



Inspector of Custodial Services Bill 2012

by Lynsey Blayden

1 INTRODUCTION

On 23 May 2012, the NSW Government introduced the [Inspector of Custodial Services Bill 2012](#) (the 2012 Bill). The Bill passed the Legislative Assembly without amendment on 20 June 2012¹ and is currently awaiting debate by the Legislative Council.

The 2012 Bill seeks to establish an independent statutory officer, the Inspector of Custodial Services (Inspector) to oversee the operation of corrective services and juvenile justice facilities in NSW. In his [second reading speech](#), the Attorney General and Minister for Justice, the Hon Greg Smith SC MP, described the role of the proposed officer as follows:

The inspector will perform an independent statutory role that will provide external scrutiny of the standards and operational practices of custodial services in New South Wales. The inspector will also provide an independent mechanism for monitoring broader thematic and systemic issues arising out of inspection of adult and juvenile correctional facilities and services. It is no longer appropriate – if it ever was – that agencies that provide adult and juvenile correctional services oversee themselves.

In 2009, following an inquiry into the privatisation of prisons and prison-related services in NSW, the Legislative Council General Purpose Standing Committee No. 3 [recommended](#) that the position of Inspector General of Prisons, which was abolished in 2003, be reinstated.²

The Attorney General noted in his second reading speech that the 2012 Bill aims to implement this recommendation and also a commitment made by the Coalition prior to the last election to reinstate the office of Inspector of Custodial Services.

This e-brief is basically in two parts, one concentrating on the Bill itself, the other dealing with background issues. It starts by outlining the key provisions of the 2012 Bill and discussing the relationship between the proposed Inspector and other agencies, specifically the Ombudsman and the Independent Commission Against Corruption (ICAC). Note is also made of the amendments to the Bill that have been proposed by the Opposition and the NSW Greens.

The background issues considered in the second part of this e-brief relate to: the former NSW Inspector-General of Corrective Services; the requirements

of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT); and a brief discussion of comparable arrangements in other selected jurisdictions.

2 INSPECTOR OF CUSTODIAL SERVICES BILL 2012

2.1 Appointment of Inspector

Under the 2012 Bill, the Inspector is to be an independent officer appointed by the Governor. The Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission will have the capacity to veto any proposed appointment to the office of Inspector prior to the appointment being made by the Governor.³

2.2 Parliamentary Oversight

The 2012 Bill also gives the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission the role of overseeing and reporting on the exercise of the Inspector's functions, as well as reporting to Both Houses of Parliament on any changes the Committee "thinks desirable to the functions, structures and procedures of the Inspector."⁴

2.3 Overview of proposed powers and functions

The proposed functions of the Inspector are set out in clause 6 of the 2012 Bill. They include:

- to inspect each adult custodial centre at least once every 5 years (6(a));
- to inspect each juvenile justice centre and juvenile correctional centre (ie Kariiong Juvenile

Correctional Centre) at least once every 3 years (6(b));

- to examine and review any custodial service at any time (6(c));
- to report to Parliament regarding each inspection, examination and review (6(d));
- to report to Parliament on any particular issue or general matter relating to the Inspector's functions, if in the Inspector's opinion, this would be in the public interest or in the interest of any person (6(e));
- to report to Parliament on any particular issue or general matter relating to the Inspector's functions at the request of the Minister (6(f));
- to include such advice or recommendations considered appropriate in these reports to Parliament (6(g)); and
- to oversee the Official Visitor programs for both corrective services and juvenile justice centres (6(h)).

The proposed powers of the Inspector, which are set out in clause 7 of the 2012 Bill, include:

- the Inspector is entitled to full access to the records of any custodial centre (including health records), and can make copies of or take extracts from those records (7(a));
- the Inspector may visit and examine centres at any time (7(b));
- the Inspector may require custodial centre staff to provide information or documents regarding the operations of the centre (7(c));

- the Inspector may refer matters relating to a centre to other appropriate agencies (7(e)); and
- the Inspector is entitled to have access to persons in custody in order to communicate with them (7(f)).

In addition, clause 8 provides:

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 term "custodial centre" is defined in clause 3(1) of the 2012 Bill as meaning the following:

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

but does not include any police station or court cell complex that is not managed by Corrective Services NSW or Juvenile Justice.

The term "custodial service" is defined in clause 3(1) to mean:

- (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 NSW or Juvenile Justice,

but does not include any function of, or service provided by, the NSW Police Force, the Serious Offenders Review Council, the Serious Young Offenders Review Panel or the State Parole Authority.

Inmate complaints: In its current form, the 2012 Bill does not give the Inspector specific functions or powers that would enable him or her to investigate complaints made by inmates.

