

Australian Capital Territory

Official Visitor Guidelines 2020

Disallowable instrument DI2020–259

made under the

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

EXPLANATORY STATEMENT

Introduction

Section 23F of the *Official Visitor Act 2012* (the Act) provides that the Minister may, after consulting the operational Minister for a visitable place, make guidelines about a range of matters including visits by an official visitor for the visitable place, and the inspection of records relating to entitled people at a visitable place by an official visitor for the place.

These Guidelines have been made following consultations with the operational Ministers for visitable places: the Minister for Children, Youth and Families, the Minister for Disability, and the Minister for Housing and Suburban Development. The Minister administering the Act is also the operational Minister for visitable places in the *Corrections Management Act 2007* and the *Mental Health Act 2015*.

These Guidelines consolidate and replace previous guidelines which regulated official visitors in particular operational areas. The Guidelines no longer include details of visitable places, which are instead required to be kept in a register, which must be made available to official visitors and others who have a need to access this information. This protects the privacy of entitled people.

These Guidelines also provide a more detailed regime for compliance with subsections 15 (2) and (3) of the *Official Visitor Act 2012* (the Act), relating to the inspection of records without consent in limited circumstances.

Human Rights

Powers to inspect records relating to an entitled person without engage and reasonably limit the right to privacy. These provisions were introduced to serve an important and legitimate purpose of safeguarding the welfare of entitled people in visitable places in situations where they are not able to

communicate or raise concerns about their treatment. This is particularly relevant in situations where entitled people have severe or profound intellectual disability, or are experiencing acute mental illness, and are not able to provide consent. In such circumstances it may be important for an official visitor to inspect records without consent to ensure that there are no systemic concerns and that entitled people are being treated appropriately.

The Act includes a range of safeguards around the exercise of this power, and the guidelines provide further detail and guidance about the effect of these provisions to ensure that any limitation on the right to privacy is proportionate and tightly constrained.

The Guidelines confirm that taking reasonable steps to seek the consent of a person would usually require the official visitor to meet and ask the entitled person for consent to inspect their records and to assess whether the person is able to communicate. The Guidelines require official visitors to 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.

The Guidelines confirm that 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.

Particular provisions of the guidelines apply where records are health records, and the guidelines confirm that the privacy principles under the *Health Records (Privacy and Access) Act 1997* will apply where an official visitor makes a copy of a health record.

The Guidelines also provide guidance about how official visitors can inform entitled people about the inspection of their records, particularly in situations where an entitled person may have fluctuating capacity and may later be able to understand that an inspection has occurred.

These provisions of the Guidelines have been carefully considered to ensure that the powers will be exercised in a way that is proportionate and consistent with the *Human Rights Act 2004*.

Detail

1. Purpose

This section sets out the purpose of the Guidelines which provide guidance on the visit processes and handling of complaints by official visitors appointed under the *Official Visitor Act 2012* and referred to in Operational Acts.

2. Legislative Framework

This section sets out the legislation making up the Official Visitor Scheme, which includes the *Official Visitor Act 2012* and Operational Acts being the:

- *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

This section sets out the intent of the Guidelines. It confirms that 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

This section sets out the functions of official visitors and the principles that guide their conduct as set out in the *Official Visitor Act 2012*.

5. Entitled Persons

This section sets out the different definitions of ‘entitled persons’ which are specific to particular operational areas and are drawn from the Operational Acts.

6. Visitable places

This section sets out the definitions of visitable places which are drawn from the Operational Acts.

7. Register of Visitable Places

This section provides details about what must be included in the Register kept by the relevant Director-General for an Operational Act under section 23 of the *Official Visitor Act 2012*.

This section also clarifies how places that are visitable places under more than one Operational Act may be visited, to avoid duplication of visits and how reports should be made by official visitors in these circumstances.

It provides that 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, the Guidelines provide that arrangements may be made by official visitors, in consultation with the Official Visitors Board (the Board) and operating entities, to ensure effective use of resources and avoid unnecessary duplication of visits.

8. Assistance to Official Visitors

This section sets out the ways in which official visitors appointed in relation to one Operational Act may visit visitable places under another Operational Act. It also sets out the assistance that must be provided by a visitable place to the Official Visitor.

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.

This section provides further guidance for official visitors about determining what is a 'reasonable time' to visit. It provides particular guidance on the way in which visits may be conducted, other than through a face to face visit, should this be necessary during an emergency situation.

This section provides guidance on the kind of assistance that may be provided by the Board in such situations.

This section also provides particular guidance regarding visits by the homelessness official visitor.

10. Obligations of an operating entity

This section sets out the obligations of operating entities who operate visitable places. These obligations are drawn from the *Official Visitor Act 2012* and the Operational Acts.

11. Record inspection during a visit

This section provides guidance regarding the way in which official visitors may exercise powers to inspect a record without the consent of an entitled person. It confirms that records may only be accessed without consent in very limited circumstances.

This section provides guidance on the process of seeking consent, and what is required to take reasonable steps to find out if the entitled person consents. It confirms that special communication needs must be accommodated. It notes that a young person under 18 may be able to provide consent, and notes that this must be assessed on an individual basis.

This section also provides guidance on the requirement for the official visitor to make reasonable attempts to let the entitled person know that the records have been accessed without consent, and the way in which a visitable place may keep a record of such access.

This section provides guidance on the operation of the *Health Records (Privacy and Access) Act 1997* where the record inspected is a health record.

It also provides guidance regarding records that are sensitive information under section 845 of the *Children and Young People Act 2008*.

12. Complaints

This section provides guidance on the circumstances in which a complaint can be made and investigated by an official visitor.

It provides guidance on the referral of complaints to other investigative bodies and on dealing with frivolous, vexatious or dishonest complaints. It provides detail of the process for resolving, withdrawing, closing and re-opening complaints.

This section also provides guidance on the range of reports that must be made if the official visitor believes a visitable place is non-compliant.

13. Reporting

This section provides guidance on the reporting requirements of the official visitors, board and Ministers.

It sets out the requirements for quarterly reports that must be prepared by the official visitors for the operational Minister, and summary reports to be provided to the Minister for the Official Visitor Scheme

It provides guidance on protecting privacy of eligible persons in reports.

This section also sets out requirements for the Annual Report which is to be provided by the Board to the Minister, and presented to the Assembly.