

Statutory Review

Report of the Statutory Review of the *Inspector of Custodial Services Act 2012*

MAY 2021

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1. EXECUTIVE SUMMARY

The *Inspector of Custodial Services Act 2012* (NSW) (**the Act**) commenced on 30 August 2013. It established the statutory office of the Inspector of Custodial Services (**the Inspector**). The current Inspector is Fiona Rafter, who was appointed effective 11 April 2016.

The role of the Inspector is to inspect adult and juvenile custodial centres and services, to report on findings and make recommendations to Parliament and to oversee the Official Visitor program.

The Inspector reports directly to Parliament and is independent of the New South Wales (NSW) agencies that administer and are responsible for custodial services in NSW: Corrective Services NSW (**CSNSW**) and Youth Justice NSW (**YJNSW**).

As the Act has been in operation for over five years, this review was conducted in accordance with the statutory requirement to consider whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives (section 28).¹

This review concludes that the purpose and policy objectives of the Act remain valid.

Some amendments to the Act are recommended. These amendments aim to:

- improve the efficiency of the Act's operation;
- provide clarity in relation to the capabilities and functions of the Inspector; and
- recognise the importance of the Inspector remaining an independent body and having sufficient access and oversight of all custodial centres and services in NSW.

The review has also considered the administrative structure of the Inspector and any resourcing implications of proposals made by stakeholders.

¹ All references in this report are to the *Inspector of Custodial Services Act 2012* (NSW), unless otherwise stated.

2. LIST OF RECOMMENDATIONS

Recommendation 1 – insert an objects clause

Amend the Act to insert an objects clause that reflects the aims of the Act to establish an independent Inspector to inspect, monitor and report to Parliament on custodial centres and the provision of custodial services, in order to improve offenders' prospects of rehabilitation by improving standards within custodial facilities. The needs of Aboriginal and Torres Strait Islander people, people from diverse cultural and ethnic backgrounds and children and young people, should be taken into account in the exercise of functions under the Act.

Recommendation 2 – clarify power to request information in relation to a custodial service

Amend section 7 of the Act to provide for abundance of clarity that in the exercise of the Inspector's functions, the Inspector may require custodial centre staff members to supply information or produce documents concerning a custodial service.

Recommendation 3 – allow for private interviews

Amend the Act to provide that the Inspector may conduct private interviews with a detainee, people at custodial centres and people involved in the provision of custodial services, provided the interview can be conducted in a manner that does not compromise the security of the custodial centre or safety of any person within the custodial centre.

Recommendation 4 – recognition of legislative frameworks in exercise of functions

Amend the Act to provide that, in the exercise of the Inspector's functions, the Inspector is to have regard to the legislative frameworks that govern the delivery of custodial services.

Recommendation 5 – expand formal arrangements with other agencies

Amend the Act to expand the Inspector's ability to enter into arrangements with other agencies regarding the exercise of the Inspector's functions, including the Office of Children's Guardian, the Law Enforcement Conduct Commission and the Health Care Complaints Commission.

Recommendation 6 – allow tabling of reports in Parliament at any time

Amend the Act to allow reports produced under section 6(1)(d) of the Act to be tabled in Parliament while Parliament is not sitting.

Recommendation 7 – introduce a discretionary power to request information about responses to recommendations

Amend the Act to grant the Inspector a discretionary power to request notification from a relevant agency on responses to recommendations of the Inspector, including why steps have not or are not proposed to be taken.

Recommendation 8 – provide a formal mechanism for agencies to make submissions on public interest considerations

Amend the Act to provide a formal mechanism by which agencies may make submissions to the Inspector on the public interest considerations relating to information contained in reports.

Recommendation 9 – protection of information and documents received and prepared by the Inspector

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

Recommendation 10 – consider consolidating all legislative provisions relating to Official Visitors

Consideration should be given to consolidating all legislative provisions that relate to both CSNSW and Youth Justice Official Visitors in the Act and for the Act to be the governing legislation for the Official Visitor Program.

Recommendation 11 – consider protecting communications between Corrective Services Official Visitors and inmates

Consideration should be given to amending legislation to provide that communications between Corrective Services Official Visitors and inmates are confidential and that Official Visitors are considered "exempt persons" under the Crimes (Administration of Sentences) Regulation 2014.

Recommendation 12 – clarify that the Minister responsible for Youth Justice may exercise functions under the Act

Amend the Act to ensure that the Minister responsible for Youth Justice is able to: refer matters to the Inspector; request a report; request the Inspector exercise other functions with respect to Youth Justice facilities; and has an opportunity to make submissions with respect to reports.

3. INTRODUCTION

3.1 Introduction to the review

Section 28 of the Act requires the Minister to review the Act as soon as possible after the period of five years from the date of assent. The purpose of the review is to determine whether the Act's policy objectives remain valid and whether its terms remain appropriate for securing those objectives.

The Act has now been in operation for nearly eight years, which has given the Inspector, agencies operating custodial centres and other stakeholders the opportunity to assess its operation and impact.

The Department invited stakeholders to make submissions to the review in November 2019, via letters and a public consultation notice that was published on the Department's website. The Department also conducted targeted consultation with key stakeholders in relation to proposed recommendations.

A list of organisations that provided submissions to the review is at **Appendix A**.

Overall, submissions from stakeholders were supportive of the policy objectives of the Act and considered that its terms were generally well suited to achieving those objectives.

The majority of the submissions made by stakeholders were aimed at improving the operation of the Act, enhancing the independence of the Inspector and the extent to which the Inspector may be utilised to help satisfy Australia's commitments as part of Australia's National Preventive Mechanism (**NPM**) under the Optional Protocol to the Convention Against Torture (**OPCAT**).

3.2 Background to the Act

The Act was introduced in 2012 in response to a Parliamentary inquiry into the privatisation of prisons and prison-related services in 2009, conducted by the General Purpose Standing Committee No 3 (**the General Purpose Committee**). This inquiry arose after a decision by the NSW Government to privatise Parklea Correctional Centre, Cessnock Correctional Centre and the Court Escort Security Unit².

Throughout the inquiry, one of the arguments against privatisation was that private prisons may be less accountable than public prisons. Additionally, the adequacy of monitoring in comparison to their public counterparts was of concern.³

In conducting its inquiry, the General Purpose Committee noted that a number of other jurisdictions, including the United Kingdom and Western Australia had established independent prison inspectorates.⁴ In the United Kingdom, for example, the Prison Inspector has equal access to both public and private prisons and has the power to conduct announced and unannounced inspections of custodial facilities in order to prepare qualitative assessment reports. While unable to hand out financial penalties, it was noted that the Inspector's reports are released publicly and can have a significant impact on a prison's reputation, whether it was publicly or privately operated.

² Ultimately, only Parklea Correctional Centre was privatised.

³ General Purpose Standing Committee, June 2009, *Inquiry into the privatisation of prisons and prison-related services*, Report 21, page 94. Available at: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/1673/090603%20final%20report%20version%203.pdf>

⁴ Ibid, page 95.

Equivalent functions were also granted to the Office of the Inspector of Custodial Services in Western Australia, which was established to provide independent scrutiny to the State's prisons and report directly to Parliament.

NSW previously had an Inspector-General of Corrective Services. However, that role had been abolished in 2003 due to duplication of functions with the NSW Ombudsman (**the Ombudsman**). At the time of the inquiry, a Corrections Inspectorate within the then Department of Corrective Services assumed an oversight role of prisons. However, the General Purpose Committee suggested that this role lacked the capacity for independent oversight from the Department.⁵

The General Purpose Committee believed that an independent inspector was an important position and should be reinstated to report on both public and private prisons. It recommended that, in order to ensure transparency and accountability within the prison sector, the Inspector be established once more.⁶

The subsequent *Inspector of Custodial Services Act 2012* was assented to on 21 August 2012 and commenced on 30 August 2013, establishing the statutory office of the Inspector of Custodial Services.

3.3 Activities, functions and powers of the Inspector

On its website, the Inspector describes its purpose as: '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'.

