

**Submission  
No 99**

**INQUIRY INTO HIGH LEVEL OF FIRST NATIONS  
PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF  
DEATHS IN CUSTODY**

**Organisation:** Inspector of Custodial Services

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# Inspector of Custodial Services

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25 August 2020

The Director  
Select Committee on the High Level  
of First Nations People in Custody and  
Oversight and Review of Deaths in Custody  
Parliament House, Macquarie Street  
SYDNEY NSW 2000

Dear Director

Thank you for inviting me to make a submission to the Inquiry on the High Level of First Nations people in Custody and Oversight and Review of Deaths in Custody (**the Inquiry**) in New South Wales (NSW).

To assist the Inquiry with its work, I thought I would provide some further information about the Inspector of Custodial Services (**ICS**).

## **The role of the Inspector of Custodial Services**

1. The ICS is an independent statutory office that was created in August 2013 pursuant to the *Inspector of Custodial Services Act 2012* (the Act). The position of Inspector is appointed by the Governor of NSW. It is independent of Corrective Services NSW (CSNSW), Youth Justice NSW (YJNSW) and Justice Health and Forensic Mental Health Network (JH&FMHN) and reports directly to the NSW Parliament.
2. The role of the Inspector is to provide independent scrutiny of the conditions, treatment and outcomes for adults and young people in custody and to promote excellence in staff professional practice.
3. The principal functions of the Inspector are listed in section 6 of the Act, as follows:

### **6 Principal functions of Inspector**

- 1) *The principal functions of the Inspector are as follows:*
  - a) *to inspect each custodial centre (other than juvenile justice centres and juvenile correctional centres) at least once every 5 years,*
  - b) *to inspect each juvenile justice centre and juvenile correctional centre at least once every 3 years,*
  - c) *to examine and review any custodial service at any time,*
  - d) *to report to Parliament on each such inspection, examination or review,*

- e) *to report to Parliament on any particular issue or general matter relating to the functions of the Inspector if, in the Inspector's opinion, it is in the interest of any person or in the public interest to do so,*
  - f) *to report to Parliament on any particular issue or general matter relating to the functions of the Inspector if requested to do so by the Minister,*
  - g) *to include in any report such advice or recommendations as the Inspector thinks appropriate (including advice or recommendations relating to the efficiency, economy and proper administration of custodial centres and custodial services),*
  - h) *to oversee Official Visitor programs conducted under the Crimes (Administration of Sentences) Act 1999 and the Children (Detention Centres) Act 1987,*
  - i) *to advise, train and assist Official Visitors in the exercise of the functions conferred or imposed on them under those Acts,*
  - j) *such other functions as may be conferred or imposed on the Inspector under this or any other Act.*
- 2) *The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister or in response to a reference by the Joint Committee or any public authority or public official.*
4. The inspection of these custodial centres represents a substantial body of work, particularly given the resources available to the ICS. The term "custodial centre" used in this letter has the same meaning as the definition in section 3(1) of the Act, namely:

***custodial centre*** means the following:

- a) *a correctional centre (including a juvenile correctional centre, a managed correctional centre and a periodic detention centre);*
- b) *a residential facility;*
- c) *a transitional centre; and*
- d) *a juvenile justice centre;*

*but does not include any police station or court cell complex that is not managed by CSNSW or JJNSW.*

5. As of August 2020, according to the fortnightly population report provided by CSNSW, there were 36 correctional centres, 6 residential facilities, 12 24-hour court cells and 6 juvenile justice centres that require inspection by the ICS. That is, 60 custodial centres. The ICS also has jurisdiction for 42 court cell locations, a fleet of 182 inmate transport vehicles and a detainee transport fleet of 23 vehicles.<sup>1</sup>
6. The inaugural Inspector, Dr John Paget, was appointed on 1 October 2013 and worked as the Inspector until October 2015. Since I commenced in the role in April 2016, my primary focus has been to complete the inspections required by the Act.
7. The compulsory powers available to the Inspector are provided in section 7 of the Act which provides as follows:

## ***7 Powers of Inspector***

*The Inspector in the exercise of the Inspector's functions:*

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<sup>1</sup> Inspector of Custodial Services Annual Report 2018-19, page 5.

