

Australian Capital Territory

# Official Visitor Guidelines 2020

Disallowable instrument DI2020–259

made under the

Official Visitor Act 2012, s 23F (Minister may make guidelines)

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## 1 Name of instrument

This instrument is the *Official Visitor Guidelines 2020*.

## 2 Commencement

This instrument commences on the day after its notification day.

## 3 Revocation

This instrument revokes—

the *Official Visitor (Corrections Management) Visit and Complaint Guidelines 2018* [DI2018-269];

the *Official Visitor (Disability Services) Visit and Complaint Guidelines 2014 (No 1)* [DI2014-286]; and

the *Official Visitor (Homelessness Services) Visit and Complaint Guidelines 2019 (No 1)* [DI2019-146].

## 4 Declaration

After consulting with the operational Ministers for all visitable places, I make the Official Visitor Guidelines at Attachment 1.

Shane Rattenbury MLA  
Minister for Justice, Consumer Affairs and Road Safety

1 September 2020

## **Attachment 1 Official Visitor Guidelines**

### **1. Purpose**

These Guidelines refer to the visit processes and handling of complaints by official visitors appointed under the *Official Visitor Act 2012* for visitable places under the *Children and Young People Act 2008*, *Corrections Management Act 2007*, *Disability Services Act 1991*, *Housing Assistance Act 2007* and *Mental Health Act 2015* (the Operational Acts).

These Guidelines should be read in conjunction with the Official Visitor Act and the Operational Acts.

### **2. Legislative Framework**

The Official Visitor Scheme is governed by the *Official Visitor Act 2012*. The legislative framework for the Scheme also includes five Operational Acts which define visitable places and entitled people in those operational areas, and include particular provisions relevant to those areas:

- *Children and Young People Act 2008*
- *Corrections Management Act 2007*
- *Disability Services Act 1991*
- *Housing Assistance Act 2007*
- *Mental Health Act 2015*

### **3. Statement of Intent**

These Guidelines set out how an official visitor appointed for a visitable place under an operational Act will perform their functions.

The official visitors play a vital role in safeguarding and promoting the interests of vulnerable people in our community who find themselves in difficult circumstances. The official visitors seek to identify, monitor and resolve service issues locally, using early intervention and resolution practices, and with a view to improve service quality.

### **4. Functions of Official Visitors**

An official visitor for a visitable place has the following functions:

- visiting the place and meeting entitled people at the place,
- monitoring conditions and services in the place,
- investigating and seeking to resolve complaints from or behalf of entitled people at the place,
- identifying and reporting on systemic issues adversely affecting entitled people at the place,

- referring complaints or issues from or on behalf of entitled people at the place to relevant investigative entities if appropriate,
- reporting to the Minister and operational Minister as required under the Act and
- exercising any other function given to an official visitor under the Official Visitor Act, an Operational Act or another Territory law.

When exercising these functions, an official visitor must be guided by the following principles:

- respecting and promoting the human rights of entitled people,
- promoting the high-quality provision of services to, and care and treatment of, entitled people that is centred on their needs,
- considering the wishes of entitled people in relation to visits to visitable places and how complaints from or on behalf of entitled people are dealt with,
- encouraging the early resolution of complaints from or on behalf of entitled people whenever reasonable and practicable to do so
- having regard to the objects and principles in Operational Acts.

## 5. Entitled Persons

The definitions of an ‘entitled person’ vary across the Operational Acts.

### Children and Young People Act

An entitled person (s37) means a child or young person who is detained in a detention place; or confined at a therapeutic protection place; or accommodated in a place of care; and includes a young detainee who is 18 years old or older; and a person prescribed by regulation.

### Corrections Management Act

An entitled person (s 57) means a detainee at a correctional centre; or a person prescribed by regulation.

### Disability Services Act

An entitled person (s 8A) means a person with disability.

### Housing Assistance Act

An entitled person (s 25V) means a person who is homeless or at risk of homelessness who is staying in a visitable place or a person prescribed by regulation.