The Inspector has oversight of all correctional facilities in NSW, including all adult and youth facilities. In 2018-19 this included:

- 40 correctional centres;
- two transitional centres;
- three residential facilities;
- one community offender support program;
- 12 24-hour court cell complexes;
- 42 court cell locations that are managed by CSNSW;⁷
- 182 inmate transport vehicles;⁸
- six youth justice centres; and
- 23 detainee transport vehicles.⁹

Under the provisions of the Act, the Inspector is required to inspect each custodial centre once every five years and every juvenile justice centre once every three years (section 6).

The Inspector does not respond to individual complaints. This was a policy choice to avoid duplication with the role of the Ombudsman.¹⁰ Where appropriate, the Inspector may refer

⁵ Ibid, page 97 and see recommendation 11.

⁶ Ibid, page 97 and see recommendation 10.

⁷ There are 12 24 hour court cell complexes (including Penrith Court Cell Complex which is currently used on a part-time basis, but not Amber Laurel Correctional Centre as it is currently gazetted as a Correctional Centre) as well as five and eight hour court cell locations.

⁸ These are used to transport persons in custody or otherwise detained to or from a custodial centre by or on behalf of Corrective Services NSW.

⁹ Inspector of Custodial Services, Annual Report 2018-19, page 5. Available at:

<http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202018-19.pdf>

¹⁰ NSW Hansard, *Inspector of Custodial Services Bill 2012*, Second Reading, 23 May 2012, p 25. Available at:

<https://www.parliament.nsw.gov.au/bill/files/874/INSPECTOR%20OF%20CUSTODIAL%20SERVICES%20BILL%202012.pdf>

complaints it has received to relevant agencies and/or oversight bodies, such as the Ombudsman, for investigation and resolution.

In addition to conducting inspections, the Inspector also undertakes liaison visits to centres to inform inspection work and monitors the implementation of recommendations.

The Inspector also oversees the Official Visitor programs conducted in adult and youth custodial facilities under the *Crimes (Administration of Sentences) Act 1999* (**CAS Act**) and the *Children (Detention Centres) Act 1987* (**CDC Act**).

Functions of the Inspector

The functions of the Inspector are set out in section 6 of the Act.

6 Principal functions of the 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.

Powers of the Inspector

The powers of the Inspector are set out in sections 7 and 8 of the Act.

7 Powers of the Inspector

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

- (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 Incidental powers

The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions. Any specific powers conferred on the Inspector by this Act are not taken to limit by implication the generality of this section.

The Act also enables the Inspector to enter into arrangements regarding the exercise of the Inspector's functions with various bodies including CSNSW, YJNSW, Justice and Forensic Mental Health Network (**Justice Health**), the Ombudsman and the Independent Commission Against Corruption (**ICAC**) (sections 9, 10 and 11). These provisions enable clear processes and procedures to be established for the exercise of the Inspector's functions in relation to CSNSW, YJNSW and Justice Health and address any overlap between the functions of the Inspector, the Ombudsman and ICAC.¹¹

The Inspector and the Ombudsman may share information to assist with the efficient operation of these respective bodies in discharging their functions as investigators of custodial centres and complaints (section 26).

Reports to Parliament

The Act requires the Inspector to report to Parliament in three circumstances.

First, the Inspector must report to Parliament on each inspection of adult correctional centres and youth justice centres, and any examination and review of a custodial service (section 6(1)(a)-(d)).

Secondly, the Inspector is to report to Parliament on any particular issue or general matter relating to the Inspector's functions:

- if, in the Inspector's opinion, it is in the interest of any person or in the public interest to do so (section 6(1)(e)); or
- if requested to do so by the Minister (section 6(1)(f)).

In any report to Parliament produced under the above provisions (**Inspection Reports**), the Inspector is to include 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 (section 6(1)(g)).

Finally, the Inspector is also required to make an Annual Report to Parliament (section 12). This includes:

- a description of the Inspector's activities during that year in relation to each of the Inspector's principal functions;
- an evaluation of the response of relevant authorities to the recommendations of the Inspector; and
- any recommendations for legislative changes or administrative actions that the Inspector considers should be made.

¹¹ NSW Hansard, *Inspector of Custodial Services Bill 2012*, Second Reading, 23 May 2012, p 26. Available at: <https://www.parliament.nsw.gov.au/bill/files/874/INSPECTOR%20OF%20CUSTODIAL%20SERVICES%20BILL%202012.pdf>

Official Visitor programs

One of the functions of the Inspector is to oversee the Official Visitor program, which is governed by the CAS Act for the adult correctional system and the CDC Act for the youth justice system.

Official Visitors are community representatives that act as independent observers of custodial facilities. They are appointed by the Minister for Counter Terrorism and Corrections for adult facilities and the Minister for Families, Communities and Disability Services for youth facilities.

It is the responsibility of Official Visitors to visit correctional centres and youth justice centres in NSW, report on custodial conditions, and receive and address complaints made by detainees, inmates and staff at a local level.

An Official Visitor for a correctional complex or correctional centre must visit the complex or centre at least once each month, unless prevented by illness or other sufficient cause (section 228(5)(a), CAS Act).

The Inspector's Annual Report for 2018-19 indicates that Official Visitors report to the Commissioner of Corrective Services NSW on a quarterly basis and to the Minister for Counter Terrorism and Corrections and the Inspector on a six-monthly basis.¹²

3.4 The Parliamentary Joint Committee

The Act also provides oversight of the Inspector by the Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission (**the Committee**) (section 17).

It is the Committee's function to review and report to Parliament on the performance of the Inspector and on its annual and other reports. The Committee must also report to Parliament any change which it thinks desirable to the functions, structures and procedures of the Inspector. However, the Committee cannot investigate or reconsider the Inspector's decisions or recommendations about specific complaints or investigations.

Section 18 of the Act provides the Committee with the power to veto the proposed appointment of an Inspector by the Minister.

There are no recommendations arising from this Review in relation to the provisions concerning the Committee.

¹² Ibid, page 14.

4. STATUTORY REVIEW

4.1 The policy objectives of the Act

The purpose of the statutory review of the *Inspector of Custodial Services Act 2012* (**the Review**) is to determine whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives.

The principal objective of the Act is to establish the independent office of the Inspector of Custodial Services, which has access to, and oversight of, custodial facilities in NSW, with the ability to report to Parliament directly. The second reading speech stated that improving standards within custodial facilities would improve the prospects of rehabilitation of offenders and the safety of the community as a whole.

The Second Reading Speech outlined the role the Inspector was expected to play in improving standards in custodial facilities:

- The Inspector would provide independent external scrutiny of the standards and operational practices of custodial services in NSW.
- The Inspector would provide an independent mechanism for monitoring broader thematic and systemic issues arising out of the inspection of adult and juvenile correctional facilities and services.
- The Inspector would take a proactive rather than a reactive approach to improving custodial services through regular inspections and reporting, enabling potential problems to be nipped in the bud before becoming major issues.
- Rather than dealing with complaints or grievances relating to an individual in a custodial service, the Inspector would adopt a more holistic approach focusing on systemic issues in correctional facilities to bring about real change.¹³

Stakeholders support the policy objectives of the Act

Submissions from stakeholders were broadly supportive of the policy objectives of the Act, and many acknowledged the importance of the role of the Inspector and its functions, including to:

- **monitor**: the provision of effective monitoring and oversight of custodial centres and services (Aboriginal Legal Service (**ALS**); Mental Health Review Tribunal (**the Tribunal**);
- **scrutinise**: the ability to scrutinise conditions, treatment, including the provision of health services, and outcomes for adults and young people in custody, including vulnerable people such as women and the elderly (ALS; the Tribunal); and
- **promote transparency**: its consequent ability to 'shine a light on' systemic issues (the Tribunal)

Some stakeholders recognised the flow on effect of the role of the Inspector, with the Tribunal suggesting that it was able to use information on systemic issues as a basis to better understand the ways that the custodial environment may impact on those with mental health issues.

Legal Aid NSW (**Legal Aid**) were of the view that the policy objectives of the Act remain valid, making specific reference to those mentioned in the Second Reading Speech for the Bill, and confirming that the terms of the Act were indeed achieving them.