In his [second reading speech](#), the Attorney General explained that:

To avoid the duplication that was identified between the previous Inspector-General's role and that of the Ombudsman, the proposed inspector's role will not extend to dealing with complaints or grievances relating to an individual in a custodial service. The inspector may refer such complaints to other appropriate bodies, such as the Ombudsman's office.

On this issue, the Shadow Attorney General and Minister for Justice, the Hon Paul Lynch MP, said in the [second reading debate](#) that:

. . . the provisions in the bill are not as categorical as the Minister claimed. For example, there is no outright prohibition on a prisoner complaining to the inspector. The inspector's functions allow him to report to Parliament on any particular issues relating to his functions. I am not sure that that is quite what the Minister has been saying. There are also some curious aspects to the bill. Many oversight bodies use complaints—the level,

nature and distribution—as an indication of where effort needs to be made by an agency. Of course, not every complaint is justified, but individual complaints are often an indicator of deeper systemic issues. So even if the major role of the inspector is to be the broader holistic one referred to earlier, complaint-handling assessment can be an important tool in carrying out that role efficiently.

As noted, clause 7(e) of the 2012 Bill allows the Inspector to refer matters to other agencies where appropriate. As the Attorney General said in his [second reading speech](#), this would include the referral of complaints to the Ombudsman. The use of the word "may", however, suggests that this is a discretionary power.⁵ While, in the absence of an express complaint handling power, the Inspector might not be able to handle complaints him or herself, the 2012 Bill does not seem to require the Inspector to refer complaints he or she receives to another agency, unless they relate to alleged corruption. Where the latter is the case, the Inspector is required to refer such complaints to the ICAC, as discussed further below.

The Opposition has proposed amendments to the 2012 Bill which would give the Inspector express complaint-handling powers. These amendments are discussed further below.

Reports: The Inspector will be required to report to Parliament in various circumstances. In respect of the Inspector's periodic reporting function, the Attorney General stated in his [second reading speech](#) that:

The inspector will take a proactive rather than a reactive approach to improving custodial services. Rather than simply reacting to individual

incidents after they occur, the inspector will regularly inspect and report on all correctional facilities.

The Attorney General further explained the Inspector's additional reporting functions as follows:

Of course, the inspector may also examine and review any custodial service at any time. The term "custodial service" is defined broadly and includes the management of custodial centres, the care of inmates and the transport of inmates by Corrective Services or Juvenile Justice. This provides the inspector with the ability to perform thematic reviews of custodial services generally or in relation to a particular correctional facility.

The inspector may 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. This gives the inspector the power to report to Parliament immediately, without a full investigation and review, if necessary. The inspector must also 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.

Official visitors: Both Corrective Services and Juvenile Justice have Official Visitors programs. Official Visitors are appointed by the Minister and assigned to visit a particular facility. They report to the Minister and have the capacity to enter and inspect custodial facilities and speak with inmates. There are differences between the schemes established by the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Children (Detention Centres) Act 1987* (NSW), but Official Visitors play some

role in dealing with the complaints of inmates in both the adult and juvenile custodial systems.⁶

In his [second reading speech](#), the Attorney General stated that the transfer of the administration of the Official Visitors programs to the Inspector was "essential for ensuring the independence of the Official Visitors Program in the light of findings in the 2009 [Legislative Council] inquiry." In its report regarding the privatisation of prisons, the General Purpose Standing Committee had referred to submissions it had received that questioned the independence of Official Visitors.⁷

Official Visitors will continue to be appointed by, and provide their reports to, the Minister. The Attorney General noted that Official Visitors will also provide their reports to the Inspector.⁸

2.3 Inspector's relationship with other agencies

2.3.1 NSW Ombudsman

Before considering the provisions of the 2012 Bill pertaining to the relationship between the Inspector and the NSW Ombudsman, it is useful to briefly outline the role played by the Ombudsman in overseeing the management of people in custody in NSW. An understanding of the role of the Ombudsman is also relevant to a consideration of the amendments proposed by the Opposition, which are discussed below.

Reporting and complaint-handling role of the NSW Ombudsman: The NSW Ombudsman has a number of functions relating to the oversight of correctional facilities and juvenile justice centres. These functions include:

- the investigation of complaints regarding corrective services or juvenile justice made by any person (including inmates);⁹
- attempting to deal with such complaints by conciliation;¹⁰
- in circumstances where the Ombudsman finds that the conduct subject to investigation is, for example, "contrary to law", "unreasonable, unjust, oppressive or improperly discriminatory", "based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration" or "otherwise wrong", the Ombudsman must make a report, giving reasons, to the responsible Minister, the head of the relevant public authority and, in some circumstances, the Department of Premier and Cabinet;¹¹ and
- the undertaking of investigations on his or her own initiative (ie in the absence of a complaint) regarding matters that are within the Ombudsman's jurisdiction.¹²

The Ombudsman's [website](#) provides guidance for those seeking to make a complaint regarding adult or juvenile custodial services.

