

**2017**

**THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY**

**REVISED EXPLANATORY STATEMENT**

**MONITORING PLACES OF DETENTION (OPTIONAL PROTOCOL TO THE CONVENTION  
AGAINST TORTURE) BILL 2017**

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## **Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2017**

### **Outline**

In 2002, the United Nations adopted the Optional Protocol to the Convention Against Torture (OPCAT) with the aim of ‘establishing a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’ (article 1, OPCAT).

On 8 June 2011, the Australian Government accepted six recommendations from the United Nations Human Rights Council’s Universal Periodic Review of Australia’s human rights performance, which urged Australia to ratify OPCAT.

In April 2012, the Standing Council on Law and Justice agreed to ‘work towards ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, in particular, to prioritise the preparation of jurisdictional legislation to provide for visits to Australia by the United Nations Subcommittee on Prevention of Torture.’

On 21 June 2012, the Australian Parliament Joint Standing Committee on Treaties tabled its review of OPCAT recommending that Australia take ‘binding treaty action’ (recommendation 6); and that the Australian Government work with the states and territories to implement a national preventative mechanism fully compliant with the OPCAT as quickly as possible on ratification.

Once ratified, Australia’s immediate obligation under OPCAT will be to allow the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the subcommittee) to conduct periodic visits to places of detention in Australia.

The purpose of this Bill is to establish the necessary legislative arrangements for the subcommittee to inspect places of detention in the ACT, following Australia’s ratification of OPCAT.

The Bill is based on a national model bill developed in collaboration with all States and Territories during 2012. The format of the national model bill has been modified to reflect local drafting practices.

In summary, the Bill:

- a) defines ‘places of detention’ for the purpose of subcommittee visits
- b) sets out the relationship between the Bill and other laws in the Territory
- c) provides for arrangements for subcommittee visits, including establishment of Ministerial arrangements for the purpose of facilitating subcommittee visits
- d) sets out the duties of detaining authorities and the responsible Minister
- e) provides for the subcommittee to access places of detention, access information and interview detainees and other people
- f) protects against action for giving information and against reprisal for disclosing information.

The operation of this Bill needs to be considered in conjunction with the provisions in [OPCAT](#) together with the [Guidelines of the Subcommittee on visits to States](#) and the subcommittee’s [Outline of a regular SPT visit](#), which provide clarity about the conduct of the subcommittee during visits.

## **Human Rights issues**

This Bill engages a number of rights protected under the *Human Rights Act 2004*. It supports section 10 – protection from torture, inhuman or degrading treatment; and section 19 – humane treatment when deprived of liberty, in particular section 19 (1). It may limit section 12 – right to privacy and reputation.

### **Section 10 – Protection from torture and cruel, inhuman or degrading treatment etc**

This Bill **supports** section 10 of the *Human Rights Act 2004*, the right to protection from torture and cruel, inhuman or degrading treatment:

#### **10 Protection from torture and cruel, inhuman or degrading treatment etc**

- (1) No-one may be—
  - (a) tortured
  - (b) treated or punished in a cruel, inhuman or degrading way.
- (2) No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

Section 10 is based on article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and is consistent with article 5 of the *Universal Declaration of Human Rights*. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was developed having regard to these two articles<sup>1</sup>.

The objective of OPCAT is to ‘establish a system of regular visits undertaken by independent and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’<sup>2</sup>.

This Bill establishes the ACT legislative framework to allow visits by the subcommittee to places of detention in the ACT, which is the immediate obligation under OPCAT, once ratified by Australia.

### **Section 19 – Humane treatment when deprived of liberty**

#### **19 Humane treatment when deprived of liberty**

- (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

The UN *General comment no. 21* on article 10 of the ICCPR, on which the right is based, recognises that this right applies to anyone deprived of liberty under the authority of local laws, including in correctional institutions and psychiatric hospitals<sup>3</sup>. The *General comment* identifies that this right imposes a positive obligation on the jurisdiction towards people who are ‘particularly vulnerable because of their status as persons deprived of liberty, and complements ... the ban on torture or other cruel inhuman or degrading treatment or punishment ...’ (para 4).