¹³ NSW Hansard, *Inspector of Custodial Services Bill 2012*, Second Reading, 23 May 2012, p 24. Available at: <https://www.parliament.nsw.gov.au/bill/files/874/INSPECTOR%20OF%20CUSTODIAL%20SERVICES%20BILL%202012.pdf>

Consideration

The Review considers that the policy objectives of the Act remain valid. The Inspector plays an important role in improving standards within NSW custodial facilities by providing external scrutiny of custodial facilities through regular inspections and independent reporting to Parliament.

The holistic approach to these inspections, examination of systemic issues, administration of the Official Visitor Program and ability to refer complaints to other agency bodies (including the Ombudsman and ICAC) promote the delivery of improved custodial arrangements throughout NSW.

The Inspector also helps to ensure consistency and transparency across both the public and privately-operated custodial facilities.

The Act adequately balances the functions and powers of the Inspector. The requirement for the Inspector to report to Parliament, and the oversight role granted to the Parliamentary Joint Committee in monitoring the exercise of these powers, continues to be appropriate. The breadth of the powers and the accountability of the Inspector to Parliament ensures transparency in relation to custodial facilities in NSW.

The Review considers that the Act's ambit is sufficient in its establishment of the office of the Inspector and has effective safeguards and protections.

Improvements to the terms and operation of the Act

Although the policy objectives of the Act remain valid, it is important to ensure the terms of the Act remain appropriate for securing those objectives.

Stakeholder submissions identified areas for improving the efficiency of the Act's operation and its clarity. These included:

- Clarifying the objectives of the Act (at 4.2);
- Functions and powers (at 4.3);
- Relationships with other agencies (at 4.4);
- Reports (at 4.5);
- Official Visitor Program (at 4.6); and
- The impact of the machinery of government changes (at 4.7).

4.2 Clarifying the objectives of the Act

The need for an express objects clause

Recommendation 1:

Amend the Act to insert an objects clause that reflects the aims of the Act to establish an independent Inspector to inspect, monitor and report to Parliament on custodial centres and the provision of custodial services, in order to improve offenders' prospects of rehabilitation by improving standards within custodial facilities. The needs of Aboriginal and Torres Strait Islander people, people from diverse cultural and ethnic backgrounds and children and young people, should be taken into account in the exercise of functions under the Act.

As outlined above at 4.1, the Second Reading Speech described that the policy objectives of the Act are to establish an independent statutory body to provide external scrutiny of custodial facilities, to allow for independent monitoring of thematic and systematic issues that may arise in both private and public prisons, and to facilitate direct and independent reporting to Parliament.

The Second Reading Speech indicated that the Act aimed to improve the standards in correctional facilities, and, in doing so, improve the prospects of rehabilitation of offenders. This in turn was described as contributing to improving the safety of the community as a whole because rehabilitated offenders '...can become productive, law-abiding members of society on their release.'¹⁴

These objects are not expressly included in the Act. Multiple stakeholders suggested introducing an objects clause into the Act. It was submitted that an objects clause would assist in statutory interpretation of the provisions of the Act, providing a greater general understanding of the purpose of the legislation for both readers and the Inspector (Ombudsman; Legal Aid).

Stakeholders further submitted that an objects clause could:

- **Contain the general aims or principles underpinning the operation of the Inspector.**
- **Expressly recognise the independence of the Inspector:** the Inspector submitted that, consistent with the policy objective of independence, it may be prudent to consider including an explicit statement in the Act reflecting the independence of the Inspector and staff. The Ombudsman submitted that reference be made to independence in an objects clause. The *Custodial Inspector Act 2016* (Tas) and the *Inspector of Correctional Services Act 2017* (ACT) include objects clauses that reference the independence of their respective agencies.¹⁵
- **Outline that to fulfil its functions, the Inspector is to engage with Aboriginal and Torres Strait Islander people and people from culturally diverse backgrounds:** Stakeholders to this review suggested that the Act should expressly acknowledge that the Inspector is required to engage with, and consider the unique health and wellbeing needs of, culturally and ethnically diverse and vulnerable people in custody.
 - Legal Aid suggested that this could be done by including a similar provision to section 18(2) of the *Inspector of Correctional Services Act 2017* (ACT), which requires the ACT Inspector to "...if appropriate and practicable, consult with people, or use staff, suitable to the cultural background or vulnerability of any detainee involved in a matter being examined or reviewed."

¹⁴ NSW Hansard, *Inspector of Custodial Services Bill 2012*, Second Reading, 23 May 2012, p 24. Available at: <https://www.parliament.nsw.gov.au/bill/files/874/INSPECTOR%20OF%20CUSTODIAL%20SERVICES%20BILL%202012.pdf>

¹⁵ *Custodial Inspector Act 2016* (Tas), s 3; *Inspector of Correctional Services Act 2017* (ACT), s 6.

- The ALS noted that building trust between Aboriginal and Torres Strait Islander people in detention and the Inspector is vital to facilitating open communication and transparency throughout the inspection process, including interviews with people in detention. It further submitted that it is important to ensure culturally appropriate services and interactions between ethnic and minority groups in custody and inspecting staff.
- The ALS also submitted the Inspector's work should recognise that the needs and rights of children and young people are different to those of adults, especially Aboriginal and Torres Strait Islander children.

Consideration

The Review agrees that an objects clause would assist in statutory interpretation of the provisions of the Act and provide a greater understanding of the purpose of the legislation.

It is clear from the Second Reading Speech that an independent Inspector was established to inspect, monitor and report to Parliament on custodial centres and the provision of custodial services, in order to improve offenders' prospects of rehabilitation by improving standards within custodial facilities. The objects clause should incorporate these aims.

The Review also considers that the objects clause should provide for the also include provisions that acknowledge people from diverse cultural and ethnic backgrounds, including Aboriginal and Torres Strait Islander people. It would also be appropriate to consider an object relating to the particular vulnerabilities and needs of children and young people who are in custody.

4.3 Functions and Powers

As outlined above at 3.3, the main functions and powers granted to the Inspector are contained within sections 6, 7 and 8 of the Act.

Under section 6, the Inspector must conduct inspections of custodial facilities within NSW and may examine and review a custodial service at any time and report to Parliament on each of these inspections, examinations and reviews, as well as raising any issues or recommendations.

In order to facilitate these functions, the Inspector has specific powers listed in section 7, including an entitlement to full access to the records of any custodial centre and the ability to request access to any other information, documents, staff or persons in custody.

Section 8 is an incidental power to do all things necessary in connection with, or reasonably incidental to, the exercise of the Inspector's functions.

This section of the review makes recommendations to clarify the parameters of the Inspector's functions more broadly, and specific recommendations regarding the Inspector's access to information and protection of the privacy of interviewees. This section also identifies some issues of the Inspector or other stakeholders that are out of scope and unable to be addressed by this review.

Clarifying access to information

Recommendation 2:

Amend section 7 of the Act to provide for abundance of clarity that in the exercise of the Inspector's functions, the Inspector may require custodial centre staff members to supply information or produce documents concerning a custodial service.

The Inspector has legislative power to access the records of any custodial centre (including health records) in the exercise of her functions. The Inspector may require custodial centre staff members to supply information or produce documents or other things relating to any matter concerning a custodial centre's operations.

Under section 7(a) of the Act, in the exercise of her functions, the Inspector is entitled to full access to the records of "any custodial centre (including health records)." The definition of "custodial centre" in section 3 of the Act includes "a correctional centre (including a juvenile correctional centre, a managed correctional centre and a periodic detention centre)". Those terms are further defined in the CAS Act, which provides that a "managed correctional centre" means a correctional centre that is for the time being managed under a management agreement (sections 3 and 238 of the CAS Act).

Under section 7(c) of the Act, the Inspector 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." Section 3 of the Act defines "custodial centre staff member" to mean any person employed or engaged to provide custodial services (whether they are employed or engaged at a custodial centre or elsewhere).

