

Legislative Council
Hansard
Tuesday 6 August 2024

[excerpt...]

**Office of the Custodial Inspector Tasmania: Annual Report 2022-2023 - Consideration
and Noting**

[12.01 p.m.]

Ms WEBB (Nelson) - Mr President, I move –

That the Office of the Custodial Inspector, Tasmania Annual Report 2022-23 be considered and noted.

It is useful to place debate on this motion into a contextual time frame, particularly for members who have recently joined us. I initially tabled this motion on 16 November last year, shortly after the annual report 2022-23 was tabled on 18 October. At that stage, there were no further private member's times scheduled for the 2023 parliamentary schedule. My intention was to seek to have this debate when parliament resumed in March this year. However, the government was in the midst of an early election then, hence the delay until now.

This also raises the question: why bother considering, debating, and noting a 2022-23 annual report when, in a couple of months, presumably we will have the more current 2023-24 annual report tabled and at our disposal? The short answer is that to ignore the Custodial Inspector's Annual Report 2022-23 would be a wasted opportunity. There are many lessons contained in this report. Given the time constraints today, I will focus on the recommendations made in the report and some of its key public policy observations.

I first need to briefly acknowledge that, since the October tabling of the 2022-23 annual report, the Custodial Inspector's Office has been busy releasing additional reports, specifically: the recent Youth Wellbeing Inspection Report 2024; Inspection of Youth Custodial Services in Tasmania, dated June 2024 and published on 25 July this year; the Youth Health Care Inspection Report 2023; Inspection of Youth Custodial Services in Tasmania, dated December 2023, published on 18 July 2024; and the Adult Health Care Inspection Report 2023, Inspection of Adult Custodial Services in Tasmania, also published on 18 July this year.

Although it is tempting to discuss these three additional reports in detail as well, I will not delve too much into that territory. Suffice it to say, a key theme spanning the inspections informing those subsequent reports is the impact of lockdowns. Although it is beyond the scope of today's motion and today's time constraints to go into the details of those subsequent reports, I will, in the main, keep my focus on the annual report of 2022-23.

Although it is not a recommendation as such in the report, it does highlight, on page 34, a significant matter of concern: the use of a dry cell by the Tasmanian Prison Service (TPS) in a manner that contravenes the UN Standard Minimum Rules for the Treatment of Prisoners, the Nelson Mandela Rules. The report states specifically that the cell was lit 24 hours a day and that prisoners could be held there for 72 hours or longer. The cell had no window to the outside. Of specific concern is the Inspectorate then 'confirmed that prisoners had been held

knowingly in these conditions'. This is a human rights breach and it was not accidental. It indicates a lack of awareness of the international conventions to which Australia is a signatory, or a cavalier attitude of potentially not caring enough to comply with those conventions.

I note that the Office of the Custodial Inspector undertook to report on this issue in further detail at a later date, which, as it happens, is today, and we have seen the tabling of the Inhumane Treatment in Dry Cells Review Report 2024. Unfortunately, I will be unable to attend the inspectorate's briefing at lunchtime because I will be attending a Joint Standing Committee on Integrity meeting, which I will speak more about in a minute.

I mentioned earlier that there were lessons to be learned from this annual report that we are noting today. A key lesson is using the lens of the public interest to inform decision-making and, just as importantly, reporting without fear or favour to responsible authorities and publicly.

Members here would be aware that there is a growing community and stakeholder movement, for want of a better phrase, advocating for strengthening Tasmania's democracy and for good governance, culture and architecture. During stakeholder roundtables and public forums, which I have recently attended and participated in, an emerging theme is frustration regarding the lack of a robust public-interest ethos in the core of much of recent policy determinants and decision making. As the annual report points out, the public interest is central to the Office of the Custodial Inspector's mandate under the provisions of its Custodial Inspector Act 2016. As stated on page 8 of the report, 'When performing their functions the inspector must act independently, impartially and in the public interest.' Alarming, at times it appears there is little interest in ensuring the public interest is central in matters of custodial detention and particularly children and youth in detention.