- (a) *is entitled to full access to the records of any custodial centre (including health records) and may make copies of, or take extracts from, those records and may remove and retain those copies or extracts, and*
  - (b) *may visit and examine any custodial centre at any time the Inspector thinks fit, and*
  - (c) *may require custodial centre staff members to supply information or produce documents or other things relating to any matter, or any class or kind of matters, concerning a custodial centre's operations, and*
  - (d) *may require custodial centre staff members to attend before the Inspector to answer questions or produce documents or other things relating to a custodial centre's operations, and*
  - (e) *may refer matters relating to a custodial centre to other appropriate agencies for consideration or action, and*
  - (f) *is entitled to be given access to persons in custody, detained or residing at any custodial centre for the purpose of communicating with them.*
8. Section 8 of the Act also confers incidental powers in that the "*Inspector has power to do all things necessary to be done or for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions*".
9. Although I have powers to compel the production of information, the majority of information gathered by the ICS is done so on the basis of voluntary contributions from stakeholders.
10. In my view, the most effective and sustainable model of obtaining information for the purpose of the performance of my functions is through voluntary disclosures and I rely on my powers of compulsion as a last resort. This is why it is important that stakeholders who provide information to the ICS in confidence can trust that this information will be treated with care and confidentially.

### **The independence of the ICS**

11. The ICS is independent from the agencies which have primary responsibility for custodial services. The independence of the role of the Inspector is reinforced by section 19 of the Act which makes it an offence to obstruct, hinder, resist or threaten an Inspector, or their staff, in the exercise of functions under the Act.
12. Section 17 of the Act provides that the NSW Parliamentary Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission has oversight to monitor and review the exercise of the Inspector's functions as listed in section 6 of the Act.

### **The staffing of the Office of the ICS**

13. I have had to undertake significant recruitment to try to meet the obligations placed on the ICS under the Act. The permanent staffing of the Office is small. Since my appointment, the resources have grown from four to 12 full time equivalent staff. Expert consultants have been engaged for the purposes of assisting with the conduct of inspections, the preparation of various reports and to enhance the capacity of the ICS to examine specialised operational areas requiring particular expertise.

### **The scope of the work of the Inspector of Custodial Services**

14. As noted above, and in accordance with section 6 of the Act, the functions of the Inspector are to inspect custodial centres and report on the treatment and conditions of inmates and detainees with reference to our published standards on "Inspection

Standards for adult custodial services in New South Wales"<sup>2</sup> and "Inspection Standards for juvenile custodial services in New South Wales"<sup>3</sup> (collectively referred to as the **Inspection Standards**).

15. The Inspector reports findings and recommendations arising from these inspections to the NSW Parliament. In addition to inspecting custodial centres, the Inspector undertakes liaison visits to custodial centres to inform inspection activities, monitor implementation of recommendations and facilitate information sharing. The ICS Annual Reports provide details of an agencies' progress against recommendations made in ICS inspection reports.
16. The Inspector also manages the statutory Official Visitor scheme. Official Visitors are independent community members appointed by the Minister to visit custodial centres and resolve complaints from inmates and detainees.
17. The investigation of individual complaints, suspected criminal conduct, misconduct and corruption and deaths in custody are within the remit of other agencies such as the Ombudsman, ICAC, and the Coroner. Division 3 of the ICS Act sets out the relationship between the Inspector and both the Ombudsman and the ICAC.
18. Although the remit of the Inspector as set out in section 6 is necessarily broad it works cooperatively and in a co-ordinated manner with both the Ombudsman and the ICAC. This is embodied in the Act and MOUs between the Inspector and the Ombudsman and ICAC respectively.