In addition to these functions, section 31 of the *Ombudsman Act 1974* (NSW) enables the Ombudsman to make a special report to Parliament about "any matter arising in connection with the discharge of the Ombudsman's functions." Such reports can be about the operation of correctional facilities.

In his [second reading speech](#), the Attorney General indicated that the Ombudsman had not made a special report to Parliament regarding

corrective services since 2000. During the debate regarding the 2012 Bill on 20 June 2012, the Attorney General [corrected this statement](#), indicating that the Ombudsman had tabled a report in November 2011 regarding the operation of the [Kariong Juvenile Correctional Centre](#). In July 2012 the Ombudsman made a further special report on [Managing use of force in prisons: the need for better policy and practice](#).

Although the Ombudsman's jurisdiction is generally limited to the review of the conduct of public authorities, section 246 of the *Crimes (Administration of Sentences) Act 1999* (NSW) provides that the *Ombudsman Act 1974* applies to privately operated correctional facilities.

The 2012 Bill does not seek to alter these powers and functions of the Ombudsman, but it does contain provisions referring to the relationship between the Inspector and the Ombudsman.

Relationship between the Inspector and the Ombudsman: Even though the Inspector will not have a complaint investigation role, there does appear to be some similarities between the functions conferred upon the proposed Inspector by the 2012 Bill and the investigative and reporting functions of the Ombudsman.

Clause 10 of the 2012 Bill provides for the management of this potential overlap as follows:

Relationship with Ombudsman

- (1) The Inspector and the Ombudsman may enter into arrangements regarding:
 - (a) matters the subject of a complaint, inquiry, investigation or other action

under the *Ombudsman Act 1974* about which the Ombudsman will notify the Inspector, and

- (b) matters about which the Inspector will notify the Ombudsman that could be made the subject of such a complaint, inquiry, investigation or other action, and
 - (c) the handling of reviews, inspections, investigations or other matters by the Inspector that could be dealt with by the Ombudsman under that Act.
- (2) The Inspector and the Ombudsman are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.

The 2012 Bill also allows the Inspector to share information obtained in the exercise of his or her functions with the Ombudsman if, in the Inspector's opinion, the information relates to a matter that the Ombudsman is capable of investigating.¹³ The 2012 Bill contains a reciprocal provision relating to information obtained by the Ombudsman.¹⁴

The details of any arrangements that may be entered into, along with the resourcing and operation of the Inspector's Office are matters left to regulation and administrative policies and practices. One comment that can be made is that clause 10 appears to make the entering into of such arrangements discretionary, seemingly only requiring compliance with them once they are developed. Although not mandatory, it might be expected that the agencies will make such arrangements to avoid duplication of effort.

2.3.2 Independent Commission Against Corruption (ICAC)

Clause 11(1) of the 2012 Bill provides that the Inspector has the same duty as the principal officer of a public authority under section 11 of the *Independent Commission Against Corruption Act 1988* (NSW) to report suspected corruption to the ICAC.

Clause 11(3) provides that the Inspector may enter into arrangements with the ICAC regarding:

- (a) matters about which the ICAC will notify the Inspector where ICAC suspects misconduct of a custodial centre staff member exists, and
- (b) the handling of matters by the Inspector that may involve misconduct of a custodial centre staff member and that could be dealt with by the ICAC under that Act.

In accordance with clause 11(2), the Inspector must not exercise any of his/her functions in relation to a matter involving suspected corruption "unless authorised to do so by arrangements entered into under this section."

3 Proposed amendments to the 2012 Bill

Two sets of amendments have been proposed to the 2012 Bill, by the Opposition and by the NSW Greens.

3.1 Opposition

The Opposition's proposed [amendments](#) to the 2012 Bill are aimed at giving the proposed Inspector the power to investigate and attempt to resolve complaints, including by encouraging the mediation and informal resolution of complaints. The Inspector would be given discretion to

decide not to investigate a complaint, or to discontinue an investigation in appropriate circumstances.¹⁵

The Opposition proposes to insert an additional subclause, 10(3), which would provide:

The Inspector must not investigate a matter on complaint or on the Inspector's own initiative if the matter could be the subject of a complaint under the *Ombudsman Act 1974* until the Inspector has entered into arrangements with the Ombudsman under this section.