A key component of the 2022-23 annual report that caught my attention is section 6.6, beginning on page 30, regarding the age of criminal responsibility in Tasmania. For the benefit of those yet to read the report, it states:

My mandate is to provide independent, proactive, preventative, and systemic oversight of custodial centres. In the context of providing preventative oversight, I share the view of the Committee on the Rights of the Child that children under the age of 16 should not be in custodial centres and in line with my mandate, I welcome the announcement that the Tasmanian Government is progressing towards this by raising the minimum age of detention to 14. It seems it is only a matter of time until the age of criminal responsibility will also rise from the current age of 10. The reasons for doing so are sound but the actions and supports required to implement it are many.

The report then goes on to cite the United Nations Committee on the Rights of the Child, detailing children's rights in the child justice system, which also articulates why change is necessary. I will not read that out now, but I will reiterate the inspector's observation that by 2019, 50 state parties had raised the minimum age of criminal responsibility, following ratification of the Convention of the Rights of the Child with the most common minimum age internationally now at 14.

The Custodial Inspector then issues a blunt statement, saying:

There are sound reasons as to why Tasmania should follow suit to at least 14 years, without exceptions for more serious crimes.

Clearly, within the context of their legislated mandate to provide independent, proactive, preventative and systemic oversight of custodial centres, the Custodial Inspector is strongly urging the government to make this important change to public policy.

It is worth pointing out this is also consistent with applying a human rights framework, which again underpins many of the statutes and international conventions which provide the scaffolding in which the Office of the Custodial Inspector must operate. I also note that this Chamber considered this issue in October 2021 and supported my motion calling on the government to raise the age of criminal responsibility to 14 years.

We are left wondering when this government will catch up with the strong calls being made for this evidence-based reform, given those calls are resoundingly coming from multiple statutory officers, civil society, academia and this parliament.

I mentioned statutes, and the majority of the clear recommendations contained in the annual report detail necessary changes to the Custodial Inspector Act 2016. It is disturbing to note that, as required under section 26 of the Custodial Inspector Act 2016, recommendations for amendments were contained in earlier annual reports for 2020-21 and 2021-22, but have not been actioned by government. These include recommendations to amend the act to allow the inspector to table inspection reports directly, as is fitting for an independent statutory officer holder, rather than to go through the minister; and to reduce the current 30-day embargo period that follows the 28-day departmental consultation stage on reports, which keeps inspection reports from being tabled for at least two months after finalisation. This is extraordinary. I ask, how is a two-month delay period, before inspection reports are published, in the public interest?

A crucial recommendation highlighted in the current annual report is the need to provide protections for people who come forward to report issues to the Custodial Inspector. This is not simply a matter of strengthening protections. As the report states unequivocally on page 19, 'There are no protections for people who do come forward to report issues to my office. There should be.' Absolutely, there should be, and most Tasmanians would be shocked to learn that such presumed protection is non-existent. This is an example of the woeful inadequacy of Tasmania's whistleblower laws and protections.

I could discuss the need for urgent reform of the Public Interest Disclosures Act 2002 in great depth, however, I will leave that in-depth debate for another day. I will say that the point being made here by the Custodial Inspector highlights a significant flaw in our Public Interest Disclosures Act in its limited definition and application of a protected disclosure.

Basically, according to the Custodial Inspector's annual report, despite being an independent statutory oversight body with a mandate to act in the public interest, that office is not recognised as a defined recipient of protected disclosures made by external persons, even if they relate specifically to its core functions. Fortunately, the annual report provides details on how to rectify this problem, by highlighting the appropriate model already legislated in our OPCAT Implementation Act 2021. Hence, it is a little surprising and disappointing that nowhere yet have I heard in the Attorney-General's Law Reform Program an amendment bill to the Custodial Inspector Act to provide these necessary protections in the public interest.

Hopefully, the government will be in a position to provide an update today on its response to this call from the Custodial Inspector.

There are further recommended amendments to resolve discrepancies between the Youth Justice Act 1997 and the Custodial Inspector Act 2016 to provide consistent access to places of detention, the protection of correspondence for detainees and prisoners, and the creation of regulations facilitating delegation of the inspector's functions and powers to allow employees of the inspector's office to enter facilities at any time. In principle, these recommendations appear sensible and would enhance the capacity of the Office of the Custodial Inspector to fully meet its legislated mandate. At least, they should eventuate in amendment bills that would facilitate a broader debate and analysis of the merits or ramifications of such proposals.