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<sup>1</sup> [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, ratified by Australia 8 August 1989.

<sup>2</sup> [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

<sup>3</sup> United Nations, Office of the High Commissioner for Human Rights, [General Comment No. 2:1 Replaces general comment 9 concerning humane treatment of persons deprived of liberty \(Art. 10\):10/04/1992](#).

By establishing an ACT legislative framework to allow visits by the subcommittee after ratification, this Bill establishes one of the mechanisms through which the ACT will meet its positive obligations under this right.

## Section 12 – Right to privacy and reputation

### **12 Privacy and reputation**

Everyone has the right –

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

Clauses 11 to 14 and 16 may limit an individual’s right to privacy.

The right to privacy is relative and may be limited to the extent necessary, reasonable and proportionate to achieve a demonstrated and justifiable purpose (UN Human Rights Committee, General Comment 16). Such limits must not be ‘unlawful’ or ‘arbitrary’. This means that interferences must only be authorised by precise and circumscribed law (including clear and relevant criteria) and must not give overly broad or unnecessary discretion to authorities.

Clauses 11 and 12 provide that, if the subcommittee requests access to a place of detention, the Minister and detaining authority must ensure that the subcommittee and any accompanying experts or assistants are given unrestricted access to every part of the place of detention for the purpose of exercising their functions under OPCAT. This access is limited where there are ‘urgent or compelling grounds of national defence, public safety, natural disaster or serious disorder.’ A detaining authority may also limit access where the Territory has requested that an objection be made or where the Commonwealth Attorney-General has made an objection and that request has not yet been resolved.

Clause 13 provides for the subcommittee to access all relevant information for evaluating the needs and measures to strengthen, if necessary, protection of detainees against torture and other cruel, inhuman or degrading treatment or punishment.

The purpose of this limitation is to ensure that the subcommittee is able to undertake its mandate to ‘prevent torture and other cruel, inhuman or degrading treatment of punishment and to strengthen the protection of persons deprived of their liberty against torture and other forms of ill-treatment’<sup>4</sup>. Without the required level of access to places of detention and relevant information, the subcommittee would not be able to effectively carry out its role.

The limitations on privacy are minimised in a number of ways through the Bill and through the subcommittee’s guidelines. In particular, the right of access to information about detainees’ treatment and conditions of detention is subject to compliance with applicable privacy laws, including the *Information Privacy Act 2014* and *Health Records (Privacy and Access) Act 1997*. This means that, in the majority of cases, the Minister or detaining authority will need to obtain consent from detainees or other affected individuals to grant the Subcommittee access to relevant personal information.

Generally, the subcommittee ‘carries out [its] visit according to the principle of co-operation and maintains strict confidentiality concerning its work and findings’<sup>5</sup>.

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<sup>4</sup> [Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment](#), guideline 1.

<sup>5</sup> [Outline of a regular SPT visit](#)

As outlined above, the Commonwealth Attorney-General is able to object to visits to a requested place of detention on certain grounds and the ACT is able to request that the Commonwealth Attorney-General lodge such an objection (clause 12 (3) and (4)). The subcommittee has no coercive powers to enforce compliance with any of its requests.

The Bill clearly limits the scope of the information that must be provided to the subcommittee to 'relevant information ... for evaluating the needs and measures that should be adopted to strengthen, if necessary, the protection of people deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment' (clause 13).

The subcommittee's guidelines contain a number of guidelines about access to information and the manner in which the subcommittee is to deal with information. Guideline 5 provides that as a general rule, the Subcommittee considers that photo documentation from places of detention is unnecessary and does not use this modality. If, in exceptional circumstances, this is regarded as essential express acceptance must be gained from the head of the delegation<sup>6</sup>.