### Mental Health Act

An entitled person (s 208) means a person receiving treatment, care or support for mental disorder or a mental illness at a visitable place, or a person receiving this treatment, care or support at a place other than a visitable place under an order under the Mental Health Act.

## 6. Visitable places

The Operational Acts also define the places that can be visited by official visitors. Details of each visitable places will be set out in the Register held by the Director-General for the Operational Act.

### Children and Young People Act

A visitable place (s 37) means a detention place, a place outside a detention place if the detainee is, or has been, directed to work or participate in an activity at the place, a therapeutic protection place or a place of care.

A 'detention place' means a place declared to be a detention place under section 142. On 26 August 2008, the Minister declared the Bimberi Youth Justice Centre as a detention place. A 'therapeutic protection place' means a place declared to be a therapeutic protection place under section 625. There is currently no declared therapeutic protection place under the Children and Young People Act. A 'a place of care' means a place approved as a place of care under section 525.

### Corrections Management Act

A visitable place (s 57) means a correctional centre or a place outside a correctional centre if a detainee is, or has been, directed to work or participate in an activity at the place.

### Disability Services Act

A visitable place (s 8B) means accommodation provided to an entitled person for respite or long-term residential purposes. This includes accommodation that is owned, rented or operated by a specialist disability service provider, accommodation at which a specialist disability service provider provides a specialist disability service and a residential aged care facility that accommodates the entitled person.

A visitable place does not include:

- a private home if the person receives a specialist disability service at the home only from a person who is not a specialist disability provider,
- a private home if the person lives in the home with at least one adult family member who does not receive a specialist disability service from a specialist disability service provider at the home,
- accommodation if the only specialist disability service the person receives at the accommodation is a type of service declared by the Minister not to require visitation,
- a residential aged care facility if the person is 65 years old or older when they first receive a specialist disability service (whether at the facility or elsewhere).

### Housing Assistance Act

A visitable place (s 25V) means multiple occupancy supported accommodation or single occupancy independent accommodation that is provided by an entity funded by the Territory for people who are homeless or at risk of homelessness.

## Mental Health Act

A visitable place (s 208) means a mental health facility, a long-term residential accommodation facility or respite facility at which a person receiving treatment, care or support for mental disorder or a mental illness may stay or a place in a correctional centre where a detainee is receiving treatment or care for mental disorder or a mental illness for the period in which the treatment, care or support is given to the detainee.

### **7. Register of Visitable Places**

Section 23B of the Act requires the relevant Director-General for an Operational Act to keep a register of visitable places under the Operational Act.

The register must include:

- the address of each visitable place;
- the contact details of a person who can provide access to the visitable place; and
- any information prescribed by an Operational Act.

The register *may* include:

- the name of each entitled person at each visitable place;
- the name and contact details of each operating entity for each visitable place; and
- if an operating entity for a visitable place is not an individual – the name, phone number and email address of the following:
  - an employee or volunteer based at the visitable place
  - two employees of the entity.

The relevant Director-General must give the address of a visitable place, contact details of a person providing access and any information required under an Operational Act to the following people, to the following people on request:

- an official visitor under the Operational Act;
- the official visitors board;
- the official visitors executive officer (EO);
- the public advocate;
- a commissioner under the *Human Rights Commission Act 2005*; and
- the senior practitioner for the elimination and reduction of restrictive practices.

The Director-General may give the address of a visitable place, contact details of a person providing access and any information required under an Operational Act to the following people, if satisfied that giving the information is reasonable in the circumstances:

- a person exercising a function under the Official Visitor Act or the Operational Act;
- a member of the emergency services;
- an entitled person at the place;

- a carer or legal representative of an entitled person;
- anyone else approved by the Director-General.

### Visitable places that may be visitable under more than one Operational Act

Where a place is a visitable place under more than one Operational Act, the Directors-General for the relevant operational areas may, by agreement, specify in the Register that the visitable place is to be visited primarily by official visitors under a particular Operational Act.