#### **Model of theme-based inspections**

19. To respond to the legislative obligations using the limited resources available to the ICS, a model of theme-based inspections was developed by Dr Paget. I have modified and refined the model during my tenure as the Inspector.
20. The approach taken in recent and ongoing theme-based inspections involves the inspections of individual custodial centres as well as including that custodial centre in a broader, theme-based inspection of multiple centres.
21. Theme based inspections allow for several centres to be inspected across an identified theme or practice. It is through this thematic approach that the ICS has met its statutory obligations for inspection (for example, see the report on *The management of radicalised inmates in NSW* produced in May 2018).
22. The Terms of Reference and custodial centres to be inspected are published on the ICS website. The theme-based model of inspection involves far more than a physical visit to relevant custodial centres by me or my staff.
23. Firstly, a typical theme-based inspection will involve a review of a range of materials, including legislation, policy documents, training materials, academic literature and reports by government bodies and non-government stakeholders.
24. Secondly, wide consultation with internal and external stakeholders (both government and non-government) is undertaken. This consultation may include custodial staff,

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<sup>2</sup><http://www.custodialinspector.justice.nsw.gov.au/Documents/Adult%20Inspection%20Standards.pdf> (accessed August 2020).

<sup>3</sup><http://www.custodialinspector.justice.nsw.gov.au/Documents/nsw-youth-justice-inspection-standards.pdf> (accessed August 2020).

nurses, psychologists, Official Visitors and the inmates or detainees themselves. This may need to occur over a number of days or over multiple visits.

25. Thirdly, data and other information is often requested from the relevant custodial centres and responsible agencies such as CSNSW, JJNSW and JHFMHN. It takes time for those custodial centres and agencies to gather data and further time for my Office to analyse and consider it for the purpose of any given report. Such requests for data and information may be made prior to, during or subsequent to a visit to the custodial centre.
26. More recently I have introduced an inspection methodology of individual custodial facilities against the ICS Inspection Standards. Consistent with the Optional Protocol to the Convention Against Torture (an international human rights agreement ratified by Australia in 2017) the methodology aims to prevent the mistreatment of people in places of closed detention through a regime of regular independent inspections.<sup>4</sup>
27. Section 6(1)(d) of the Act requires that I report to Parliament on the results of each inspection, examination or review. However, prior to finalising a report to Parliament, serious and extensive consultation obligations are triggered under the Act. Section 14(2) of the Act requires that the Inspector must not make a report to Parliament that sets out an opinion that is either expressly or impliedly critical of a public service agency (other than one critical of CSNSW or JJNSW) or any individual person unless they have first been afforded the opportunity to make either oral or written submissions. Notwithstanding this section, I am careful to provide CSNSW, YJNSW and JH&FMHN with procedural fairness before submitting a draft report to the Minister for the purpose of making a submission under section 14(1).
28. I am also required under section 14(1) of the Act to provide the Minister with a draft of each report to be made to Parliament under the Act and to give the Minister a reasonable opportunity to make submissions, either orally or in writing, in relation to that draft report.
29. As required by section 14(3) of the Act, I take the submissions made by the Minister, agency head or any other person, into account and will investigate the issues raised in these submissions prior to finalising my report. However, I am not bound to amend my report in light of any submissions made by the Minister, agency head or any other person with whom I must consult.
30. The statutory regime with which I must comply in relation to providing my reports to the Minister is set out in section 14 of the Act is as follows:

#### **14 Furnishing of draft reports to Minister and others**

- 1) *The Inspector is to provide the Minister with a draft of each report to Parliament to be made by the Inspector under this Act and give the Minister a reasonable opportunity to make submissions, either orally or in writing, in relation to the draft report.*
- 2) *The Inspector must not make a report to Parliament under this Act that sets out an opinion that is, either expressly or impliedly, critical of a Public Service agency (other than an opinion critical of Corrective Services NSW or Juvenile Justice) or any person*

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<sup>4</sup>Optional Protocol to the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, opened for signature on 18 December 2002 (entered into force by the United Nations on 22 June 2006 and ratified on 15 December 2017), <https://www.phchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> (accessed August 2020).

unless the Inspector has afforded the following persons the opportunity to make submissions, either orally or in writing, in relation to the matter:

- a) if the opinion relates to a Public Service agency—the head of the agency,
- b) if the opinion relates to another person—the person.