"Custodial service" under the Act means:

- (a) the management, direction, control or security of a custodial centre,
- (b) the security, management, control, safety, care or welfare (including health care) of persons in custody, detained or residing at a custodial centre,
- (c) the transport of persons in custody or otherwise detained to or from a custodial centre by or on behalf of Corrective Services or Juvenile Justice.¹⁶

Under section 7(f) of the Act, in the exercise of her functions, the Inspector is entitled to be given access to persons in custody, detained or residing at any custodial centre for the purpose of communicating with them.

Some stakeholders considered that there is a lack of clarity as to whether the Act guarantees the Inspector full access to the records of all custodial centres. The Inspector submitted that the power to request information held and collated centrally by relevant agencies or contractors should be specified in the Act. It was submitted that this would reflect current practice in NSW.

The Inspector suggested that section 28(1) of the *Inspector of Custodial Services Act 2003* (WA) (**the WA Act**) could provide an appropriate model for the Inspector to have free and unfettered access to:

- all documents in the possession of the Department in relation to a prison or to a custodial service in relation to a prison or to a person who is, or has been, a prisoner; and
- all documents in the possession of a contractor or a subcontractor in relation to a prison that is a subject of a contract; or a custodial service in relation to a prison that is a subject of a contract; or a person who is, or has been, a prisoner in a prison that is a subject of a contract.

Further, the Inspector suggested that the Act may also be clarified to make clear that the power in section 7 extends to documents and information relating to a "custodial service."

¹⁶ Certain services provided by the NSW Police Force, the Serious Offenders Review Council, the Serious Young Offenders Review Panel or the State Parole Authority are excluded.

Consideration

In relation to the Inspector's powers to compel the production of documents, the Review does not consider that any amendment to adopt the language used in the WA Act is necessary. Although the WA Act provides an alternative model of providing powers to compel documents, it is not considered that there are any deficiencies in the current drafting of the Act that would suggest that the language used in the WA Act should be preferred.

The Review considers that section 7 of the Act is sufficient for the Inspector to access relevant documents in respect of all custodial centres, including those that are privately managed. In addition, the Review considers that the definition of "custodial centre staff member" in section 3 is broad enough to include Justice Health employees or contractors, YJNSW members of staff or contractors, CSNSW members of staff or contractors, and staff or contractors of private operators of correctional centres.

With respect to records and information held centrally, the review notes that 'custodial centre staff member' captures all persons employed or engaged to provide custodial services, whether they are employed or engaged at a custodial centre or elsewhere. This picks up persons as senior as the Commissioner of Corrective Services and the Secretary of DCJ, whose functions, as outlined in section 232 of the CAS Act and section 6 of the CDC Act and elsewhere in those Acts, fall within the definition of 'custodial service'.

However, the Review agrees with the Inspector that there may be benefit in providing, for abundance of clarity, that the power to require information and documents captures information and documents relating to a "custodial service" (as defined in section 3). The power in section 7(c) and (d) of the Act only refers to "a custodial centre's operations".

Although a broad reading of the definition of "custodial centre staff member" in section 3 would interpret the section 7 powers as extending to custodial services, and the matters included in the definition of 'custodial services' appear to be part of a custodial centre's operations, the subsection could benefit from clearer expression to ensure that there is no gap between the Inspector's powers to examine and review custodial services (section 6(c)) and her ability to require information and documents in respect of a custodial service.

Requirement for private interviews

Recommendation 3:

Amend the Act to provide that the Inspector may conduct private interviews with a detainee, people at custodial centres and people involved in the provision of custodial services, provided the interview can be conducted in a manner that does not compromise the security of the custodial centre or safety of any person within the custodial centre.

Section 7(d) provides that the Inspector 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. Section 7(f) provides that the Inspector is entitled to be given access to persons in custody, detained or residing at any custodial centre for the purpose of communicating with them.

Stakeholders expressed concern that there is no express power included in the Act for the Inspector to conduct private interviews with a detainee (with the detainee's consent), people at custodial centres and people involved in the provision of custodial services.

The Inspector noted that her current practice was to request that an interview be conducted in private, if requested by the interviewee or considered necessary by the Inspector or her staff. In general, custodial centre staff facilitate private interviews, subject to any safety concerns being addressed (this may mean that line of sight is maintained by custodial centre staff). In respect of interviews with detainees and inmates, interviews are only conducted with the consent of that person.

However, the Inspector supported the inclusion of an explicit power to make the current arrangements clear.

CSNSW submitted that it is important that any security concerns raised by the staff member concerning a private interview be addressed, as there may be circumstances where the security of the centre and the safety of the Inspector's staff, inmates and centre staff may be jeopardised.

Consideration

In order to perform functions under the Act, the Review considers that it is appropriate that the Inspector conduct private interviews with a detainees, people at custodial centres and people involved in the provision of custodial services and that the power to do so should be expressly set out in the Act. The Review also considers that it is important that any private interview be conducted in a manner that does not jeopardise the safety and security of a custodial centre. The Review notes that current arrangements for private interviews already seek to balance these considerations.

The Review recommends that the Act is amended to make clear that the Inspector has the power to conduct any interview in private, subject to any security and safety concerns being addressed.

Inspections – frequency and method (no recommended changes)

The Inspector has a legislative obligation to inspect each adult custodial centre at least once every 5 years and to inspect each juvenile justice centre and juvenile correctional centre at least once every 3 years (section 6).

The extent of the inspections is outlined in the in the 2018-19 Annual Report: eight thematic inspections were conducted throughout the year, which allowed for multiple centres to be visited multiple times to be inspected within each theme.¹⁷

To respond to the legislative requirement under section 6, using resources available, the Inspector has utilised a theme-based model of inspection which allows multiple custodial facilities to be included in a single theme-based inspection.

In the 2018-19 financial year, the Inspector reviewed this methodology and began undertaking individual centre inspections in addition to theme-based inspections.¹⁸

Stakeholders were supportive of the Inspector's responsibility to inspect custodial facilities.

Legal Aid noted that effective monitoring requires regular and frequent visits, as well as timely reporting of recommendations and follow-up visits to monitor implementation. It was submitted that the Act should be amended to require inspections of adult custodial centres at least once every four years, and of youth justice centres at least once every two years.

¹⁷ Inspector of Custodial Services, *Annual Report 2018-19*, pages 6-9. Available at: <http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202018-19.pdf>

¹⁸ Inspector of Custodial Services Annual Report 2018-2019. Available at: <http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202018-19.pdf>

The ALS noted concerns about the frequency of visits in NSW. However, the ALS also noted that the Inspector has the power to inspect a custodial facility at any time and that there have been some reports indicating that the custodial environments are being inspected at a higher rate than mandated. It was recognised that while it is important to ensure that custodial facilities are regularly inspected, this must be balanced against the Inspector's resourcing to meet these obligations.

The Inspector was of the view that the timeframes for inspections continues to be appropriate for NSW given the size of the NSW custodial system and the Inspector's resourcing. The Inspector noted that she has power to access, visit or inspect centres more frequently, if necessary, and has done so in the past.

Consideration

The Review agrees with the Inspector that the current cycle of inspections, and discretion of the Inspector, is sufficient in the NSW context. The Review also notes that the Inspector oversees the Official Visitors schemes, which is a source of regular reports and information about issues arising from the operations of custodial centres. In addition, the Ombudsman has a program of visits to custodial centres and can share information with the Inspector about any systemic issues of which they become aware.

Inspections – use of technology (no recommended changes at this time – for further consideration)

Currently, the Inspector must obtain authorisation under the CAS Act to bring equipment such as digital cameras, laptops and other technology into a centre.

The Inspector submitted that the power to inspect in the Act should be augmented to clarify that the Inspector or authorised delegate is able to bring essential equipment when conducting visits and inspections. These are important tools for the Inspector and staff conducting inspections and it is inconsistent with the independent role of the Inspector that permission is required to bring essential equipment into a custodial facility.

The Inspector suggested that the proposed clarifying amendment would reflect current practice and the independence of the Inspector, and reduce the administrative burden associated with the process of obtaining authorisations under the CAS Act.