The provisions proposed by the Opposition are similar to those previously in place under the *Crimes (Administration of Sentences) Act 1999* (NSW).

During the [debate](#) regarding the 2012 Bill in the Legislative Assembly on 20 June 2012, the Member for Cabramatta, Mr Nick Lalich MP, stated:

This new role of Inspector of Custodial Services will not have the power to investigate complaints. This seems quite illogical, as complaints often lead investigators to where the problem lies. An oversight body that does not deal with complaints is not really overlooking anything but merely adding further red tape to the system. It can also be asked: Where does the inspector's role finish and where does the Ombudsman's role start? The confusion caused by this bill just adds further layers of bureaucratic reporting and counter-reporting.

In response to the foreshadowing of the proposed amendments by the Opposition, the Attorney General stated during the [debate](#) on 20 June 2012 that:

Such an amendment would repeat the mistakes of the past. The 2003 statutory review of the former Inspector-General of Corrective Services recommended that it be dissolved partly because of significant duplication between the Inspector-General and the Ombudsman, as both bodies dealt with complaints of inmates. For this reason the inspector will not have a complaint-handling role but will focus on systemic issues in correctional facilities in order to bring about real change, similar to the successful West Australian inspector position. Furthermore, if the inspector were to handle individual complaints, this would detract from the inspector's primary focus of inspecting and reporting on systemic issues in correctional facilities. The inspector's resources are clearly better spent on addressing systemic issues rather than duplicating existing complaint-handling mechanisms.

Inmates and custodial centre staff members are already well catered for in terms of complaint handling. Independent official visitors attend correctional centres to resolve inquiries and complaints from inmates and staff at a local level. Official visitors produce regular reports on the types of inquiries and complaints they have received and any issues of concern. I get to see those reports. Failing that, inmates and staff may also lodge a complaint with the Ombudsman, who has extensive powers to act and resolve such complaints

3.2 NSW Greens

The [amendments](#) proposed by the NSW Greens seek to amend clause 7 of the 2012 Bill.

Clause 7(f) currently provides that the Inspector:

Is entitled to be given access to a person in custody, detained or residing at any custodial centre for the purpose of communicating with them.

The first amendment proposed by the NSW Greens seeks to add the words "free and unfettered" before the word access.

The second amendment proposed by the NSW Greens seeks to include an additional sub-clause, 7(2), to provide that:

It is not necessary for any person to be given notice of the Inspector's intention to exercise any of the Inspector's functions.

4 Former NSW Inspector-General of Corrective Services

In 1997 the Carr Government amended the former *Correctional Centres Act 1952* (NSW) to establish an Inspector-General of Corrective Services (Inspector-General). In his [second reading speech](#), the then Attorney General, the Hon Bob Debus MP, explained that the Inspector-General of Corrective Services would:

. . . investigate complaints about correctional centres and will work to improve complaint handling generally within the correctional system. It is in the nature of any correctional system that it deals with a large number of complaints each year from visitors, staff, members of the legal profession and inmates. Most of these can and should be dealt with at a local level by local managers with the minimum of formality and paperwork . . . The inspector-general, however, will be able to make recommendations on ways in which the procedures of the Department of Corrective Services in this and other areas can be improved . . .

It is imperative that the New South Wales correctional system be equipped with a comprehensive complaint-handling system which is both efficient and effective in order to maintain public confidence in the way our correctional centres are being managed.

Unlike the proposed Inspector, the former Inspector-General reported to the Minister, rather than to Parliament.

4.1 Functions and powers of the former Inspector-General

The functions and powers of the former Inspector-General of Corrective Services were initially set out in Part 2A of the *Correctional Centres Act 1952* (NSW). That Act was subsequently replaced by the *Crimes (Administration of Sentences) Act 1999* (NSW), and the provisions governing the office of the Inspector-General of prisons were transferred to Part 10 of the new Act.

Part 10, which ceased to operate in October 2003, but was not repealed until 2008,¹⁶ provided that the functions of the Inspector-General included the following:

- to investigate the operations of the Department of Corrective Services and the conduct of its officers;
- to investigate and attempt to resolve complaints made by any person relating to matters within the Department's administration;
- encourage mediation and informal resolution of complaints.
- make recommendations to the Minister regarding ways in which the procedure of the Department could be improved;

- train Official Visitors and to investigate their reports to the Minister when such reports were referred to the Inspector-General;
- provide oversight regarding contracts entered into by the Department; and
- facilitate coronial inquiries into deaths in correctional centres.¹⁷

Section 213(2) provided that the functions of the Inspector-General could be exercised not only in response to a complaint, but also on the Inspector-General's own initiative, at the request of the Minister or a referral from the Ombudsman, the ICAC or another agency.

