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

DISABILITY SERVICES AMENDMENT BILL 2018

EXPLANATORY STATEMENT

**Presented by
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INTRODUCTION

This explanatory statement relates to the *Disability Services Amendment Bill 2018* (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

BACKGROUND

The *Disability Services Act 1991* (the Act) in conjunction with the *Official Visitor Act 2012* describes the functions of the Official Visitor for Disability Services (Official Visitor). The Act gives a definition of a “visitable place”, requires the Director-General, Community Services Directorate (CSD), to keep a register of places approved as disability accommodation and requires the Official Visitor to give 24 hours written notice before visiting a “visitable place”.

These parts of the Act are no longer relevant to support for the Official Visitor to carry out their duties; largely due to the transition of services under the National Disability Insurance Scheme (NDIS) in the ACT. With the introduction of the NDIS, the relationship between the ACT Government and disability service providers has changed. As a result, the current definition of a “visitable place” does not reflect all the types of disability accommodation that should be visited by the Official Visitor. Additionally, because disability accommodation services are no longer funded or approved by the ACT Government, the information required to keep the register is not readily available to the Director-General, CSD.

The 24 hour written notice requirement is an unnecessarily cumbersome impediment to the Official Visitor performing their duties efficiently, when a telephone or email discussion with a shorter timeframe may be more useful in facilitating access. There is no intention that visits would be made without prior arrangement, other than in the case of a complaint where the Official Visitor holds concerns that an entitled person may be at risk of harm.

OVERVIEW OF THE BILL

The Bill makes three changes to the Act to address these issues.

Firstly, it changes the meaning of a “visitable place” to mean accommodation provided to a person with disability for respite or long-term residential purposes and

includes accommodation that is owned, rented or operated by a specialist disability service provider, accommodation at which a specialist disability service provides services, and a residential aged care facility that accommodates people with a disability.

Secondly, the Bill requires disability accommodation providers to report information to the Director-General, CSD information for the purpose of keeping the register of “visitable places”.

Thirdly, the Bill removes the requirement for the Official Visitor to give 24 hours written notice to a visitable place before visiting.

HUMAN RIGHTS IMPLICATIONS

During the Bill’s development due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

The measures introduced in the Bill support the Government’s commitment to the Official Visitor Scheme by giving the Official Visitor for Disability Services better access to monitor and investigate the welfare of potentially vulnerable persons in disability accommodation. In introducing these measures, the rights of people who may have an expectation of privacy in their own home must be balanced with the protection of vulnerable people in the Canberra community.

This Bill engages a number of rights protected under the HRA, it:

- supports section 10 – protection from torture, inhuman or degrading treatment and section 11 – protection of the family and children
- 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 HRA, the right to protection from torture and cruel, inhuman or degrading treatment.

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* (UNCAT) was developed having regard to these two articles¹.

This Bill supports the Official Visitor for Disability Services to safeguard the rights and dignity of vulnerable people by attending visitable places, talking to entitled

¹ [*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.

persons, inspecting records and providing regular reports to government on the standards of the facilities they visit.

Section 11 – Protection of the family and children

This Bill **supports** sections 11 of the HRA, the right to protection of the family and children.

The Bill supports the ACT to meet its positive obligation under this right. It does so by supporting the Official Visitor for Disability Services to monitor and investigate the welfare of individuals with a disability, as well as ensure that people with a disability, and their loved ones, are able to raise concerns about the services they receive.

A private home is precluded from the definition of a visitable place where a person with disability lives with one or more family members or specialist disability services are provided by non-specialist disability service providers, usually close family members (see clause 4 (8B) of the Bill).

Section 12 – Right to privacy and reputation

Clause 4 (8D) of the Bill **may limit** an individual's right to privacy. This is because it provides that if the Official Visitor believes on reasonable grounds that an entitled person is at risk of harm, the Official Visitor may visit a place that is not a visitable place without giving notice.

There may also be impacts in broadening the definition of a visitable place to include accommodation provided to an entitled person for respite or long-term residential purposes, where a specialist disability service is also provided. Due to changes in the service environment, a situation may now occur where a property is tenanted by a person with a disability who receives support services at the property. In this type of arrangement, a service provider can potentially own the property and be responsible for providing all services to that person, potentially leading to whole of life control over a person, who may experience any number of barriers to seeking external support and advocacy if required.

Currently, the Official Visitor can only visit persons within this type of accommodation if a complaint is filed. The Bill will enable the Official Visitor to conduct visits on their own initiative. It is important the Official Visitor is able to conduct visits on their own initiative to protect people in this type of accommodation, who may be unable to file a complaint because of their disability. Allowing the Official Visitor to conduct a visit on their own initiative may limit the right to privacy. As persons with a disability will not have requested a visit from the Official Visitor, they may have less notice that a visit to their home is occurring.

In recognition of this, a provision has been added at 8(C)(1) to allow an entitled person (a person with a disability) to notify the Official Visitor that they do not wish to be visited. The Official Visitor must comply with this request, and can only subsequently visit with the entitled person's consent (s 8(D)(3)(a)). The *Official*

Visitor Act 2012 also has a requirement at s 14(1)(C) that an Official Visitor must be sensitive to the wishes of an entitled person when conducting a visit. This gives the entitled person further control over if, and how, the Official Visitor conducts a visit – which protects their right to privacy.

Furthermore, Clause 4 (8E) of the Bill allows the Director-General, CSD to give protected information to a range of specified persons. It is appropriate and necessary that the Director-General, CSD may give protected information to a range of entities as deemed necessary. For example, during severe or catastrophic fire danger periods, information about visitable places has been provided to emergency services organisations.