CSNSW submitted that there is a need for control over bringing equipment into a custodial facility to ensure that its introduction does not compromise the security of the facility.

Consideration

The Review notes that administrative arrangements are in place to facilitate authorisations under the CAS Act and to support the Inspector and staff to bring equipment and tools into facilities as part of the inspection.

The Review acknowledges the Inspector's submission that these administrative arrangements are at times not efficient or effective to support the Inspector's functions under the Act. The Review also acknowledges the view of CSNSW that it is important for it to retain control over the introduction of anything into a correctional centre, given the security risks.

This issue may be able to be resolved by improving administrative arrangements, including a formal arrangement under s.9 of the Act, or alternatively through an amendment to the CAS Act and CDC Act that appropriately balances the public interest in facilitating the work of the Inspector with the public interest in maintaining the security and safety of custodial centres. The Department will further consider this issue and explore its resolution with stakeholders outside of this review.

Extension of functions to police custody (no recommended changes – outside of scope)

The Inspector does not currently have any responsibility or function in relation to NSW Police Force (**NSWPF**) cells and custody arrangements. Police stations and court cell complexes that are not managed by CSNSW or YJNSW are expressly excluded from the definition of ‘custodial centre’ for the purpose of the Act (section 3).

Some stakeholders submitted that the role of the Inspector of Custodial Services should extend to include oversight of custodial centres and services managed by the NSWPF.

Stakeholders submitted concerns about:

- the length of time a young person spends in police custody and the extent to which young people are separated from adult detainees while in police custody;
- the impact of police custody arrangements in regional areas, particularly for young people who may need to be transported long distances to a youth detention centre;
- the number of clients who have been held in police custody for the maximum length of time (seven days);
- a lack of clarity about who is responsible for monitoring court and police cells.

Legal Aid considered that oversight of these settings by the Inspector would enable the monitoring of condition and treatment issues that can arise as people move between detention settings. Ultimately, this would contribute to continuity of care between custodial settings.

Some stakeholders suggested that the role of the Inspector could be expanded to a role similar to that of the Chief Inspector in the United Kingdom, which would include police premises and the oversight of the legal protections afforded young people through the arrest and charging process. This could include the use of options that can divert a young person from a possible custodial setting through the appropriate application of the *Young Offenders Act 1997* (NSW).

Consideration

The Review notes that a proposal to expand the Inspector’s functions to police custodial settings could have significant resourcing implications. There are approximately 112 police lock-ups or police station cells in NSW where people are held for equal to, or greater than, 24 hours.¹⁹ The Review also notes that the Law Enforcement Conduct Commission already has an oversight role over agency maladministration and officer misconduct and maladministration within the NSW Police Force, which would need to be reconciled with any expansion of the Inspector’s role.

Resolution of this issue is outside the scope of the review, noting that the Law Enforcement Conduct Commission has oversight powers over the NSW Police Force and the recent statutory review of the *Law Enforcement Conduct Commission Act 2016* made no recommendations to alter that body’s role in the oversight of misconduct and maladministration within the NSW Police Force. Therefore, no recommendation is made in relation to this proposal.

¹⁹ Commonwealth Ombudsman, *Implementation of the OPCAT: Baseline Assessment of Australia’s OPCAT readiness*, September 2019, page 31-33. Available at: https://www.ombudsman.gov.au/_data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf

Expressly provide that reports may include advice and recommendations on treatment, care, wellbeing and rehabilitation (no recommended changes)

As indicated above, the Inspector's principal functions include inspection of custodial centres, examination and review of any custodial service at any time and reporting to Parliament on each such inspection, examination or review. The Inspector is also to report to Parliament on any particular issue or general matter relating to the functions of the Inspector.

In any report to Parliament, the Inspector may include 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). The Inspector submitted that it would better reflect the role and functions of her office if this provision were to state that advice and recommendations may be made about the treatment, care, wellbeing and rehabilitation of persons in custody.

Consideration

The term 'custodial service' is defined to include a broad range of activities carried out by custodial authorities, including the 'safety, care or welfare (including health care) of persons in custody'. The Review considers that the definition of 'custodial service' and the plain meaning of 'welfare' is broad enough to pick up matters relating to the treatment, care, wellbeing and rehabilitation of persons in custody.

The Review has also recommended inserting an objects clause into the Act referring to the goal of improving offenders' prospects of rehabilitation by improving standards within custodial facilities through the establishment of an independent Inspector to inspect, monitor and report to Parliament on custodial centres and the provision of custodial services. The meaning of the term 'custodial service' and the matters that fall within its scope will be interpreted through the lens of that objects clause.

Accordingly, no recommendation is made in relation to this proposal.

Recognition of legislative frameworks in exercise of functions

Recommendation 4:

Amend the Act to provide that, in the exercise of the Inspector's functions, the Inspector is to have regard to the legislative frameworks that govern the delivery of custodial services.

One function the Inspector undertakes is to develop publicly available Inspection Standards for both adult and youth custodial services in NSW²⁰. The current Inspection Standards were developed having regard to international and domestic legal instruments and conventions. The Inspector consulted with CSNSW, YJNSW and Justice Health in developing the current Inspection Standards.

The Inspector advises that the purpose of the current Inspection Standards is to establish a transparent understanding of the inspection benchmarks for more effective, more accountable, and more humane correctional services. Standards provide a guide to both Inspectors and agencies as to best practice in the areas of custody, care and wellbeing, programs, employment and education, and resources and systems. The Inspector considers that the standards are not benchmarks against which a prison should be audited or measured, but instead enable a qualitative assessment of the performance of a custodial centre, custodial service or custodial system.

²⁰ Available online at: <https://www.inspectorcustodial.nsw.gov.au/inspector-of-custodial-services/inspection-standards.html>

CSNSW submitted to the review that, while it is imperative for inspections to be independent, the NSW Inspection Standards should be developed in consultation with the agencies administering custody and the responsible Minister. This would avoid Inspection Standards including benchmarks that are not achievable or that may be considered inconsistent with existing policy and legislation.

Consideration

Setting inspection standards is not expressly stated as a function of the Inspector. However, it appears to be captured by section 8 of the Act, which gives the Inspector power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of her functions. It makes sense for the Inspector to set and publish inspection standards as they establish a benchmark against which the delivery of custodial services can be measured, and show what an effective custodial system looks like.

The Review considers it imperative that the Act preserve the independence of the Inspector and enable her to perform her functions of independently examining and reviewing custodial services. This principle extends to the development and setting of the Inspection Standards. It would be inconsistent with the concept of an independent Inspector for the benchmark against which the delivery of custodial services is measured to be mutually agreed between the Inspector and Government.

However, while inspection Standards should be independent, robust and measure the delivery of custodial services against effective and humane benchmarks, they should also be realistic and practical in their expectations. Custodial services are delivered within legislative settings imposed by Parliament under Acts providing for the detention of persons in custody. Any standard for inspecting and measuring the delivery of custodial services should be cognisant of the legal landscape within which it occurs, so that custodial agencies are held to standards of accountability that reflect the standards imposed on them by statute and common law.

The Inspector's practice of consulting with custodial agencies in developing the Inspection Standards enables the legal and operational landscape within which those agencies work to inform the content of those benchmarks.

The Review considers that in order to facilitate the development and setting of robust and realistic Inspection Standards, an amendment to the Act is warranted to clarify that any function exercised by the Inspector must be done so having regard to the applicable legislative frameworks that govern the delivery of custodial services. This amendment would require the Inspector to consider these legislative frameworks when exercising functions, including the setting of inspection standards and reporting on the outcome of inspections, without limiting her capacity to comment on the existing legislative framework where she considers it could be improved, or otherwise compromising her independence.

4.4 Relationships with other Agencies

Expanded powers in relation to formal arrangements

Recommendation 5:

Amend the Act to expand the Inspector's ability to enter into arrangements with other agencies regarding the exercise of the Inspector's functions and those agencies' functions, including the Office of Children's Guardian, LECC and HCCC.