The former Inspector-General had similar powers to those ascribed to the proposed Inspector in the 2012 Bill, including the power to attend and also to require information to be supplied. However, these powers appear to have applied generally to the Department, its officers and its premises, rather than only to custodial centres which is the case with the powers of the proposed Inspector set out in the 2012 Bill.¹⁸

The former Inspector-General also had the power to conduct systematic inspections of correctional centres, although there was no requirement that this be done within a specified timeframe as there is in the 2012 Bill.¹⁹

Unlike the proposed Inspector, the Inspector-General had no jurisdiction over juvenile justice facilities.

4.2 Relationship with Ombudsman

The former section 217(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) provided:

The Inspector-General must not investigate a matter that could become the subject of a complaint under the *Ombudsman Act 1974* unless the Inspector-General has entered into arrangements with the Ombudsman under this section.

Aside from this additional subclause, former section 217 was very similar to clause 10 of the 2012 Bill. It provided that the Inspector-General "may" enter into arrangements with the Ombudsman before investigating a matter that could become the subject of a complaint under the *Ombudsman Act 1974*.²⁰

4.3 Outcomes of the Review of the office of the Inspector-General

Part 10 provided that the office of the Inspector-General would cease on 1 October 2003, unless an Act of Parliament or a resolution of both Houses provided otherwise.²¹ Part 10 further required that a review of the Part be undertaken within five years of its commencement.²²

The review was conducted by Mr John Avery, a former Police Commissioner, and Mr Vernon Dalton, a former chairman of the Corrective Services Commission. It was tabled by the then Justice Minister on 10 June 2003.

The review recommended that the arrangements for the Inspector-General be discontinued when the legislation expired later that year, and that the Inspector's responsibilities be transferred elsewhere. One of the main reasons for this recommendation appears to have been the perceived overlap between the functions of the Inspector-General and those of other agencies, in particular, the Ombudsman, but also the ICAC.

According to the review, the Inspector-General had "only reported on comprehensive inspections of two correctional centres during the time the Office has existed."²³

After noting that complaints by inmates had been one of the main things that had engaged the time of the Inspector-General, the review quoted a Deputy Ombudsman as observing:

[T]he Inspector-General's complaints function is a complete duplication of complaints processes and causes confusion and results in extra resources being used trying to co-ordinate and avoid forum shopping.²⁴

The review stated that in 2001/02, the Ombudsman had handled far more complaints from inmates than the Inspector General (3470 compared with 1486).²⁵ The review also referred to discussions with other stakeholders which had indicated that:

. . . it was clear they felt that complaints to the Ombudsman were likely to be handled more quickly and with better feedback.²⁶

In addition, the review also considered that what it described as the "modus operandi" of the Office of the Inspector-General had "produced a counter-productive climate."²⁷ Among other things, the review noted that there had been:

- tension between the Department of Corrective Services and the office of the Inspector-General;²⁸
- disputes regarding the extent of the Inspector-General's power;²⁹ and
- issues regarding the personal "approach and style" of the Inspector-General himself.³⁰

Despite this, the review considered that the "limitations in the effectiveness" of the Office were "not merely an issue of personality differences", but were also related to legislative and budgetary matters.³¹ It concluded:

It is difficult to justify the retention of the Office of the Inspector-General when that role can be provided through the better management of resources and better coordination of the auditing, monitoring, investigative and inspectional capacities already available to the Government.

More importantly, the Ombudsman and the Independent Commission Against Corruption have far stronger legislative powers and advanced investigation skills and processes.³²

Media reports from 2003 indicate that the review's conclusions attracted criticism from the NSW Greens and the then Opposition.³³

No action was taken by Parliament to extend the operation of the office. In accordance with section 223 of the former Part 10, it ceased to exist on 1 October 2003.

5 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

In his [second reading speech](#) on the 2012 Bill, the Attorney General referred to the OPCAT, which was signed by Australia on 19 May 2009, but which has not yet been ratified. The [OPCAT](#) was [tabled](#) for consideration by the Joint Standing Committee on Treaties (JSCOT) on 28 February 2012.

The [National Interest Analysis](#) (NIA) prepared by the Commonwealth Attorney General's Department for the Committee explains OPCAT and its requirements as follows:

The Optional Protocol provides for a system of regular visits to places of detention by a national body or bodies to be designated by the State Party (the 'national preventive mechanism') and also by the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Subcommittee').