I will briefly touch on the issue of funding, a perennial area of complaint for statutory offices. The report details its resourcing and constraints that apply to the office and the inspectorate team to fulfil their obligations as stipulated under statute. Such limitations imposed by resourcing shortages are always worrying. In this instance, it is of further concern given the fact, as detailed in the report on pages 8 and 9, the Premier specifically stated in relation to AYDC on 6 September 2022, almost two years ago, that, 'Discussions have commenced with the Custodial Inspector regarding additional support to enable robust oversight and real-time feedback'. The government sought the Custodial Inspector's team to increase its AYDC presence to at least multiple visits per month; however, the inspector states:

Currently, I have the capacity to conduct up to a maximum of four inspections a year and ad hoc visits when resourcing permits.

Further, despite more discussions with the Department of Education, Children and Young People regarding additional support, no resolution was achieved, with apparently those same resourcing discussions continuing throughout the 2023-24 reporting year. This tells us that despite the government requesting in 2022 that the Custodial Inspectorate Team increase their visits and presence at AYDC to at least multiple visits per month, resourcing of that same office only facilitates four visits per year. This is nowhere near the multi-monthly calendar. I have marked that spot. I will be looking for a real and tangible update in the forthcoming 2023-24 report to see whether and how this discrepancy has been addressed.

Before I leave the report's recommendations, I will use this opportunity to specifically request from the government an update regarding whether and how it intends to act upon these outstanding recommendations spanning the Custodial Inspector's last three annual reports, 23 Tuesday 6 August 2024 including the one we are noting today. I hope that the government's contribution today provides us with that update on whether it has accepted these following recommendations:

- to provide the Custodial Inspector the capacity to table inspection and other reports directly to parliament.
- to reduce the current 30-day embargo additional to the 28-day consultation stage provided for departments prior to the publishing of reports.
- to resolve the perception of inspectorate staff being Department of Justice employees by changing employment arrangements to a department which has no direct responsibility for prison services or youth justice.

Additionally, I am keen to hear from the government about further action taken to address the identified matter of AYDC detainees requiring restricted mobile phones with pre-programmed family and oversight entity numbers. Young people and the TPS accessing the Common Auto Dial List, or CADL, should have automatic access to all appropriate oversight bodies and relevant legal services. I also note the report's point that similarly those same oversight bodies and other services should also be made aware proactively by government that those entities can request to have their phone numbers provided to detainees via the CADL. I hope the government is able to provide an update today on that. There seems to have been confusion between the Office of the Custodial Inspector and the opportunities to be on that CADL function for detainees.

I am also interested to hear whether further action has been taken on the matter raised about remandees and prisoners sentenced to less than three years who are eligible to vote, and ensuring that they have appropriate access to election materials and voting facilities.

Another area I would like to have an update on further action about is the provision of greater support for Aboriginal detainees and prisoners. This is an urgent requirement that was also highlighted in not just the annual reports of recent years, but also the subsequent wellbeing and health reports.

I also note on page 18 of the report the fact that, unlike the Department of Justice, which has undertaken to provide annual updates on progress made on any Custodial Inspector recommendations received, the inspectorate was unaware of similar undertakings being made by either the Department of Health or the Department for Education, Children and Young People. This is concerning given that the Department for Education Children and Young People is responsible for AYDC. I hope the government is in a position to reassure us on that front today that similar updates on progress are provided across all relevant departments regarding the recommendations made in the annual reports.

It is also worth noting that when reading the annual report 2022-23, I was struck by the lack of reference to, and the current lack of involvement with, civil society. It is clear that the team from the Custodial Inspector's office have undertaken some rigorous and impressive professional development, utilising the skills and expertise of interstate and international peers and counterparts from the ACT, Western Australia, and the United Kingdom National Preventative Mechanism, the NPM. This is laudable. However, I was surprised to see that the list of primary and other stakeholders detailed on pages 12 and 13 of the annual report were 24 Tuesday 6 August 2024 heavy on government departments and other statutory offices, but silent on any NGO or community service providers or other civil society groups. A specific example is the mention on page 13 of 'the manager of the Prison Official Visitors Program', a reference which appears to omit consideration of the actual participating official visitors as fellow stakeholders who potentially have expertise, observations and insights worthy of consideration.