Guidelines 5.23 and 5.26 provide that the guiding principle for the subcommittee is to highlight generic and systemic issues, rather than individual issues. The subcommittee may only 'address the State party about individual cases, if it deems it necessary in order ... to avoid irreparable damage to the person(s) concerned' and then only with the consent of the individual concerned<sup>7</sup>.

Part III of the guidelines clearly sets out the subcommittee's confidentiality obligations, including that information gathered by the subcommittee is and must remain confidential and that no personal data is to be published without the express consent of the person concerned. Members of the subcommittee, experts and other people accompanying the subcommittee have an express obligation to uphold confidentiality in relation to any information that they become aware of while carrying out their duty<sup>8</sup>.

The purpose of the Bill is to facilitate visits of the subcommittee with the aim of preventing torture and other forms of ill treatment and making systemic recommendations to strengthen the protection of detainees. This necessarily involves striking a balance between the right to privacy and ensuring that a detainee is protected from torture and other cruel, inhuman or degrading treatment or punishment. In view of the purpose of this Bill, any limitations on the right to privacy are the least restrictive available to achieve this purpose.

The offence in Clause 16 limits the Government's ability to take disciplinary action against a person who contravenes an ACT privacy law by disclosing personal information to the Subcommittee. This clause seeks to address the obligation in Article 15 of the OPCAT that obliges the ACT Government to protect any person who provides information to the Subcommittee from any sanction or prejudice. Strong protection from reprisals encourages detainees and staff in ACT places of detention to report issues or abuse to the Subcommittee without fear of adverse consequences.

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<sup>6</sup> [Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment](#), guideline 5, para 22.

<sup>7</sup> [Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment](#) guideline 5, paras 24 and 26

<sup>8</sup> [Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment](#), part III, guideline 10

To the extent that this clause limits an individual’s right to privacy under section 12 of the Human Rights Act 2004 it is proportionate and justifiable. For serious breaches of privacy, clause 15 of the Bill preserves the Director of Public Prosecutions’ independent discretion to prosecute officials for recklessly using or disclosing personal information protected under ACT Privacy Laws.

### **Notes on Clauses**

#### **Clause 1      Name of Act**

Clause 1 is a formal provision that sets out the name of the proposed legislation.

#### **Clause 2      Commencement**

Clause 2 explains that the provisions in the Bill will commence on a day to be fixed by the Minister by written notice, but that the commencement date must be at least 30 days after the day the Commonwealth deposits the instrument that ratifies OPCAT with the United Nations Secretary.

This provision ensures that the necessary formal recognition of obligations at a national level is in place before the ACT becomes bound to the provisions of the Act. The Legislation Act, s 79 provides a default commencement for Acts expressed to commence on notice by the Minister that have not commenced within six months. As this Bill is dependent on ratification by the Commonwealth, it is not appropriate for this default commencement to apply, and it is expressly disapplied.

#### **Clause 3      Dictionary**

Clause 3 states that the dictionary at the end of the Act is part of the Act.

#### **Clause 4      Notes**

Clause 4 provides that a note included in the Act is explanatory only and not part of the Act.

#### **Clause 5      Offences against the Act – application of the Criminal Code etc**

Clause 5 provides that other legislation applies in relation to offences against the Act.

#### **Clause 6      Meaning of *detaining authority***

Clause 6 (1) defines the meaning of ‘detaining authority’, necessary to determine the scope of obligations under the Act.

Clause 6 (2) extends the definition of ‘detaining authority’ to include an entity engaged for or on behalf of a detaining authority to provide services under contract on behalf of the authority. This provision is necessary to cover places of detention such as contracted services to transport detainees.

#### **Clause 7      Meaning of *place of detention***

Clause 7 (1) defines the scope of the term ‘place of detention’ by reference to article 4 of OPCAT, under which the Territory must allow the subcommittee to visit ‘any place under its jurisdiction and control where persons are or may be deprived of their liberty.’