Where the Register does not specify who should visit a visitable place that is visitable under more than one Operational Act, arrangements may be made by official visitors, in consultation with the Board and operating entities, to ensure effective use of resources and avoid unnecessary duplication of visits.

In these circumstances, official visitors should report relevant issues arising from visits to both Operational Ministers to ensure that both Ministers have an appropriate line of sight in relation to the operation of these visitable places.

## **8. Assistance to Official Visitors**

Section 9A of the Official Visitor Act provides that an official visitor appointed under section 10(1) of the Act for a visitable place is authorised to visit the place. The official visitor may also visit another visitable place or deal with an entitled person at that place if asked in writing by another official visitor or by the official visitors board. The official visitors board may delegate this function to the EO.

Section 18 (2) states that an operating entity for a visitable place must give an official visitor any reasonable assistance the official visitor asks for to exercise their functions, in a reasonable timeframe. This may include access to documents and records relating to a complaint, answering reasonable questions about the facts of a complaint or giving reasonable access to facilities.

Section 19 states that it is an offence for a person in charge of an operating entity (as defined in subsection (4)) to fail to provide assistance to the official visitor, without reasonable excuse. Failure to assist an official visitor in their functions includes:

- refusing or neglecting to render assistance if asked;
- failing to answer questions if asked; and/or
- obstructing or hindering an official visitor in exercising their functions.

## **9. Conditions of entering a visitable place**

An official visitor may, at any reasonable time, enter a visitable place, following a complaint or at the official visitor's own initiative.

An operating entity for a visitable place must give an official visitor any reasonable assistance that the official visitor asks for in order to exercise their functions at the place.

What is a 'reasonable time' will depend on all the circumstances.

Visits will generally occur during normal operating hours. Prior arrangements between an official visitor and the operating entity may be made to visit an entitled person after hours and at other times. An official visitor must comply with the safety procedures of the visitable place.

Whether it is a reasonable time to visit also requires consideration of any safety or other risks that might be present in relation to the visitable place at the time. Official visitors must determine whether it is a reasonable time to conduct a visit, subject to any requirement or direction made under another territory law.

It would not be reasonable to visit a correctional facility or youth justice facility at a time that would hinder a search or coincide with an escape attempt at the facility.

Official visitors should not visit a visitable place in person where visiting would pose a serious safety risk to the official visitor, entitled people or others, and that risk cannot be effectively mitigated, for example, where there is an emergency situation, such as a fire or an outbreak of communicable disease which could affect the visitable place.

Where an emergency situation or significant safety risk is ongoing in relation to the visitable place, a visit may be conducted by means other than a personal visit, for example, by communicating with entitled persons by telephone, audio-visual technology or email, and by seeking to resolve complaints and concerns with staff and management at the visitable place, or making appropriate referrals.

Where it is not possible to communicate directly with entitled people by remote means, visits may still be conducted through communication with management and staff of the visitable place, and/or through contact with family members or advocates of entitled people.

Remote visits may be claimed by official visitors as authorised business of the official visitor scheme. Appropriate records must be kept by official visitors to verify time claimed for remote visits.

The Board may provide assistance to official visitors regarding the conduct of visits in emergency situations, including seeking expert advice on risks and mitigation strategies if required.

#### Homelessness Official Visitor

The Homelessness Official Visitor may visit a visitable place without giving notice to the operating entity in certain circumstances. If the visitable

place is multiple occupancy accommodation, the official visitor may visit without notice if the official visitor reasonably believes, or has been given a complaint, that an entitled person at the visitable place is at risk of abuse and harm and the entitled person consents to the visit.

If the visitable place is single occupancy independent accommodation, the official visitor may visit without notice if the official visitor reasonably believes, or has been given a complaint, that there is serious risk to the health or welfare of an entitled person at the visitable place.

It is intended that official visitors will generally only visit an entitled person in independent single occupancy accommodation on request from the entitled person. An official visitor will not enter the single occupancy independent premises without the consent of the entitled person.