Given the commentary elsewhere throughout the annual report of the limited funding and resourcing for the Custodial Inspectorate Office, particularly in light of its mandated threeyearly facility inspection cycle, it would be a logical assumption that there was greater integration, involvement and utilisation of the skills and experiences of the NGO and service provider sector. For example, members will recall that in October last year, TasCOSS and a coalition of justice and social service organisations, including the Prisoners Legal Service

Tasmania and 54 Reasons, called on the Premier to demonstrate his stated commitment to the safety of our children by closing the Ashley Youth Detention Centre as a matter of urgency and working with the community services industry on progressing alternative arrangements.

These are also stakeholders, albeit on a different tier from formal members of the bureaucracy or other statutory entities. I expected there to be more recognition of the roles that they provide and the connections they may well make with the Custodial Inspector's Office and its work. This may be a point worth exploring further via the oversight mechanisms of the joint parliamentary committee.

The role of civil society is also pertinent when considering one of the key themes that emerges from reading this annual report. Other than the specific state legislation, such as the Custodial Inspectors Act 2016, the Youth Justice Act 1997, and the OPCAT Implementation Act 2021, there is continual reference to international treaties and conventions. These include the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; Committee on the Rights of the Child, General comment No. 24 (2021) on children's rights in the child justice system; and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

It is of great concern that in most cases these international treaties are cited in the context that Tasmania may be in breach of them. This is even further concerning when, to be blunt, it means we are in breach of conventions against torture and other cruel, inhuman and degrading treatment or punishment of children. That is a huge red flag.

This annual report has been waving at us since October last year and, in fact, the reports from the year before that and the year before that, and no doubt the year before that. For those who may not have had a chance to closely read this annual report, I draw the Chamber's attention to section 6.1, which begins on page 25 of the report. Key observations concern the use of lockdowns. A quote from the report:

I have not previously observed lockdowns on a systemic level in youth detention in Tasmania and it is a disturbing precedent.

This statement in itself would be of sufficient concern to warrant parliament demanding to know from the minister what is going on. The report continues:

It was the subject of negative comment by the United Nations Committee against Torture in its Concluding Observations on the sixth periodic report of 25 Tuesday 6 August 2024 Australia with respect to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It said on 5 December 2022:

The Committee was seriously concerned about:

...

(d) the practice of keeping children in solitary confinement, in particular at ... Ashley youth detention centre [sic] in Tasmania, which contravenes the Convention and the Nelson Mandela Rules;

To be clear, that was not the Custodial Inspector saying the conditions at AYDC at the time breached the UN Convention Against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment. That was the UN Committee against Torture's finding. Even without the commission of inquiry's final report a month earlier, this should have set alarm bells clanging. Statements such as this, which basically state that Tasmania is in breach of international torture conventions, are not made lightly by our independent statutory officers. This is gravely shocking and deeply serious.

It is further mind-boggling that, since this report was published last year, it has largely passed without comment or any apparent change in policy or practice from the government. How can that be? Have we really become so desensitised - so inured to the crisis we lurch from over and over in our so-called youth justice system - that a deliberate and non-hyperbolic reference by a statutory oversight entity to a UN Committee against Torture statement that we are in contravention of that convention receives a mere shrug of the shoulders? If that, what an indictment on us all.

I acknowledge that more recently, such as on 25 July this year, the Custodial Inspector's office has released statements identifying some improvements specifically at AYDC, in areas such as engagement with the Tasmanian Aboriginal community and improved access to sport, recreation, and nutritional food. While these are to be lauded, and hopefully maintained into the future, it is important to note that the July media release still emphasised the ongoing and troubling high lockdown rates and other concerns such as the need for improved training and security provision, particularly for visitors.