In providing for such visits, the Optional Protocol aims to strengthen the protection of persons deprived of their liberty against acts of torture and other cruel, inhuman or degrading treatment or punishment. It provides for a mechanism to better ensure that detaining authorities are accountable for conditions in places of detention and for greater international transparency. The model of activity provided for under the Optional Protocol is for dialogue and review between the detaining authority and the visiting body to encourage States to improve conditions where necessary.³⁴

Ratification of the OPCAT therefore requires the establishment of a body or bodies with the capacity to perform the functions required of a "national preventative mechanism" (NPM) by the Protocol.

The [NIA](#) summarises the requirements of the OPCAT in relation to the NPM in detail.³⁵ These requirements include:

- the body or bodies must be independent;³⁶
- they must have the powers and resources that are appropriate for the performance of their oversight

functions, including the powers to regularly inspect places of detention, have access to information about detainees and to make recommendations regarding the treatment of detainees aimed at the prevention of torture and other ill-treatment;³⁷

- Government authorities must "examine the reports and recommendations of the NPM, enter into dialogue with the NPM on the implementation of its recommendations" as well as "publish and disseminate" its annual reports.³⁸

In its [report](#) on the ratification of the OPCAT, published on 21 June 2012, the JSCOT indicated its support for the OPCAT and recommended that binding treaty action be taken.³⁹ The JSCOT noted that:

Australia's inspection systems, while substantial, do not fully meet the Optional Protocol requirements. It is anticipated that implementation will involve designating a range of existing inspection regimes at jurisdictional level, utilising a cooperative approach between the Commonwealth and the States and Territories. A working group of officials from all jurisdictions, reporting to the Standing Committee on Law and Justice, has been formed to carry forward implementation arrangements.⁴⁰

In his [second reading speech](#), the Attorney General said that the Inspector "could be deemed to be part of the national preventative mechanism to assist the State in meeting its obligations" under the OPCAT.

In the [second reading debate](#), the Shadow Attorney General noted that there are some limitations on the

capacity of the proposed Inspector to fulfil the functions required by the OPCAT:

The NPM's role relates not just to prisons and juvenile detention centres but also, for example, to police stations and secure mental health facilities.

The Shadow Attorney General also said that the NSW Ombudsman had indicated in his submission to the JSCOT that the Ombudsman "could be designated as an agency to form the national preventative mechanism with appropriate legislative underpinning and resourcing."⁴¹

The Ombudsman's submission also notes that:

[T]he NSW Ombudsman already carries out visits or inspections to prisons, juvenile detention centres and disability services, as well as providing complaint handling to the NSW Forensic Hospital. We have oversight of the NSW Police Force and can readily visit police facilities.⁴²

Article 24 of the OPCAT allows State Parties, upon ratification of the Protocol, to make a declaration postponing their obligations with respect to the NPM for up to three years. The JSCOT report notes that the Australian Government plans to make such a declaration, in order to ensure that all States and Territories are able to put necessary arrangements in place.⁴³

6 Other selected jurisdictions

6.1 Western Australia

The only other Australian jurisdiction with an oversight body dedicated to custodial services that reports to

Parliament, similar to the proposed NSW Inspector, is Western Australia.

The [Inspector of Custodial Services Act 2003 \(WA\)](#) establishes an [Inspector of Custodial Services](#), who is required to conduct inspections of prisons, detention centres and certain other facilities, including court custody centres and lock-ups (except those controlled by police)⁴⁴ in Western Australia at least once every three years.⁴⁵ Like the proposed New South Wales Inspector, the West Australian Inspector cannot investigate complaints, but has discretion to refer them to the appropriate body.⁴⁶ The West Australian Inspector also administers the [Independent Visitor Scheme](#). Independent Visitors perform a similar role to that of Official Visitors in NSW.

6.2 Queensland

In Queensland, for example, Part 8 of the [Corrective Services Act 2006 \(Qld\)](#) provides that the Chief Executive of the Department of Corrective Services can appoint Inspectors in certain circumstances.

There is an [Office of the Chief Inspector](#) within the Department, and [reports](#) regarding completed inspections are available on the Department's website.

Section 294(2) of the *Corrective Services Act 2006* provides:

The function of an inspector is—

- (a) to investigate an incident; or
- (b) to inspect a corrective services facility or a probation and parole office; or
- (c) to review the operations of a corrective services facility or a probation and parole office; or

- (d) to review services offered at a corrective services facility or a probation and parole office.