## **10. Obligations of an operating entity**

An operating entity must let entitled people know about their rights to contact official visitors. The operating entity must tell an entitled person, or a person acting on the entitled person's behalf, about the functions of an official visitor and how the official visitor may be contacted.

The operating entity must also give the entitled person information about the person's right to make complaints under the Official Visitor Act in a way that is accessible to the person. The operating entity must provide this information no later than when an entitled person first enters a visitable place.

Section 19 (3) of the *Official Visitor Act 2012* states that a person in charge of an operating entity must keep a record of each visit made by an official visitor to a visitable place.

Section 21 states that where an operating entity is advised an entitled person wants to meet an official visitor, the operating entity must ensure the official visitor is told as soon as practicable and within 24 hours of the request being made.

Notice of a request may be emailed to an official visitor.

An operating entity must not ask an entitled person, and the person need not explain to the operating entity, why the person wants to meet an official visitor.

Section 22 (4) specifies that should an entitled person request that a complaint be made with no-one else present and the official visitor agrees, the operating entity must provide reasonably private facilities for the complaint to be made. Sections 51, 103 (5) (b) and 104 (4) (b) of the *Corrections Management Act 2007* state that a communication between a detainee and an official visitor is protected communication.



## 11. Record inspection during a visit

Official visitors are generally required to seek an entitled person's consent to access their records (including health records). An official visitor may inspect a record if the official visitor has the person's written consent. An official visitor may also inspect a record if the person has given oral consent, provided that a written record of the consent has been made by a person who heard the consent being given. Consent must be voluntary and informed, and the entitled person must understand what they are agreeing to.

### Accessing records without consent

Records may only be accessed without consent in very limited circumstances.

#### *Seeking consent*

The official visitor must take reasonable steps to find out if the entitled person consents. This would usually require the official visitor to meet and ask the entitled person for consent to inspect their records.

The official visitor should ensure that any special communication needs of the person are accommodated, for example if the official visitor is aware of any technology or supports that the person uses to communicate, the official visitor must ensure that these are utilised.

A young person under 18 may be able to consent to the inspection of their own records, depending on their level of maturity and understanding of the decision. This must be assessed on an individual basis as there is no fixed age limit for this decision.

To inspect records without consent the official visitor must form a reasonable belief that the entitled person may not be able to make a decision about consent or communicate that decision.

If the person objects to the records inspected, the official visitor must not inspect records, even if there is doubt about the person's capacity to consent. The official visitor cannot override the entitled person's expressed wishes objecting to inspection, whether or not the entitled person has formal capacity to consent.

The official visitor must also reasonably believe that access to the record is necessary and appropriate to allow the official visitor to exercise their functions under the Act.

#### *Additional requirements*

If the official visitor accesses a record without consent, additional requirements apply. The official visitor must make reasonable attempts to let the entitled person know that the records have been accessed without consent. What is reasonable is a matter for the judgement of the official visitor and depends on the circumstances of the person. This could be done by talking with the person afterwards or writing to the person if this is practicable, particularly where a person may have fluctuating capacity and may later be in a position to understand that their records have been accessed.

The visitable place must keep a record of each time the official visitor accesses a record without consent. There is no prescribed form for this record, and this could be in the form of a notation made by the official visitor in a record book, or through electronic systems which create an audit trail when a record is accessed.

The official visitor's quarterly report must also disclose the number of times that the official visitor used this power to inspect the records without consent.

#### *Health Records*

If the records to be accessed are health records under the *Health Records (Privacy and Access) Act 1997* then the record holder must comply with the privacy principles under that Act regarding disclosure. Provided that the requirements of the Official Visitor Act and these guidelines are complied with this will satisfy the requirement that the disclosure to the official visitor is allowed under a law of the Territory.

If the official visitor takes any copies or notes of health records, they will also need to comply with the privacy principles and give appropriate protection to these records.

Where an advanced care directive has been made by an entitled person setting out their wishes regarding access to their health records, this directive should be followed by the official visitor.