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 necessary criteria) and must not give overly broad or unnecessary discretion to authorities.

In order to safeguard the rights and dignity of vulnerable people with disability, a proactive visiting schedule is required. This acts as a more effective prevention measure than simply responding to allegations of harm once they have occurred. It is also important that the Official Visitor can respond flexibly to circumstances where there appears to be an imminent risk of harm to a vulnerable person. Without the required level of access to places where specialist disability services are provided, the Official Visitor will not be able to effectively carry out their role.

CLAUSE NOTES

Clause 1 Name of Act

This clause is a formal provision setting out the name of the new Act as the *Disability Services Amendment Act 2018*.

Clause 2 Commencement

This clause provides that the Act will commence on the day after its notification.

Clause 3 Legislation amended

This clause specifies that this Act amends the *Disability Services Act 1991*.

Clause 4 Parts 3 and 4

This clause updates Part 3 - Official Visitors and removes Part 4 - Disability accommodation.

Part 3 defines an entitled person and a visitable place for the *Official Visitor (OV) Act 2012* and prescribes other matters for the OV Act.

Section 8A provides definitions for providers associated with a visitable place, an entitled person, official visitor and operating entity.

A definition of 'associated' is included to capture specialist disability service providers that are associated with visitable places for the purpose of reporting requirements specified under Section 8F. This is in recognition that 'disability accommodation' as a definition of visitable place has become redundant due to the NDIS service funding environment.

Section 8B defines a visitable place as:

- (a) accommodation provided to a person with disability for respite or long-term residential purposes; and
- (b) includes –
 - i. accommodation that is owned, rented or operated by a specialist disability service provider; or
 - ii. accommodation at which a specialist disability service provider provides a specialist disability service; and
 - iii. a residential aged care facility that accommodates a person with disability.

This definition is intended to reflect all types of disability accommodation that ought to be captured by the Official Visitor Scheme, including younger people with a disability in Commonwealth-funded residential aged care. The definition also includes people who have been provided accommodation and are reliant on disability services for support. This is to remove the potential for service providers to exercise whole of life control, for example, in a situation where they may act as both tenancy manager and service provider.

Section 8B (2) precludes private homes where the person is receiving a specialist disability service from someone who is not a specialist disability service provider, for example, a friend or relative. It also precludes a private home where with disability lives with one or more family members, or any accommodation declared by the Minister to be a type of service that does not require visitation.

Section 8B (3) clarifies that a declaration for subsection 2(c) is a disallowable instrument.

Section 8B (4) defines family member.

Section 8C states that an entitled person may ask, in writing, Official Visitor not to visit. It further prohibits a visit from the Official Visitor on receipt of the request.

Section 8D expands the example of a place other than a visitable place for the purpose of an entitled person making a complaint to an Official Visitor. The previous example, 'a private home', is now partly covered under the previous clause; that being where a specialist disability service provider is providing services.

The example under Section 8D, now reads 'a private home where a specialist disability service is provided to a person with disability only by a close relative of the person'.

Section 8D allows an entitled person residing in a place, as precluded under Section 8B or 8C, to make a complaint to an Official Visitor under the *Official Visitor Act 2012, Section 22*.

Section 8D (3) stipulates that the Official Visitor can only visit a place that is not a visitable place with the entitled person's consent and with reasonable notice unless there is a reasonable belief that the entitled person is at risk of harm.

Section 8E (1) stipulates that the Director-General must keep a register of visitable places.

Section 8E (2) specifies that the Register must include the address of each visitable place, the names of those residing there and names and contact information for 1 or more employees or volunteers based at the address, as well as the names and contact information for at least two representatives of the specialist disability service provider associated with the address.

Section 8E (3) requires the Director-General to provide information on the Register to an Official Visitor and the Public Advocate.

Section 8E (4) states that the Director-General may give an address on the register to a member of the emergency services, under the *Emergency Services Act 2004*, a person with disability, or a carer or legal guardian or a person exercising a function under this act or anybody else approved by the Director-General if satisfied that giving the information is reasonable in the circumstances.

Section 8F (new) compels specialist disability service providers to give the Director-General the information required for the register no later than 5 business days of the information being current.

Clause 5 New Part 10

Clause 5 specifies transitional provisions for the Bill.

The transitional provisions are included to allow the arrangements around the register of approved disability accommodation to be transitioned to visitable places register.

The provisions make clear that the amendments apply from commencement day, but gives existing providers up to three months to provide the information required for the register.

Part 10 expires 6 months after commencement.

Clauses 6 to 10 amend the Dictionary as follows:

Dictionary, definition of *applicant*

Clause 6 inserts definition of a 'domestic partner'.

Clause 7 removes the definition of 'applicant' from the dictionary because it refers to a provider of services seeking approval from the Director-General, CSD for a disability accommodation. This process is now redundant.

Dictionary, new definition of *associated*

Clause 8 inserts the new definition of 'associated' to the dictionary. Specialist disability service providers that are considered associated with a visitable place are compelled to give the Director General information for the visitable places register under Section 8F.

Dictionary, definition of *disability accommodation*

Clause 9 removes the definition of 'disability accommodation' from the dictionary due to redundancy noted under Clause 7. The term disability accommodation is now replaced by visitable place.

Dictionary, definition of *entitled person, official visitor and operating entity*

Clause 10 substitutes the definitions of 'entitled person', 'official visitor' and 'operating entity' for the definitions now specified under Section 8A.

Dictionary, definition of *reviewable decision*

Clause 11 removes 'reviewable decision' in relation to approval of disability accommodation from the dictionary.

Dictionary, definition of *visitable place*

Clause 12 substitutes the definition of 'visitable place' for the definition now specified under Section 8B.