The Act enables the Inspector to enter into arrangements regarding the exercise of the Inspectors functions with:

- The Secretary of the Department on behalf of CSNSW and YJNSW (section 9(1)) and with the Chief Executive of the Justice and Forensic Mental Health Network (part of the NSW Ministry of Health) (section 9(2)). Currently, the Inspector maintains communication and liaison with these agencies rather than having a formal arrangement in place.
- The Ombudsman in relation to complaints, inquiries, investigations or other actions (section 10(1)). The Inspector has a Memorandum of Understanding (**MOU**) with the Ombudsman, signed in 2014.
- The Independent Commission Against Corruption (**ICAC**) regarding matters relating to misconduct (section 11(2)). The inspector has a MOU with ICAC, signed in 2018.

Stakeholders submitted that the list of agencies in the Act needs to be updated to include:

- **the Office of the Children's Guardian:** the Inspector noted that the reportable conduct scheme - the scheme to report, monitor and investigate allegations of reportable conduct (including sexual misconduct, ill-treatment, and neglect) towards children in certain government organisations (including youth justice facilities) - was recently transferred from the Ombudsman to the Children's Guardian.
- **NSW Health Care Complaints Commission (HCCC):** inmates at correctional centres and detainees in youth justice centres can make health complaints to the HCCC through a free call on the inmate telephones. Legal Aid noted that complaints about correction and detention facilities comprised between 12% (257) and 6% (142) of all complaints received by the HCCC from 2016-17 to 2018-19. Legal Aid submitted that cooperation and information sharing between the HCCC and the Inspector would enhance the Inspector's ability to fulfil its function to monitor inmate and care and welfare. While the Inspector does not have a role in dealing with individual complaints, Legal Aid submitted that the Inspector's mandate to take a proactive approach to improve services, and to make recommendations to address systemic issues, requires that its recommendations are informed by relevant data. The Inspector is supportive of extending the ability to enter into arrangements to the HCCC.
- **the Law Enforcement Conduct Commission (LECC):** the Inspector suggested that formal arrangements with the LECC may be required for referrals from the Inspector to LECC arising out of circumstances where the NSWPF provides operational support to facilities, for example in response to disturbances.

Consideration

The Review considers that there are good reasons to justify expanding the ability of the Inspector to enter into arrangements with other agencies, including the Office of the Children's Guardian, the LECC and the HCCC, to refer matters that could be the subject of an inquiry, investigation or other action.

4.5 Reports

Flexibility in the provision of reports to Parliament

Recommendation 6:

Amend the Act to allow reports produced under s 6(1)(d) of the Act to be tabled in Parliament while Parliament is not sitting.

As outlined above at 3.3, the Inspector must report to Parliament in three different circumstances:

1. On any inspection, examination or review undertaken as a result of the requirement to inspect each adult custodial centre at least once every five years and each youth justice centre at least once every three years (section 6(1)(a)-(d)).
2. On any particular issue or general matter relating to the Inspector's functions, if it is in the opinion of the Inspector that it is in the interests of any person or in the public interest to do so, or if requested to do so by the Minister (sections 6(1)(e)-(f)).
3. An Annual Report to Parliament (section 12).

Circumstances (1) and (2) above are referred to as **Inspection Reports**.

Section 16 outlines the processes that apply to providing reports to Parliament:

- Any report by the Inspector is to be made by furnishing it to the Presiding Officer of each House of Parliament (section 16(1A)).
- After it is received by the Presiding Officer, it is to be laid before that House within 15 sitting days (section 16(1)), unless the report includes a recommendation that it should be made public immediately (section 16(2)), in which case it can be made public whether or not that House is in session and it has been laid before it (section 16(3)). Such a report attracts the same privileges and immunities as if it had been laid before that House (section 16(4)).
- If the report is an Annual Report under section 12 and a House of Parliament is not sitting, the Inspector may furnish the Annual Report to the Clerk of that House and the report is taken to have been made to the House (sections 16(6) and (7)).

The Inspector has noted that while section 16(6) of the Act permits the Inspector's Annual Reports to be tabled when Parliament is not sitting, it is silent as to whether Inspection Reports are similarly able to be tabled when Parliament is not sitting.

The Inspector also noted that at times, the requirement in section 14 of the Act to provide an opportunity for the Minister, agency head or other person to make submissions can impact on the timeframes within which a report may be tabled in Parliament (see below for more detail). This can sometimes result in the report being finalised while Parliament is not sitting.

The Inspector has submitted that consideration should be given to amending the Act to allow the Inspector to furnish any inspection reports to the Clerk of a House of Parliament when that House is not sitting, in line with existing provisions for Annual Reports. Comparable provisions exist in similar legislation in other jurisdictions.²¹

Consideration

The Review considers it is appropriate that there are consistent arrangements for the tabling of Annual Reports and Inspection Reports.

Submissions in relation to draft reports (no recommended changes)

Section 14 of the Act requires a draft of each report to Parliament to be provided to the Minister, with the Minister able to make submissions.

Reports are also not permitted to set out an opinion that is critical of a person or Public Service agency (other than CSNSW or YJNSW) unless the person or the head of the agency in question has been afforded the opportunity to make submissions (section 14(2)).

²¹ *Custodial Inspector Act 2016* (Tas), ss 15(6), (7), *Inspector of Custodial Services Act 2003* (WA), ss 35(2), (3).

The Inspector is not bound to amend the report in light of any submissions made by the Minister, agency head or person but must consider any such submissions before finalising the report and provided to Parliament (section 14(3)).

Stakeholders suggested amending the Act to specify the timeframe within which submissions may be made. This would assist in reducing delays in finalising reports.

Different models were suggested, including:

- Section 29 of the *Inspector of Correctional Services Act 2017* (ACT), which requires a draft report to be provided to a Minister (and relevant director-general) at least 6 weeks before a report is provided to Parliament, with submissions to be provided within that 6 week period (Legal Aid).
- 30 days within which the Minister could exercise his or her discretion to make any submission (the Inspector).

Regarding submissions on reports that are critical of a person or Public Service agency, the Inspector also suggested the addition of a discretionary power in section 14 permitting the Inspector to publish submissions, in line with current practice.

Consideration

The Review considers that the Act as currently drafted provides an appropriate balance between procedural fairness for stakeholders and the independence of the Inspector.

Section 14 of the Act stipulates that the Inspector must provide a “reasonable opportunity” for the Minister to make submissions and an opportunity for an agency head or other person to review and respond to a draft report.

However, the Act does not fetter the Inspector’s independence, allowing her to finalise any report and provide it to Parliament even where a submission has not been received.

With respect to the power to publish submissions, the Review considers that if the maker of a submission consents to its publication, the Act does not prevent the Inspector from publishing that submission, unless there is an overriding public interest against publication under section 15.

For these reasons, the Review does not consider that legislative amendment is required.

Discretion to require agencies to respond to recommendations

Recommendation 7:

Amend the Act to grant the Inspector a discretionary power to request notification from a relevant agency on responses to recommendations of the Inspector, including why steps have not or are not proposed to be taken.

The Act is silent as to whether there is any requirement for agencies to respond or provide updates to the Inspector about recommendations made by the Inspector in its reports to Parliament.

The Inspector’s Annual Reports do include some updates on progress, which are currently obtained via informal arrangements or, where necessary, reliance on the Inspector’s incidental power contained in section 8.

This issue was not raised by stakeholders in submissions but was considered by the Review.

The Review notes that section 21 of the *Custodial Inspector Act 2016* (Tas) states:

21. Recommendations with respect to report

(1) The Inspector may make such recommendations with respect to a report on a mandatory inspection or an occasional inspection and review as he or she considers necessary or appropriate.

(2) If the Inspector makes a recommendation to the [Secretary responsible for a custodial centre or for service provided at the custodial centre], 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.

The Review considers that it would provide greater transparency if the Act included a discretionary power for the Inspector to request a response or update from agencies who have been the subject of a recommendation.

As already noted, the Inspector's Annual Reports include updates on the progress made by agencies on the Inspector's recommendations. Consequently, the Review considers that amending the Act to include such a requirement would merely formalise existing practices rather than imposing a new requirement on agencies. This view was confirmed by Corrective Services NSW in its submission to the review.