#### *Sensitive information under the Children and Young People Act*

The official visitor cannot inspect records without consent that are classed as 'sensitive information' under section 845 of the *Children and Young People Act 2008*.

Sensitive information means

- care and protection report information;
- care and protection appraisal information;
- interstate care and protection information;
- family group conference information; and
- contravention report information.

In these circumstances, records may only be inspected with the consent of the young person if they have sufficient maturity to consent, or with the consent of a person with parental responsibility for the child or young person.

Access to sensitive information for official visitors is dealt with under section 39 of that Act. That section provides that where an official visitor intends to ask the operating entity for sensitive information in relation to a complaint, that before asking, the official visitor must consider whether the complaint would be better dealt with by, and should be referred to an investigative entity, for example the Human Rights Commission, which can take complaints about services for children and young people and can compel the production of information.

## 12. Complaints

Section 22 of the *Official Visitor Act 2012* states that an entitled person or anyone else may make a complaint to the official visitor personally or through someone else about any aspect of the person's accommodation including:

- the conditions of accommodation of an entitled person;
- the care or services provided to an entitled person at a visitable place;
- the activities available to an entitled person at a visitable place; or
- how a visitable place is conducted.

The entitled person may ask to make a complaint to the official visitor with no one else present or may ask to make a complaint to an official visitor of the same gender. If the official visitor agrees that the complaint may be made with only the entitled person present, the operating entity must provide reasonably private facilities for the complaint to be made.

An entitled person or someone acting on their behalf may make a request to meet or make a complaint through another person, including an operating entity, or directly to an official visitor.

### Referral of complaints to another entity

If the official visitor has received a complaint and considers the complaint would be better dealt with by an investigative entity (e.g. police, Public Advocate, Human Rights Commission, Ombudsman) with the power to investigate the complaint, the official visitor may refer the complaint to the investigative entity.

If a referral to an investigative entity has been made by the official visitor, the official visitor must:

- give the investigative entity all information concerning the complaint;
- advise the complainant of the referral;
- seek written consent for the referral from the complainant; and
- close the complaint.

### Frivolous, Vexatious or Dishonest Complaints

If the official visitor receives a complaint and, after due consideration, is satisfied the complaint is frivolous, vexatious or not made honestly, the official visitor may close the complaint. Where reasonable, the official visitor should advise the complainant.

### Non-compliance of a visitable place

Section 16 of the *Official Visitor Act 2012* states that a visitable place may be considered non-compliant if the official visitor believes on reasonable grounds that any of the following is not in accordance with the Operational Act:

- the care and other services provided to an entitled person at a visitable place for the Operational Act;
- the living conditions and activities of an entitled person at the visitable place; and
- if an entitled person for the Operational Act is detained under that Act at the visitable place – the detention of the person at the place

(including any aspect of the treatment, living conditions, work or activities of the detainee).

If after a visit, an official visitor believes the place is non-compliant, the official visitor must report the belief to the operational Minister and may report the belief to:

- the relevant Director-General;
- the Public Advocate;
- the official visitors board; or
- the senior practitioner for the elimination and reduction of restrictive practices.

An Operational Act may prescribe other reporting requirements for the Operational Act.

### Resolving complaints

When seeking to resolve a complaint, an official visitor may seek approval from the operating entity for an agreed action plan to resolve the issues of the complaint. This would include relevant information sharing, timeliness of response and agreed actions to address issues raised in a complaint. Initial inquiries made by an official visitor about a complaint should be undertaken with the operating entity.

If the official visitor is not satisfied with the response to a complaint by the operating entity (including timeliness, actions taken, etc), the official visitor may contact the head of service of the operating entity to consider how best to resolve the issue prior to escalation through to the operational Minister.

### Closing complaints

If the official visitor is satisfied the complaint is resolved with the operating entity to the satisfaction of the complainant, the official visitor must close the complaint. The official visitor must advise the complainant that the complaint has been closed and the reasons for the closure.