- 3) The Inspector is not bound to amend a report in light of any submissions made by the Minister, an agency head or other person, but must:
  - a) before finalising a report, consider any such submissions before the report is furnished to the Presiding Officers, and
  - b) include in the report a statement that the Minister, the agency head or other person concerned has made submissions in relation to the Inspector's draft report.

### Previous and Current Inspections

- 31. The first report in which I was involved was the report titled *Prison Greens: the clothing and bedding of inmates*. I have been involved in every report since. Since my appointment in April 2016, my Office has undertaken approximately 169 liaison visits to custodial centres and 65 custodial centre inspections across NSW. This translates, on average, to approximately three liaison visits and one - two centre inspections each month. During this period, we have tabled eight significant reports in Parliament relating to 52 custodial facilities.
- 32. These reports included 312 recommendations directed towards CSNSW, JJNSW and JHFMHN or the relevant private provider where a custodial centre is operated under this model.
- 33. The ICS has not undertaken any inspections or investigations that specifically focus on deaths in custody. I have not received any referrals from the Minister, or other entities, requesting that I exercise my functions specifically in relation to deaths in custody.
- 34. The following table provides a list of reports that have been finalised and provided to Parliament since the establishment of the ICS.

Report	Centres inspected	Inspector	Year of publication
The invisibility of correctional officer work	Nil	Dr John Paget	2014
Full House: The growth of the inmate population in NSW	Parklea CC; Metropolitan Remand and Reception Centre; Metropolitan Special Programs Centre Area 2	Dr John Paget	2014
Making Connections: Providing Family and Community Support to Young People in Custody Report	Juniperina Juvenile Justice Centre (no longer in operation); Reiby Juvenile Justice Centre	Dr John Paget	2015
Lifers: Classification and regression Report	Nil	Dr John Paget	2015
Old and inside: Managing aged offenders in custody Report	Metropolitan Special Programs Centre Area 3; Silverwater Women's CC; the Kevin Waller Unit; Long Bay Hospital Aged Care and Rehabilitation Unit	Dr John Paget	2015

Prison Greens: The clothing and bedding of inmates in NSW Report	Cooma CC; Oberon CC; Emu Plains CC; Surry Hills CCC	Fiona Rafter	2017
24-hour court cells in NSW	Surry Hills CCC; Dubbo CCC; Moree CCC; Wagga Wagga CCC; Albury CCC; Newcastle CCC; Queanbeyan CCC; Batemans Bay CCC; Wollongong CCC; Lismore CCC; Port Macquarie CCC; Penrith CCC; Parramatta CCC; Amber Laurel CC	Fiona Rafter	2018
The management of radicalised inmates in NSW	Metropolitan Remand and Reception Centre; Mid North Coast CC; Goulburn CC; High Risk Management CC; Lithgow CC	Fiona Rafter	2018
Use of force, separation, segregation and confinement in NSW juvenile justice centres	Reiby JJC; Cobham JJC; Frank Baxter JJC; Orana JJC; Riverina JJC; Acmena JJC	Fiona Rafter	2018
Women on remand	Grafton CC; Wellington CC; Silverwater CC; Dilwynnia CC.	Fiona Rafter	2020
Inspection of Five Minimum Security Correctional Centres in Non-Metropolitan NSW	St Heliers CC; Mannus CC; Glen Innes CC; Brewarrina CC; Ivanhoe CC.	Fiona Rafter	2020
Programs, Employment and Education Inspection	Outer Metropolitan and Multipurpose CC; Mid North Coast CC; South Coast CC; Bathurst CC; Broken Hill CC; Dawn de Loas CC; MSPC and Special Purpose Centre.	Fiona Rafter	2020
Inspection of the Residential Facilities and the Compulsory Drug Treatment Correctional Centre	Balund-a; Bolwara Transitional Centre; Compulsory Drug Treatment Correctional Centre; Miruma; Nunyara COSP; and Parramatta Transitional Centre.	Fiona Rafter	2020

I trust the above is of assistance to the Inquiry and its work.

Yours sincerely

**Fiona Rafter**

Inspector of Custodial Services