Article 4 (2) of OPCAT defines ‘deprivation of liberty’ as ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority’.

## **Clause 8 Relationship to other laws**

Clause 8 provides that other Territory laws that prevent or limit the exercise of any function of the subcommittee have no effect to the extent of any inconsistency. Defined ACT laws that protect individual privacy are not affected by this provision and will still apply.

The purpose of this clause is to ensure that the subcommittee’s mandate under OPCAT is not limited by Territory laws that are inconsistent with this Act, except those that protect an individual’s right to privacy under ACT privacy laws.

This section is not expressed, and does not intend, to limit future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and the Assembly could make another law that overrides this law if necessary.

## **Part 2 Visits by subcommittee**

### **Clause 9 Object – pt 2**

Clause 9 states that the object of this part is to enable the subcommittee to fulfil its mandate under article 11 (1) (a) of OPCAT as it relates to places of detention. Article 11 sets out the subcommittee’s mandate to visit places of detention and ‘make recommendations ... concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman, degrading treatment or punishment.’

### **Clause 10 Ministerial arrangements**

Clause 10 allows the Minister to enter into Ministerial arrangements with the Commonwealth Attorney-General to support the subcommittee to exercise its functions within the ACT under the Act. In addition to allowing arrangements to be made for the subcommittee’s visits, this clause also seeks to ensure that the ACT retains responsibility and authority for the care, safety and security of the place of detention and detainees.

Clause 10 (2) lists matters about which a Ministerial arrangement may be made. This list is not exhaustive and does not limit clause 10 (1). The list includes matters relating to:

- a) the care, direction, control and management of detainees or other people within places of detention;
- b) the safety and security of places of detention;
- c) access to, and disclosure of, information;
- d) publication of information;
- e) the privacy of individuals or their rights to the confidentiality of personal information about them;
- f) the special needs of children and other vulnerable people;
- g) urgent and compelling risks to public health caused by outbreaks of infectious diseases.



Clause 10 (3) seeks to ensure that Ministerial arrangements are consistent with OPCAT and reasonably appropriate and adapted for implementing OPCAT.

Clause 10 (4) allows a detaining authority to exercise the functions under a Ministerial arrangement in order to give effect to OPCAT.

Clause 10 (5) allows the Minister to enter into arrangements with the Commonwealth in relation to places of detention and detainees under the control and jurisdiction of the Commonwealth.

#### **Clause 11 Duties of detaining authority and responsible Minister for places of detention**

Clause 11 provides that, if the subcommittee requests access to a place of detention, the responsible Minister and detaining authority must ensure that the subcommittee and any accompanying expert or assistant are given access and are able to exercise their functions in accordance with OPCAT. This clause also defines the term ‘assistant’ to mean a person appointed under Ministerial arrangements to assist the subcommittee.

This clause may limit section 12 of the *Human Rights Act 2004*, the right to privacy. As discussed above, any limitation is assessed as reasonable and the least restrictive to achieve the purpose of the limitation.

#### **Clause 12 Subcommittee’s access to places of detention**

Clause 12 provides that, if the subcommittee requests access to a place of detention, the responsible Minister and detaining authority must ensure that the subcommittee and any accompanying expert or assistant are given unrestricted access to every part of the place of detention.

However, the ability to access places of detention is limited in circumstances where there are ‘urgent or compelling grounds of national defence, public safety, natural disaster or serious disorder’, as set out in OPCAT article 14 (2). Clause 12 (3) provides that the detaining authority may prohibit or restrict access to a place of detention so that the Territory may request the Commonwealth Attorney-General to object to the visit and allow time for the Commonwealth Attorney-General to decide whether or not to object.

Clause 12 (4) also allows a detaining authority to prohibit or restrict access if an objection has been made by the Commonwealth Attorney-General and the objection has not yet been removed or otherwise resolved.