Public interest considerations & confidentiality

Recommendation 8:

Amend the Act to implement a formal mechanism by which agencies may make submissions to the Inspector on the public interest considerations relating to information contained in reports.

Under section 15 of the Act, the Inspector must not disclose information in a report to Parliament if there is an overriding public interest against disclosure. This includes where disclosure of the information would prejudice the supervision or facilitate the escape of a person in custody or would prejudice the security, discipline or good order of any custodial centre.

The Inspector considers that CSNSW and YJNSW should be able to make submissions relating to public interest considerations and confidentiality requirements, so that the security risks associated with certain information relating to policies and procedures within correctional centres being made public can be addressed. CSNSW supports the implementation of a formal mechanism by which to make submissions, given the information included in the Inspector's reports may be sensitive and have implications for the order and security of correctional centres.

Consideration

Currently, the Inspector has been discharging her obligations under section 15 by consulting with agencies on draft reports. However, there isn't a formal mechanism by which agencies can make submissions to the Inspector on the public interest considerations relating to information contained in reports.

The Review recommends that an amendment should be made to formalise some of the processes that agencies and the Inspector use to resolve public interest concerns around the content of reports. This will legislate the current arrangements, based on the Inspector's interpretation of the Act and working relationships with CSNSW and YJNSW.

Protection of documents and information

Recommendation 9:

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

There are a number of legal protections for information and records received or prepared in the course of the performance of the Inspector's functions.

Section 15 of the Act provides that the Inspector must not disclose information in a report to Parliament if there is an overriding public interest against disclosure of the information.

Section 25 of the Act makes it an offence to disclose information obtained in connection with the administration or execution of the Act (or any other Act conferring or imposing functions on the Inspector) unless that disclosure is made:

- (a) with the consent of the person from whom the information was obtained, or
- (b) in connection with the administration or execution of this Act (or any such other Act), or
- (c) for the purposes of any legal proceedings arising out of this Act (or any such other Act) or of any report of any such proceedings, or
- (d) in accordance with a requirement imposed under the Ombudsman Act 1974, or
- (e) with other lawful excuse.

Information relating to the operational auditing, review, inspection, investigative and reporting functions of the office of the Inspector is 'excluded information' under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**). Access applications cannot be made under the GIPA Act for excluded information. The GIPA Act also conclusively presumes that there is an overriding public interest against disclosure of excluded information of an agency, unless the agency consents to disclosure.

The Inspector raised concerns that these protections may not be sufficient to ensure that documents and material cannot be made public.

The Inspector submitted that Parliament clearly intended to protect informants, confidential information and provide affected individuals and agencies with procedural fairness before requiring reports to be made public to the Parliament.

This is because the disclosure of confidential information would prejudice the free flow of information from individuals and agencies to the Inspector and, importantly, may prejudice the safety and security of individuals (including, but not limited to inmates and staff). Disclosure could also compromise the current and future work of CSNSW, YJNSW, other State and Commonwealth law enforcement agencies.

The Inspector identified that, based on past experience when responding to subpoenas and other requirements to produce documents, there have been difficulties in ensuring that information produced is not made public.

The Inspector submitted that to remove any doubt, the Act should have a provision to make it clear that documents in the possession of the Inspector (however they have come to be in possession, i.e. voluntarily or compulsorily) should not be admissible in any proceedings (where proceedings is defined as civil, criminal, tribunal, parliamentary inquiry and Royal Commission).

In addition, the Inspector submitted that the Act could include an explicit statutory privilege over documents and material received, in addition to a provision relating to inadmissibility.

Section 35 of the *Ombudsman Act 1974* provides that an Ombudsman or an officer of the Ombudsman cannot be compelled to give evidence or produce any document in any legal proceedings in respect of any information obtained by the Ombudsman or officer in the course of their office, except in certain limited circumstances. Section 53 of the *Inspector of Custodial Services Act 2003* (WA) provides explicit privilege over documents received or prepared in the course of the performance of the Inspector's functions, and states (with limited exceptions) that they are not admissible in evidence in any proceedings.

Consideration

The Review considers that it is inconsistent with the statutory regime created by the Act for the Inspector to be required to produce or disclose information received or prepared by the Inspector in the course of her functions as a result of a subpoena or other compulsory process. The Review recommends that the Act be amended to clarify that documents that are obtained by the Inspector in course of performing a function under the Act are privileged and not admissible in any proceedings. The Review notes that similar bodies have this type of information protection provision, including the NSW Ombudsman, the Inspector of Custodial Services of WA²² and the NSW Auditor General²³.

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

The Review also considers it may be appropriate to include exceptions to the protection against producing or disclosing records and information provision, similar to those that apply to the NSW Ombudsman and the Inspector of Custodial Services of WA. There should be consultation with key stakeholders to ensure that any such exceptions are appropriate to the circumstances of the Inspector's activities and functions.

4.6 Official Visitor Program

Legislative complexity and need for other updates

Recommendation 10:

Consideration should be given to consolidating all legislative provisions that relate to both CSNSW and Youth Justice Official Visitors in the Act and for the Act to be the governing legislation for the Official Visitor Program.

Responsibility for the Official Visitor Program rests with the Inspector (section 6).

²² See section 53 of the *Inspector of Custodial Services Act 2003* (WA).

²³ See section 38 of the *Public Finance and Audit Act 1983*.

Corrective Services Official Visitors conduct their role in accordance with the provisions of the CAS Act. Youth Justice Official Visitors conduct their role in accordance with the provisions of the CDC Act.

Under both those Acts, Official Visitors are required to:

- visit their assigned facility;
- interview inmates or detainees, custodial officers and staff;
- resolve complaints and concerns at a local level; and
- examine the facility and report to the Minister and Inspector.²⁴

The Inspector submitted that the legislative provisions relating to the administration of the Official Visitor Program should be consolidated within one piece of legislation.

Provisions relating to the appointments and administration of the Official Visitor Program for custodial centres are currently included in the Act, the CAS Act and its regulations, and the CDC Act and regulations.

The Inspector submitted that consolidating all provisions relating to the Official Visitor Program into the Act would present an opportunity to create greater consistency in relation to the programs operating in adult corrections and youth justice settings in respect of reporting requirements, the protection of confidential conversations and correspondence.

CSNSW submitted that further consultation would be required to remove Official Visitors from the CAS Act, in order to avoid any unintended consequences of consolidation.

Other stakeholders submitted that consideration should be given to amendments that may facilitate an increase in the number of Aboriginal-identified and culturally diverse Official Visitors.

Consideration

The Review understands that having several pieces of legislation, with provisions addressing both sets of Official Visitors, has at times led to confusion among Official Visitors as to their role and responsibilities.

The Inspector conducted a review of the Official Visitor Program (**Official Visitor Review**), published in December 2020, which recommended that consideration be given to the consolidation of all legislative provisions that relate to both corrections and Youth Justice Official Visitors in the Act.

This Review considers that there may be benefit in consolidating Official Visitor legislation in one location and adopts this recommendation. The Review accepts, as submitted by CSNSW, that any consolidation of the Official Visitor legislative provisions into the Act must involve careful consideration and consultation on the drafting to ensure there are no unintended consequences arising from the consolidation.

In relation to the issue of diversity amongst Official Visitors, the Inspector's Annual Report 2018-19 indicates that there were 16 Aboriginal Official Visitors out of a total of 80 for CSNSW facilities and 7 out of a total of 12 for YJNSW facilities.²⁵ There is no indication in the Annual Report of other cultural or ethnic identities or backgrounds amongst Official Visitors.

The Official Visitor Review made two recommendations relating to the diversity of Official Visitors, both of which the Inspector advises are already being implemented via administrative or policy changes. The recommendations are to:

²⁴ See section 228(5) of the CAS Act and section 8A of the CDC Act.