Along with the powers and functions of the inspector, Part 8 sets out certain other requirements in relation to the appointment of inspectors (eg, where inspectors are appointed to investigate an incident, two must be appointed and at least one of the two must not be employed by the Department). Inspectors appointed to carry out an investigation, inspection or review, must provide a written report containing the result and any recommendations to the Chief Executive of the Department of Corrective Services.⁴⁷

6.3 United Kingdom

The [Prisons Act 1952](#) establishes [Her Majesty's Inspectorate of Prisons](#), which is an independent body that inspects and reviews conditions in prisons as well as juvenile detention in England and Wales. The Chief Inspector is appointed by the Justice Secretary, and reports to the Justice Secretary and Ministers regarding prisons and juvenile detention facilities and the Home Secretary regarding immigration detention facilities. According to the Inspectorate's webpage:

The Prisons Inspectorate also has statutory responsibility to inspect all immigration removal centres and holding facilities. In addition, HM Chief Inspector of Prisons is invited to inspect the Military Corrective Training Centre in Colchester, prisons in Northern Ireland, the Channel Islands and Isle of Man.

Together with HM Inspectorate of Constabulary the Inspectorate of Prisons inspects police custody in England and Wales and, with HM Inspectorate of Probation, offender

management arrangements in custody during all full announced prison inspections.

The Inspectorate also coordinates the [NPM](#) required by OPCAT for the United Kingdom.⁴⁸

Complaints from inmates are not handled by the Inspectorate, but by the [Prisons and Probation Ombudsman](#) for England and Wales.

Similar arrangements exist in Scotland.⁴⁹

6.4 New Zealand

The New Zealand Department of Corrective Services has a Prison Inspectorate, which is established in accordance with the [Corrections Act 2004 \(NZ\)](#). According to the Corrective Services [website](#), there is a team of Inspectors, overseen by a Senior Inspector. The website also states that Inspectors of Corrections:

- report directly to the Chief Executive and are independent from prison management
- receive around 6,000 contacts from offenders a year
- investigate around 3,000 formal complaints a year
- undertake around 20 investigations a year relating to the safe, fair and humane treatment of prisoners
- monitor the progress and outcomes of a further 60 or so internal prison investigations.

Given that, under section 29(1)(g) of the *Corrections Act 2004* (NZ), these Inspectors report to the Chief Executive, rather than to Parliament or the Minister, the New Zealand model appears, on its face, to have more in common with the arrangements in Queensland than with those of

Western Australia or those proposed for NSW.

New Zealand ratified the OPCAT in 2007. Its NPM is comprised of several bodies, including the Ombudsman, which are coordinated by [the Human Rights Commission](#).

7 Conclusion

Like similar bodies in Western Australia and the United Kingdom, the proposed NSW Inspector of Custodial Services does not have an express power to investigate inmate complaints. However, given the proposed Inspector's other powers and functions, it is likely that complaints will be directed to it. The 2012 Bill establishes a framework for the integration of the role of the proposed Inspector with that of other relevant agencies, including the Ombudsman, which will continue to be the main complaint-handling body for those in corrective services and juvenile justice facilities in NSW.

In respect to the OPCAT, one issue is whether, under the 2012 Bill, the Inspector will be able to fulfil all of the requirements of an NPM. But note that the Attorney General only suggested that the Inspector might form a "part" of the NPM. If existing oversight of people in places of detention that are not covered by the 2012 Bill (eg police stations) is deemed insufficient to meet the requirements of the OPCAT, the NSW Government may need to revisit this issue.

¹ See Legislation Review Committee, [Legislation Review Digest No 18/55](#) (29 May 2012) for the Committee's comments on the 2012 Bill.

² Legislative Council General Purpose Standing Committee No 3, [Report 21: Inquiry into the privatisation of prisons and](#)

[prison-related services](#) (June 2009), 94-97, recommendation 10.

³ [Inspector of Custodial Services Bill 2012 \(NSW\)](#), Clauses 4 and 18.

⁴ [Inspector of Custodial Services Bill 2012 \(NSW\)](#), clause 17.

⁵ See *Interpretation Act 1987* (NSW), section 9(1), which provides "[i]n any Act or instrument, the word "may", if used to confer a power, indicates that the power may be exercised or not, at discretion."

⁶ See *Crimes (Administration of Sentences) Act 1999* (NSW), section 228 and *Children (Detention Centres) Act 1987* (NSW), section 8A. See also these webpages of [Juvenile Justice](#) and [Corrective Services NSW](#), this Department of Attorney General and Justice, Juvenile Justice document, [Policy and Procedures for Managing Client Complaints](#) (May 2012), and part 15.6 of the [Visits to Inmates and Correctional Centres](#) section of the Corrective Services Operations Procedures Manual for more information about Official Visitors.

⁷ [Report 21: Inquiry into the privatisation of prisons and prison-related services](#), 97.

⁸ See [Inspector of Custodial Services Bill 2012 \(NSW\)](#), 3.1 and 3.3 of Schedule 3.

