justice Reform Initiative, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (January 2024), 1-2.

¹¹⁷ Office of the Inspector of Correctional Services, *Health Prison Review of the Alexander Maconochie Centre 2022*, 16.

¹¹⁸ This list is non-exhaustive, the complete requirements may be found at s 31(1) of the *Inspector of Correctional Services Act 2017*.

¹¹⁹ *Inspector of Correctional Services Act 2017* s 31(2).

Part 5 also allows for broader cooperation amongst Territory authorities, by ensuring that the Inspector is empowered to refer matters for investigation,¹²⁰ receive referrals from other entities,¹²¹ consult with other oversight bodies and share information.¹²²

Coroners Act 1997

The Coroner is required by section 13(1)(i) of the Coroners Act to investigate and hold an inquest into deaths in custody. The object of the Coroner is to hold inquests in order to be able to make findings about particular kinds of deaths which will allow them to make recommendations about the prevention of deaths, public health and safety, the administration of justice, and any need for further investigation or review by another authority.¹²³ This is to be achieved in a way that recognises the impact deaths and inquests can have on the deceased's loved ones and that they have interests in understanding the circumstances of the death, but also that promotes the development of a systematic and comprehensive public record of findings in an inquisitorial, non-adversarial manner.¹²⁴ The Review recognises the importance of the Coroner being able to achieve these overarching functions, which have significant public and personal implications, in an unimpeded manner.

As noted above, section 31 of the Act sets out a requirement that the performance of the Inspector's functions must "not delay or unnecessarily duplicate the exercise of functions" by a coroner operating under the Coroners Act. This section was designed to facilitate the cooperation between entities and give power to the Inspector to make arrangements with those entities which would further that cooperation, ensuring functions were managed appropriately and efficiently. Whilst some duplication of function between the Inspector and the Coroner is inevitable due to the inclusion of deaths in custody within the definition of critical incidents, the Act establishes measures designed to mitigate these difficulties as much as possible. The first of these is the discretion afforded to the Inspector in section 18(1)(c), which states the Inspector "may" review a critical incident. The Act does not stipulate how the Inspector is to determine whether or not to exercise that discretion. As discussed earlier in this report, criteria for making this determination were developed internally by the OICS and previously published in the report of the critical incident review into the February 2022 death in the Alexander Maconochie Centre.¹²⁵ The Review understands that these criteria are currently being updated with an effort to address competing legislative functions in this regard.

A number of submissions recognised functional difficulties and overlap between the Act and the Coroners Act.¹²⁶ Whilst submissions to the Review clearly showed the Inspector and the Coroner are working in good faith to share documents and information as provided for in their respective Acts, parliamentary privilege may prevent the Coroner from being meaningfully assisted by the Inspector's findings and recommendations in their deliberations. The materials which are covered by parliamentary privilege can

¹²⁰ Ibid s 32.

¹²¹ Ibid s 34.

¹²² Ibid ss 33, 35.

¹²³ *Coroners Act 1997* s 3BA(1).

¹²⁴ Ibid s 3BA(2). Objects and methods of achievement stated here are non-exhaustive, for completeness please see s 3BA of the Coroners Act.

¹²⁵ Office of the Inspector of Correctional Services, 'Death in custody at the Alexander Maconochie Centre on 1 February 2022' (Report of a review of a critical incident, 3 August 2022), 8.

¹²⁶ Submissions included the Office of the Inspector of Correctional Services, the ACT Coroner, Legal Aid ACT, Canberra Health Services, ACT Corrective Services and Winnunga Nimmityjah Aboriginal Health Service.

include witness interviews and other documents, as all evidence gathered by the Inspector in fulfilment of their functional requirement to report on that incident to the Legislative Assembly is included. The Review also recognises that the process of being interviewed first by the Inspector and then by investigating police, government solicitors (and possibly third-party solicitors), and appearing to give evidence in an inquest is a traumatic and lengthy process for witnesses who are already struggling with the impacts of a death in custody. This was raised as a significant concern in a number of submissions to the Review.¹²⁷