So, while improvements are to be welcomed, there is clearly still a long way to go. None of the points canvassed mitigate the ultimate need for the government to act on its commitment to close AYDC as soon as possible. We all know that was an urgent recommendation of the commission of inquiry - an urgent recommendation for which we are already approaching the 12-month anniversary with little apparent progress and no firm timeline committed to by the government.

Let us demonstrate unequivocally to the next visit by the UN Committee against Torture - as there will be further visits under the OPCAT protocol - that we heeded their alarming observation from last time, and let us have AYDC closed by the time the committee visits again, which inevitably will still be too late for the children who are suffering in that place. We need to demonstrate that we have heard this bell tolling. The bell that tolls for Ashley Youth Detention Centre is our responsibility to respond to.

To conclude, it is also interesting and significant to note section 5.6 of the report on page 23 where the custodial inspector provides a polite rebuke to this parliament:

The Custodial Inspector has a significant range of powers and it is important that my office and I are subject to effective oversight.

How refreshing. Often we are in a tug of war with those who resist effective oversight and accountability. Here we have an independent authority requesting more of it. The report comments on the fact there appears to be no evidence that Custodial Inspector reports have been considered, particularly by the Joint Standing Committee on Integrity - which is specifically charged with monitoring and reviewing the performance of integrity entities, which the Office of the Custodial Inspector is. I believe that may be in the process of changing. I am certainly keen to pursue that as a new member of that committee.

I reiterate my request to hear from the government regarding its plans to address recommendations contained in the Office of the Custodial Inspector Annual Report 2022-23. I am sure the government will want to focus on more recent media statements, which praised some improvements. However, none of those identified mini-improvements provides a systematic response framework to the things that have been raised again and again. They certainly do not negate the outstanding and unaddressed recommendations detailed in this annual report.

To summarise, the specific recommendations of interest from the report are:

- legislative action taken to provide protections for people who report or raise issues with the Custodial Inspector's office;
- action to enhance the independence of the Custodial Inspector's office, such as providing for direct tabling of the inspection reports in a more timely manner, as well as resolving issues of non-independence perceptions due to employment under the Department of Justice;
- resolving access and other confidentiality inconsistencies between the Youth Justice Act and the Custodial Inspector Act;
- further legislative reforms, including improved access to independent oversight entities and legal services for detainees and prisoners; and
- greater support on the ground for Tasmanian Aboriginal detainees.

Hopefully, the government's response will be sufficiently thorough and swift that the next annual report, expected within the next couple of months, can contain a meaningful update and progress report instead of being stuck on repeat.

I also acknowledge the gentle, if somewhat exasperated, prod also contained in the annual report that, up until now, the joint Integrity Committee appears to have ignored one of the statutory regulatory entities within its remit. As a new member of that joint parliamentary committee, I accept my share of responsibility to ensure it is more inclusive in this regard. I imagine my fellow committee members feel the same.

It would be a remarkable turnaround in light of the series of earlier annual reports should the Office of the Custodial Inspector not feel the need to copy and paste from this 2022-23 annual report to the forthcoming document because those matters remained unaddressed or outstanding. I certainly hope not. It should be apparent what an integral role the Custodial Inspector's office should play in providing Tasmania's independent oversight of and ensuring the protection of those Tasmanians who spend the slightest amount of time in custodial facilities - especially in this time of heightened awareness following the commission of inquiry process and final report.

In that context, I hope that today's debate renews this Chamber's ongoing consideration of the range of work undertaken and reports provided by the Office of the Custodial Inspector and that we do so in a more systematic and rigorous manner. I also hope that we continue to weave this and other statutory entities' reports and recommendations into our related legislative debate and policy reviews as appropriate. To go full circle, that is, we should utilise the public interest lens and place the public interest at the core of the scrutiny, transparency and accountability that we are responsible for in this place.

To be frank, that is the bare minimum of what we should do with any annual report stipulated to be tabled in this place - let alone in this instance, where section 26 of the Custodial Inspector Act 2016 legally requires the inspector's office to include in its annual report an evaluation of the response of the relevant authorities to the inspector's recommendations; and any recommendation for changes in the laws of the state or for the administrative action that the inspector considers should be made as a result of the performance of their functions.