⁹ *Ombudsman Act 1974* (NSW), sections 12 and 13.

¹⁰ *Ombudsman Act 1974* (NSW), section 13A.

¹¹ *Ombudsman Act 1974* (NSW), sections 26(1)(a), (b), (d), (g) and 26(3).

¹² *Ombudsman Act 1974* (NSW), section 13.

¹³ [Inspector of Custodial Services Bill 2012 \(NSW\)](#), clause 26(1).

¹⁴ [Inspector of Custodial Services Bill 2012 \(NSW\)](#), clause 26(2).

¹⁵ The amendments also seek to include certain limitations on the Inspector's functions. These amendments appear to be consequent upon the proposed conferral of a complaint-handling power upon the Inspector. For example they provide that the Inspector cannot investigate complaints if they are of the kind excluded from jurisdiction of the Ombudsman by Schedule 1 of the *Ombudsman Act 1974*, or if they relate to a decision, procedure or member of the State Parole Authority or the Serious Offenders Review Council.

¹⁶ By the *Crimes (Administration of Sentences) Amendment Act 2008* (NSW).

¹⁷ *Crimes (Administration of Sentences) Act 1999* (NSW), section 213(1)(a), (b), (c), (d), (e), (k), (l) and (m) (repealed).

¹⁸ *Crimes (Administration of Sentences) Act 1999* (NSW), section 215 (repealed).

¹⁹ *Crimes (Administration of Sentences) Act 1999* (NSW), section 215(f) (repealed).

²⁰ *Crimes (Administration of Sentences) Act 1999* (NSW), section 217 (repealed).

²¹ *Crimes (Administration of Sentences) Act 1999* (NSW), section 223 (repealed).

²² *Crimes (Administration of Sentences) Act 1999* (NSW), section 222 (repealed).

²³ Avery, J and Dalton, V, *Review of the Office of Inspector-General of Corrective Services* (May 2003), 14.

²⁴ Avery and Dalton, 13.

²⁵ Avery and Dalton, 13.

²⁶ Avery and Dalton, 13.

²⁷ Avery and Dalton, 19.

²⁸ Avery and Dalton, 11.

²⁹ Avery and Dalton, 11.

³⁰ Avery and Dalton, 12.

³¹ Avery and Dalton, 20.

³² Avery and Dalton, 20.

³³ N O'Malley, "Softly, softly dies the jail watchdog", *Sydney Morning Herald* (27 August 2003), 4. The article states that "The Opposition's justice spokesman, Andrew Humpherson, said the recommendations [of the review] were government scripted. He said the only independent critic of a department particularly susceptible to corruption" and also quotes the then NSW Greens MLC Lee Rhiannon as stating "[t]his report is the least objective example of this type of document I have come across and reads like a political set-up job."

³⁴ Commonwealth Attorney General's Department, [National Interest Analysis \[2012\] ATNIA 6](#), [3]-[4].

³⁵ [National Interest Analysis](#), [18]-[21].

³⁶ [National Interest Analysis](#), [18]-[19].

³⁷ [National Interest Analysis](#), [19]-[20].

³⁸ [National Interest Analysis](#), [21].

³⁹ Joint Standing Committee on Treaties, [Report 125: Review into Treaties](#) tabled on 7 and 28 February 2012, tabled on 21 June 2012, 52 (recommendation 6).

⁴⁰ [Report 125](#), 44.

⁴¹ See also NSW Ombudsman, [Submission Joint Standing Committee on Treaties: Consideration of the National Interest Analysis Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (March 2012). http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives/Committees?url=jsct/28february2012/subs/sub21.pdf

⁴² [Submission](#), 3.

- ⁴³ [Report 125](#), 45.
http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/28february2012/report/chapter6.pdf
- ⁴⁴ [Inspector of Custodial Services Act 2003 \(WA\)](#), section 3.
- ⁴⁵ [Inspector of Custodial Services Act 2003 \(WA\)](#), section 19.
- ⁴⁶ [Inspector of Custodial Services Act 2003 \(WA\)](#), section 26.
- ⁴⁷ [Corrective Services Act 2006 \(Qld\)](#), section 305.
- ⁴⁸ According to the Her Majesty's Inspectorate of Prisons [webpage](#), the United Kingdom ratified the "OPCAT in December 2003 and designated its [national preventative mechanism] in March 2009."
- ⁴⁹ The [Prisons \(Scotland\) Act 1989](#) establishes [Her Majesty's Chief Inspectorate of Prisons for Scotland](#), which performs a similar function in relation to prisons and certain police cells in Scotland. Complaints regarding prisons in Scotland are dealt with by the [Scottish Public Services Ombudsman](#).

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