While conducting the jurisdictional analysis for this report, the Review was not able to find examples of similar functional difficulties occurring in other inspectorate jurisdictions. This may be due to the uniqueness of the ACT's critical incident scheme, in combination with requirements to table reports and the drafting of section 31. However, the investigation of critical incidents remains a discretionary power of the Inspector ancillary to their key mandatory functions under the Act. Investigating a death in custody is, in contrast, a key function of the Coroner. The Coroner is equipped with the assistance of the Australian Federal Police to be able to conduct an investigation which will ultimately result in the public transparency that comes with the court process.¹²⁸ It is a broader investigation that focusses on the deceased, all parties connected to the death and public health and safety. The Coroner is also able to refer the matter to the Director of Public Prosecutions, and will suspend the inquest where appropriate to allow any resulting criminal proceedings to have primacy.¹²⁹

The Review recognises that the inquest process often takes some time due to standard court procedures, in particular noting that sometimes proceedings may be delayed pending the outcome of a criminal process. In contrast, the Inspector's reviews are required to be completed and a report provided to the Speaker within 6 months of that completion. It is important that the Inspector continue to be able to investigate and review deaths in custody as the function provides timely, valuable oversight and a specialised ability to identify areas for systemic improvement. It is also vital that the Coroner be able to function unimpeded and witnesses to the death be able to give their evidence to authorities in the least traumatic way possible. There are several options which may achieve this.

Of the similar legislative schemes in Australia, only WA and Queensland contain provisions similar to section 31 drafted to regulate the relationship between their Inspectors and the functions of other legislation. Interestingly both sections are firmer than the ACT in regulating functioning, with WA stating that "[t]he Inspector is to ensure that the performance of any of the Inspector's functions is *not likely*¹³⁰ to delay, interfere with or duplicate" inquiries or investigations of other entities.¹³¹ Queensland goes further with a complete prohibition, providing that "[t]he inspector must ensure the inspector's functions are performed in a way that *does not*¹³² delay, interfere with or duplicate" the functioning of other entities.¹³³ In contrast, the ACT Act allows for duplication so long as it does not cross the line of 'unnecessarily.' Removing 'unnecessarily' from section 31 of the Act may ensure a narrower scope for the Inspector, thus

¹²⁷ Submissions included Winnunga Nimmityjah Aboriginal Health Service, Canberra Health Services, the ACT Coroner and the Office of the Inspector of Correctional Services.

¹²⁸ *Coroners Act 1997* s 63(1).

¹²⁹ *Ibid*, Division 5.5.

¹³⁰ Emphasis added.

¹³¹ *Inspector of Custodial Services Act 2003* (WA) s 26(1).

¹³² Emphasis added.

¹³³ *Inspector of Detention Services Act 2022* (Qld) s 19(1).

resulting in less functional overlap and duplication of witness involvement. This may, however, still result in the same difficulties.

An alternative option is to qualify the Inspector's power under section 18(1) to provide that any investigation must not commence until the Coroner's function is completed. This would have the benefit of removing duplication of investigation from the outset. Once a coronial inquest is completed the evidence admitted to the inquest would become a matter of public record.¹³⁴ Evidence given in the inquest and the ultimate findings of the Coroner may then be used to assist the Inspector in their investigation; potentially reducing or removing the need for witnesses to be further questioned, or for any additional questioning to be limited in scope. This approach also removes the risk that the Coroner may make findings and recommendations at odds with those of the Inspector (a current issue as the Coroner cannot consider the Inspector's report owing to parliamentary privilege). However, there would be nothing preventing the Inspector considering the findings and recommendations of the Coroner if the timing of investigations were reversed.

The Review recognises that this issue is complex both legislatively and functionally. Noting the practical efforts currently underway by agencies to alleviate the impact of any overlaps in function, the Review recommends further consultation and policy development be undertaken with a view to determining what amendments, if any, may assist with this issue.

Recommendation 12

Further consultation and policy development should be undertaken with a view to determining what legislative amendments, if any, may assist with functional overlaps between the Act and the Coroner's Act 1997.