Certainly, the inspector's office does report to us; it is required to report to this parliament. It is then incumbent on the parliament to pay attention, to listen and, most importantly, to act. Having said that, I acknowledge we have tabled reports and documents coming at us at a fast rate of knots, particularly during the final sitting weeks of October. I include myself in that reminder and I know we will all put our shoulders to the wheel.

Finally, while I am speaking about this annual report, I acknowledge and thank the team of the Office of the Custodial Inspector Tasmania for their diligence and their persistent patience for the parliament to pay attention to its yearly findings and recommendations. I thank them for their work. It is important work and I want them to know that we will be listening and we will undertake our function as they report to us. Mr President, I note the Custodial Inspector Annual report 2022-23.

Resumed from above.

[3.24 p.m.]

Ms WEBB (Nelson) - Mr President, I thank members for engaging with the motion. I appreciate the contributions made and the comments accompanying them. I will not speak in any length here other than to thank the members for Launceston, Hobart and McIntyre for their thoughtful contributions. I strongly concur with the member for Hobart who spoke about the failure of this government to close AYDC as a matter of priority and the ongoing disgrace of that. Progress is not happening fast enough and while I do appreciate the comment from the member for McIntyre that we need somewhere for children to go if we are closing that facility - yes, we do but we promised to close it nearly three years ago. As far as we can see, progress is far too slow in developing the new model. We could have one in place here. Civil society and NGOs in this space have been crying out to assist in that and the development of interim measures and that has been far too slow so.

It is simply an excuse that is rolled out again and again by the minister and by the government that we have to delay this until we have the new model in place. We have better options than that. COVID taught us we can immediately stand up a response that is needed when there is an urgent situation. If the abuse of children is not an urgent situation that prompts us to do that, I do not know what is.

Thank you to the government for the contribution, which was largely a benign noting of the elements of the report. I was looking, as I said in my first contribution, for some more detailed updates on progress of the recommendations that were made in the report. That was not particularly forthcoming. However, I appreciate the update that indicated at least a receptivity from the government to enhance protections for people disclosing to the Custodial Inspector. I believe those protections are required; they are not there now. It is disingenuous for the government to say that there is no indication that people are being put off from doing that by fear of reprisals. In fact, the Custodial Inspector has identified that in the report. There

is indication: your independent statutory officer has told you, so the impetus to act is there. If we pass another year and see the same thing in this year's annual report, it will be another 12 months of failure from the government to respond to a clear, straightforward request and recommendation from a statutory officer.

The other matter that was spoken about in regards to recommendations from the report was about the tabling of reports and doing that in a more timely way. There is convenient conflation of things there to try to excuse the slow tabling of these reports. The Custodial Inspector is quite clear in the annual report. The 28 days provided to the department to make corrections and ensure that there is accuracy in the report is not in question. There is no recommendation to change that.

The recommendation is to change the current 30 days that is available to the minister to hold on to the report before tabling it. It is quite clear the government does not need to conflate those two things and pretend that accuracy in conversations with the department in the 28 days has anything to do with the request that is being made - for two reasons. Timeliness is one of 51 Tuesday 6 August 2024 the reasons to cut the middle minister out, as it were, and have the report tabled directly in the parliament by the statutory officer; one reason to do that is to make it timelier. There is no need for the minister to hold onto the report for 30 days. The other reason is simply that it is more appropriate that that statutory officer answers to this parliament, not to the minister. The report should be made to the parliament, not to the minister. That is the point made.

I thank members for their contributions. It is important that we continue, in a regular way, to note these reports, both through the mechanism we have available to us in the Joint Standing Committee on Integrity - I believe there is a good appetite for that to be more actively undertaken by the new committee - and in this Chamber more generally. That we turn our minds to these reports as they are placed before us and we collectively take responsibility as a Chamber to carry out our function of oversight and accountability by noting them and following up when necessary - when it is clear that recommendations, and particularly recommendations relating to legislative change, are not being pursued in a timely manner by the government of the day. Thank you to members. I note the report.

Motion agreed to; report noted.