### Withdrawal of a complaint

A complainant may withdraw a complaint at any time by giving the official visitor written notice. The official visitor or a member of staff of the visitable place may assist a complainant, with their consent, to make a written request to withdraw their complaint. Other written forms of communication may also be used. The form must be signed by the complainant.

The official visitor must close the withdrawn complaint if satisfied the complaint:

- is about a minor issue;
- has been resolved appropriately; or
- has lapsed (the person has left the place and the complaint is no longer relevant).

If the official visitor considers it is in the public interest that a withdrawn complaint be considered, the official visitor must:

- refer the complaint to the Human Rights Commission or other investigating entity and provide all information about the complaint to the entity for consideration;
- close the complaint; and
- tell the complainant about the referral and the closing of the complaint.

In such instances, the official visitor may ask the entity investigating the complaint about the investigation of the complaint. The entity should advise the official visitor about the investigation of the complaint and the official visitor may advise the complainant about the progress of the investigation.

If the official visitor has received a complaint from an entitled person concerning a visitable place and that entitled person no longer resides at the visitable place, the complaint can only be closed if:

- the official visitor is satisfied the substance of the complaint has been addressed; or
- after reasonable inquiries have been made to contact the complainant, the official visitor is not able to gain enough information regarding the complaint to undertake a proper review.

Reasonable inquiries may include attempts to contact the complainant by telephone or at their residential premises. The official visitor may request details from the operating entity to enable such inquiries to be made.

### Reopening complaints

Where the official visitor is not satisfied that an operating entity has fully complied with an action or undertaking agreed to in the closing of an original complaint, the official visitor may re-open the complaint. In doing so, the official visitor must try to resolve the complaint by taking all reasonable steps to promptly and efficiently resolve the complaint with the operating entity. In addition, the official visitor should promptly advise the person in charge of the operating entity in writing of this decision.

The official visitor may resolve the complaint by:

- making inquiries about any matter raised in the complaint; and
- exercising any function given to an official visitor under the relevant legislation.

Before asking for assistance that may involve sensitive information, the official visitor must consider whether the complaint would be better dealt with by, and should be referred to, an investigating entity.

## **13. Reporting**

### Quarterly reporting

The official visitor must prepare a written report for each quarter. This report summarises:

- the number and kinds of complaints received by the official visitor in relation to the place;

- the action taken on the complaints received;
- the number and kinds of matters referred by the official visitor to an investigative entity; and
- any systemic issues identified by the official visitor.

The report must also include the number of times the official visitor used the power to inspect records without the consent of the entitled person.

The official visitor must give a copy of the full report, as soon as practicable after the end of each quarter, to the operational Minister. If the official visitor makes a recommendation in relation to the administrative unit which is responsible for administering the Operational Act for a visitable place, the official visitor must also give a copy of the report to the relevant Director-General.

The official visitor must also prepare a report summarising the matters in the full report (a summary report). As soon as practicable after the end of each quarter, the official visitor must give the summary report to the Minister, the official visitors board and the EO.

The official visitor may give a copy of the report to the relevant Director-General for the visitable place or to the public advocate. If the report includes matters in relation to an administrative unit or Operational Act where another Minister is responsible, the official visitor may provide a copy of the report to the other Minister.

Information that identifies an entitled person at the visitable place must not be included in a report to the Minister. For any other report, the identifying information must only be included in the report if the official visitor considers it necessary to deal with a complaint mentioned or issue raised in the report.

#### End of financial year reporting

The Official Visitor Board must give the Minister, within three months after the end of a financial year, a written report for the financial year.

The report must include the following information:

- the number of visits by official visitors;
- the number of complaints received by official visitors;
- the number of referrals of complaints to investigative entities;
- the action taken on the complaints received;
- any systemic issues in relation to the operation of the Act identified by the board;
- the number and kinds of matters referred by the official visitor to an investigative entity; and
- the number of times the official visitor inspected records without the consent of the entitled person in accordance with section 15(2)(b).

The Minister must present the report to the Legislative Assembly within 6 sitting days after being given a copy of the report by the board. The Minister must also give additional public notice of the report.