Corrections Management Act 2007

Section 62(4) interpretation

Section 62 of the CMA contains safeguards to ensure that the CMA is construed and administered consistently with an inspection law unless there is explicit legislative deviation. This is an important and appropriate mechanism that allows for the CMA to be consistent with the Act and other inspection laws, and for the laws to operate concurrently.

Section 62(4) of the CMA allows that:

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

¹³⁴ Subject to any imposed non-publication orders or other court orders.

The OICS submission notes that this section has the potential to be interpreted by corrective centres to refuse entry to the Inspector and other oversight bodies, though highlights that this has not occurred in the past.¹³⁵ The Inspector recommends the inclusion of an objective assessment of the risks “such as the [Corrections Management] 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.”¹³⁶ The Review recognises that section 62(4) of the CMA is intended to ensure the safety and security of those at the correctional centre, and does not consider that the inclusion of ‘a reasonable risk’ assessment in this section would cause difficulties for the maintenance of the safety and security. The Review considers it appropriate to further explore whether an objective assessment should be included within section 62(4) of the CMA, noting substantive amendments to the CMA is beyond the current scope.

Section 105

Section 105 of the CMA allows for the director-general to open and search mail that is protected by virtue of it being addressed to an accredited person such as the Inspector, but ensures that the mail cannot be read without the written consent of the detained. The submission from the OICS notes that in other Territory legislation, such as the *Mental Health (Secure Facilities) Act 2016*, the director-general may not search mail from or to an accredited person.¹³⁷ The OICS then recommends that the CMA be amended similarly.¹³⁸

On its face the current wording of section 105 of the CMA appears to contain adequate protections for correspondence with accredited persons, particularly given the differing purposes of correctional centres as opposed to mental health facilities, however detailed consideration of these issues is outside the scope of this review.

Recommendation 13

Further consideration should be given whether amendment is required to sections 62(4) and 105 of the *Corrections Management Act 2007*, noting it is beyond this review to determine whether such amendments are appropriate.

Health records and confidentiality

Section 22 of the Act provides the Inspector with the power to request the production of any document or information relevant to their examination and review functions under section 18. In practice, this power may include the ability to access and view medical records of a person without first requiring the knowledge and consent of that individual. The submission from the CHS raises concerns that both the ability of the Inspector to access these records and to be notified of certain critical incidents without the

¹³⁵ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 28-29.

¹³⁶ Ibid, 29.

¹³⁷ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 30; Mental Health (Secure Facilities) Act 2016 s 25(2).

¹³⁸ Office of the Inspector of Correctional Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023), 30.

consent of the adult individual concerned may create a legal and ethical conflict, particularly where in other circumstances the consent of the individual would be required to make such a disclosure.¹³⁹

The Review recognises the importance of appropriately dealing with these sensitive matters and records. Section 37 of the Act ensures that there is protection for the information and evidence gathered by the Inspector, as well as accountability for the misuse of that information. Given that the object of the Act is to ensure systemic review and scrutiny, the Review considers there is a necessity to having access to these documents as they may contain important details of the functioning of health services and staff within correctional centres. JACS has conducted a jurisdictional analysis and notes that other similar legislation provides the same broad powers for the Inspector to access all records, with Tasmania and NSW ensuring for an abundance of clarity health records are included within that power.¹⁴⁰ The Review does not recommend any amendments to section 22 of the Act.

¹³⁹ Canberra Health Services, Submission to the Statutory Review of the Inspector of Correctional Services Act 2017 (September 2023) [4].

¹⁴⁰ See for example, *Custodial Inspector Act 2016* (Tas) s 8, and *Inspector of Custodial Services Act 2012* (NSW) s 7.

Appendix A: List of Submissions Received

The Review received submissions from the following stakeholders:

- The Office of the Inspector of Correctional Services
- The ACT Coroner
- ACT Corrective Services
- The Community Services Directorate (as the provider of youth justice services)
- Canberra Health Services
- Legal Aid ACT
- Aboriginal Legal Service ACT/NSW
- Winnunga Nimmityjah Aboriginal Health Service
- The Justice Reform Initiative
- The ACT Council of Social Services