²⁵ Inspector of Custodial Services, Annual Report 2018-19, pages 11-13. Available at: <http://www.custodialinspector.justice.nsw.gov.au/Documents/Annual%20Report%202018-19.pdf>

- increase the appointment of Aboriginal Official Visitors in centres which have high Aboriginal inmate populations, through targeted recruitment (recommendation 4.1); and
- ensure women are appointed as Official Visitors to CSNSW facilities accommodating women and Youth Justice facilities accommodating young women; and Aboriginal women appointed to the role of Official Visitor in centres with a high percentage of Aboriginal women and girls (recommendation 4.2).

These recommendations are subject to ongoing monitoring and implementation.

Confidentiality and Privacy of Communications

Recommendation 11:

Consideration should be given to amending legislation to provide that communications between Corrective Services Official Visitors and inmates are confidential and that Official Visitors are considered “exempt persons” under the Crimes (Administration of Sentences) Regulation 2014.

Both the CDC Regulation and CAS Regulation provide protections over the confidentiality of correspondence to or from certain ‘exempt’ bodies or persons, including correspondence to the Inspector.

However, while Official Visitors to youth justice centres are included as an exempt person under the CDC Regulation, Official Visitors to adult correctional facilities are not exempt persons under the CAS Regulation.

The Official Visitor Review noted that the majority of Australian jurisdictions provide that correspondence and communications between an Official Visitor or Independent Visitor and a person in custody are confidential and cannot be opened and read. It argued that confidentiality of communication between inmates, detainees and Official Visitors is necessary to ensure the integrity of the Official Visitor Program. It recommended that consideration be given to protecting communications between Corrective Services Official Visitors and adult inmates.

This Review notes the need for inmates to be able to communicate privately with Official Visitors and adopts the Official Visitor Review’s recommendation for consideration to be given to protecting communications between Corrective Services Official Visitors and inmates.

4.7 The impact of machinery of government changes

Organisational arrangements for the Inspector and staff (no recommended changes)

The Inspector submitted that consistent with the policy objective of independence it may be prudent to consider including an explicit statement reflecting the independence of the Inspector and staff of the Inspector in the Act. This is because, as a result of a series of machinery of government changes and amendments to administrative arrangements, the head of the Public Service agency in which the staff of the Inspector are employed (see section 5(4)) is the Secretary of the Department of Communities and Justice; the Department that also includes CSNSW and YJNSW.

Concern was raised by the Ombudsman with respect to the perceived independence of staff and it was submitted that the office of the Inspector should be structurally and functionally independent of Government, especially of those whose facilities and activities are to be inspected.

The Ombudsman also noted that staff of the Inspector are employed by the same department that runs correctional and youth justice facilities is also likely to be inconsistent with any future designation of the Inspector as an NPM entity under the OPCAT. Accordingly, the Ombudsman

recommended that consideration be given to moving the staff of the Inspector to be employed in a different public service agency, such as the Department of Premier and Cabinet or to have the inspectorate staff employed in the Ombudsman's Office.

It was further noted that the Parliamentary Committee, in recommending the establishment of an independent inspector, also recommended that this role “be removed from the control of the (then) Department of Corrective Services and placed under the authority of another government department such as the Attorney General's Department or the Department of Premier and Cabinet.”²⁶ As a result of the administrative changes to the machinery of government, this recommendation is no longer being complied with.

The Review notes that recommendation 39 of the April 2021 report of the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**Select Committee**) is that the NSW Government consider merging the functions of the Inspector of Custodial Services into the NSW Ombudsman's office. The Select Committee saw merit in the Ombudsman's reasoning that this merger could reduce existing overlap between the offices and prepare NSW for the implementation of OPCAT.

Consideration

The submissions of stakeholders are noted. However, decisions about the location of government agencies and their staff within the broader NSW Government clusters are Executive decisions and therefore beyond the scope of this statutory review. Any movement of the Inspectorate into another agency would require legislative amendments to the *Government Sector Employment Act 2013* which is administered by the Premier and Special Minister of State.

The NSW Government is currently considering the Select Committee's recommendations.

The Review notes that the Inspector of Custodial Services has the status of an independent body within the Stronger Communities Cluster and as noted above (in respect of Recommendation 1) the Review recommends that the objects clause should explicitly reference the independence of the Inspector.

Definition of ‘Minister’ for the purpose of certain powers

Recommendation 12:

Amend the Act to ensure that the Minister responsible for Youth Justice is able to refer matters to the Inspector, request a report, request the Inspector exercise other functions with respect to Youth Justice facilities and has an opportunity to make submissions with respect to reports.

The Minister with responsibility for the Act is currently the Minister for Counter Terrorism and Corrections.

In 2019, the NSW Government made machinery of government changes resulting in the Minister for Families, Communities and Disability Services assuming responsibility for Youth Justice matters.

The term ‘Minister’ is not defined in the Act.

This may impact the ability of the Minister responsible for YJNSW to:

²⁶ General Purpose Standing Committee, June 2009, *Inquiry into the privatisation of prisons and prison-related services*, Report 21, page 97. Available at: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/1673/090603%20final%20report%20version%203.pdf>

- Refer matters to the Inspector pursuant to section 6(1)(f) (request a report) and section 6(2) (request a function be exercised under the Act).
- Receive draft reports and have an opportunity to make submissions (section 14).
- Refer the proposed appointment of an Inspector to the Committee (section 18).
- Enter into an arrangement with a Minister of another State or Territory providing for the exercise of functions conferred on or delegated to the Inspector or member of staff under the law of the other State or Territory (section 21).
- Conduct this statutory review of the Act (section 28).

The Inspector submitted that consideration should be given to including a definition of Minister into the Act to reflect there are now three responsible Ministers for agencies subject to the statutory functions of the Inspector: the Minister for Counter Terrorism and Corrections, the Minister for Families, Communities and Disability Services, and the Minister for Health and Medical Research.

Consideration

With respect to the functions under sections 18, 21 and 28, the Review considers that it may not be necessary to clarify any role for other Ministers, as these could be exercised by the Minister Responsible for the Act and, if necessary, consultation could occur at Ministerial level.

However, the Act should be amended to provide clarity that the Minister for Families, Communities and Disability Services is able to request a report or request the Inspector exercise any other function under the Act, and has an opportunity to make submissions with respect to reports (sections 6 and 14).

The Review does not make any recommendation with respect to whether the Minister for Health and Medical Research should also be provided with these powers.

The Review does not recommend making any changes to the 'Responsible Minister' for the Act, as this is outside the scope of the review. Machinery-of-government changes (including the organisation arrangements of the public service and the allocation of Acts to Ministers) are the prerogative of the Premier.

References to 'juvenile justice' and the 'Department of Justice' (no recommended changes)

The Act continues to use the terms 'Department of Justice' and 'juvenile justice'.

Some stakeholders noted that the act makes a number of references to 'the Department of Justice' and 'Juvenile Justice'. The Inspector also noted the issue of the definition of Department.

Stakeholders submitted that these titles should be updated to 'the Department of Communities and Justice' and 'Youth Justice' consistent with the recent changes made by the Government; and that the terms 'juvenile justice centre' and 'juvenile correctional centre' replaced by the more modern term 'youth detention centre'.

Consideration

Clause 10(3) of the Administrative Arrangements (Administrative Changes – Public Services Agencies) Order 2019 ensures that any reference to the Department of Justice is taken to be a reference to the Department of Communities and Justice.

Despite Juvenile Justice adopting a new name, Youth Justice NSW, on 1 July 2019 with the commencement of the machinery of justice changes, the term 'juvenile justice' continues to be used in the *Children (Detention Centres) Act 1987*. Given the interrelationship between the two Acts, references to these facilities should not be updated in one Act, independent of another.

The Department considers that amendments are not necessary.

APPENDIX A

LIST OF STAKEHOLDERS WHO MADE A SUBMISSION TO THE REVIEW

1. The Inspector of Custodial Services
2. Chief Justice of the Supreme Court of NSW
3. Chief Judge of the District Court of NSW
4. Chief Magistrate of the Local Court of NSW
5. President of the Children's Court of NSW
6. Corrective Services NSW
7. President of the Mental Health Review Tribunal
8. State Coroner NSW
9. Legal Aid NSW
10. The Aboriginal Legal Service (ALS)
11. The NSW Ombudsman