This clause may limit section 12 of the *Human Rights Act 2004*, the right to privacy. As discussed above, any limitation is assessed as reasonable and the least restrictive to achieve the purpose of the limitation.

#### **Clause 13 Access to information**

Clause 13 provides that if the subcommittee requests access to a place of detention, the responsible Minister and detaining authority must provide all relevant information requested by the subcommittee for evaluating the needs and measures to strengthen, if necessary, protection of detainees against torture and other cruel, inhuman or degrading treatment or punishment.

The information requested must only be given to member of the subcommittee and any accompanying experts, not to ‘assistants’.

The information to be provided in relation to the place of detention on request includes the number of detainees, the treatment of detainees and conditions of detention in that place.

An Act or other law that restricts or denies access to records will not prevent the Minister from providing that information, except insofar as an ACT privacy law applies.

This clause engages section 12 of the *Human Rights Act 2004*, the right to privacy. On the rare occasions that the subcommittee requests personal information, ACT privacy laws will continue to apply. This means the Minister or detaining authority will still need to seek an individual's consent to disclose that information.

As discussed above, any limitation is assessed as reasonable and the least restrictive to achieve the purpose of the limitation.

This clause provides that a provision of any Act or other law, other than an ACT privacy law, that restricts or denies access to records does not prevent the responsible Minister or detaining authority from complying with this section. This clause is not expressed, and does not intend, to limit future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and the Assembly could make another law that overrides this law if necessary.

#### **Clause 14 Subcommittee may interview detainees and other people**

Clause 14 provides that if the subcommittee requests access to a place of detention, the responsible Minister or detainee authority must ensure that the subcommittee and any accompanying expert are given reasonable assistance to interview any detainee or other person at the place of detention, as chosen by the subcommittee, without witnesses.

In addition, the responsible Minister must give the subcommittee reasonable assistance to interview anyone the subcommittee believes may be able to assist with relevant information about the place of detention, the treatment of detainees at that place or the conditions of detention.

The requirement that a person be interviewed without any witnesses is to ensure that interviewees have an opportunity to provide information to the subcommittee without fear of reprisal or any undue pressure from a representative of the detaining authority being present. It does not preclude the subcommittee from interviewing a person through an interpreter.

In addition, clause 14 (4) specifically allows a support person nominated by the interviewee to be present at the interviewee's request and with the agreement of the subcommittee. A person who objects or does not consent is not required to participate in an interview with the subcommittee.

#### **Clause 15 Protection against actions etc**

Clause 15 protects a person from any civil or criminal action for giving information to the subcommittee when the subcommittee is performing its mandate under OPCAT. This protection applies despite any duty of secrecy or confidentiality. However, this section does not act to restrict the power of the Legislative Assembly to amend or repeal this section, or make another law overriding this section.

These protections will not apply to the extent that the person contravenes an ACT privacy law.

## **Clauses 16      Protection against reprisals**

Clause 16 (1) provides that it is an offence for a person to intentionally take detrimental action against another person because the other person has given or disclosed information to the subcommittee, or if they believe that the other person has given or disclosed information to the subcommittee. This provision applies whether the detrimental action was taken wholly or partially because the other person gave, or was believed to have given, information to the subcommittee.

Clause 16 (2) extends the application of the offence clause 16 (1) to a detaining authority who engages in conduct that would constitute an offence under that clause and provides for disciplinary action against the detaining authority.

Clause 16 (3) defines what is meant by the term 'detrimental action'.

## **Part 3            Miscellaneous**

### **Clause 17      Directions of responsible Minister**

Clause 17 provides that the responsible Minister for a place of detention may give directions for the purpose of the Act and that the detaining authority must comply with those directions. Any direction given under this section is a notifiable instrument.

### **Clause 17      Regulation-making power**

Clause 17 provides that the Executive may make regulations for the Act.

### **Dictionary**

The dictionary contains definitions for terms used in the Act.