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

**TENTH ASSEMBLY**

**MONITORING OF PLACES OF DETENTION  
LEGISLATION AMENDMENT BILL 2024**

**REVISED EXPLANATORY STATEMENT**

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# Monitoring of Places of Detention Legislation Amendment Bill 2024

This Explanatory Statement relates to the Monitoring of Places of Detention Legislation Amendment Bill 2024 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to inform its 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. Provisions are not to be taken as an authoritative guide to the meaning of the provision, which is a task of court interpretation.

The Bill **is** a significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

## OVERVIEW OF THE BILL

The Bill has a dual purpose. Firstly, it fulfils the ACT's international human rights obligations under Part IV of the United Nations *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) by amending the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture Act 2018* (the Monitoring of Places of Detention Act) to provide for the establishment, functions and powers of the ACT National Preventive Mechanism (NPM). Secondly, it amends the *Inspector of Correctional Services Act 2017* (ICS Act) to improve the Office of the Inspector of Correctional Services and ensures effective management and oversight of places of detention in the ACT, following from a recent Government review of the ICS Act.

### National Preventative Mechanism amendments

OPCAT is an international human rights agreement designed to strengthen state compliance with existing international human rights law, including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Its focus is on protecting the rights of people deprived of their liberty in places of detention by preventing torture and other cruel, inhuman or degrading treatment or punishment. OPCAT aims to achieve its preventive objective by establishing mechanisms for proactive, independent oversight, recognising that torture and ill-treatment is more likely to occur in places closed to external scrutiny.

Australia signed the OPCAT on 19 May 2009 and ratified it on 21 December 2017.

The two mechanisms established under OPCAT are the UN Subcommittee for the Prevention of Torture (SPT or the subcommittee) and the National Preventive Mechanism (NPM). Both mechanisms hold visiting mandates, to independently examine places of detention within a state. Each entity exercises different but complementary functions.

As a human rights jurisdiction, the ACT has been a strong and consistent supporter of the OPCAT and introduced the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill in August 2017 in anticipation of Australia's ratification of OPCAT making provision for SPT visits.

The SPT is a standing entity established at the international level and mandated to visit places of detention within the jurisdiction and control of any OPCAT state party. Following a visit, the SPT makes recommendations to the state to improve the treatment of persons deprived of their liberty. States party to OPCAT are obligated to receive the SPT and grant it unfettered access to places of detention, provide it with certain information, and agree to engage cooperatively with the SPT during its visits.

NPMs are independent visiting bodies established at the domestic level and are intended to play a critical, complementary role in the prevention of torture and other cruel, inhuman or degrading treatment or punishment by being a permanent, regular presence within each state.

Under Article 17 of OPCAT, a State Party is required to set up, designate or maintain an NPM empowered to visit and independently monitor any place of detention under their jurisdiction and control. The visits are to be undertaken with a view to strengthening, if necessary, the protection of persons against torture and other cruel, inhuman or degrading treatment or punishment.

The NPM has four key functions: visiting, advisory, education, and cooperation. The way it exercises these functions is intended to be supportive, engaging in ongoing and constructive dialogue to improve the treatment of people deprived of their liberty over the long term. The NPM is proactive, rather than reactive to individual events and is not an investigative body. The mandate of an NPM differs from other bodies working against torture in its preventive approach, by seeking to identify patterns and deter systemic risks of torture, rather than investigating or adjudicating complaints concerning torture or ill-treatment. The NPM is intended to complement rather than replace existing systems of oversight.

The Australian Government has elected to adopt a multiple-body cooperative network model, in which multiple NPMs at the Commonwealth, state and territory level together meet Australia's obligations under OPCAT. The Australian Government has asked states and territories to designate their own NPM for oversight of places of detention within their relevant jurisdictions. The Commonwealth Ombudsman has been nominated by the Australian Government as the NPM Coordinator, being tasked with coordinating the Australian NPM Network.

On 20 January 2022, the ACT Attorney-General designated the Office of the Inspector of Correctional Services, the ACT Human Rights Commission and the ACT

Ombudsman as the ACT's NPM (the NPM).

In the establishment phase, the NPM is utilising the existing oversight powers of the three agencies to undertake visits and provide oversight for places of detention in the ACT. However, the SPT has provided guidance that domestic legislation is needed to incorporate the key OPCAT provisions on NPMs to set out their mandate, independence, powers, privileges, immunities and all other relevant details to ensure full compliance with OPCAT.

The Bill will amend the Monitoring of Places of Detention Act to give the NPM a clear mandate, expressly providing for its functions and powers in centralised legislation, to support the ACT's implementation of OPCAT.

The key features of the Bill are set out below.

#### *Establishment and designation of the NPM*

The amendments establish the NPM and provide that it is comprised of entities prescribed by regulation. Schedule 2 of the Bill is taken to be a regulation made under the Act, namely the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Regulation 2024 (the Regulations). The Regulations specify that the NPM is made up of the custodial inspector, the Human Rights Commission and the ombudsman.

The Bill also provides that if new NPM entities are to be prescribed, the Minister must give public notice of the proposed regulation, invite submissions about it and the Executive must consider any written submissions that are received.

#### *Independence and impartiality of the NPM*

Under Article 18.1 of OPCAT, the NPM must have functional independence and independence for its personnel. This requires that it is structurally independent, operationally independent and avoid conflicts of interest in its personnel. The Bill provides for the functional independence and impartiality of the NPM and its staff.

#### *Functions of the NPM*

The primary function of an NPM is the visiting function to carry out visits to places of detention. Under this function, an NPM is required to regularly examine the treatment of persons deprived of their liberty, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Article 19 of OPCAT.

The amendments provide that the functions of the NPM are to improve the treatment

and conditions of detainees in places of detention, and to strengthen the protection of detainees against torture and other cruel, inhuman or degrading treatment or punishment, by doing the following:

- examining the treatment of detainees in places of detention;
- making recommendations and observations to responsible entities for places of detention;
- submitting proposals and observations concerning existing or draft legislation that relates to detainees or places of detention.

The NPM also has any other function given to the NPM under the Act or another territory law.

### *Guidelines*

The Bill requires the NPM to develop and publish guidelines about how it will operate and perform its functions. This will include how it will conduct visits, how it will ensure that visits will respect the sensitivity or care required when carrying out an examination of the treatment of detainees or in a particular place of detention, and how the NPM will work with the NPM Coordinator, the SPT and investigative entities. The guidelines must also provide for any procedures of the NPM prescribed by regulation. The Regulations include a requirement that the Guidelines must include details of how the entities that comprise the NPM will work together to efficiently and effectively exercise functions as the NPM.

The NPM must consult with responsible directors-general for each place of detention and the chief police officer on the development of the guidelines and consider any recommendations or advice received during this consultation.

The Bill also provides that the guidelines are a notifiable instrument and they must be made available on the NPM's website.

### *Inspection of and access to places of detention*

To effectively exercise their mandate, Article 20 of OPCAT requires that NPMs be granted:

- access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location;
- access to all information referring to the treatment of those persons as well as their conditions of detention;
- access to all places of detention and their installations and facilities;
- the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as any other person who the NPM believes may supply relevant information; and

- the liberty to choose the places they want to visit and the persons they want to interview.

The Bill provides that the NPM may conduct a visit to a place of detention at any time to inspect the place of detention and need not give notice to the detaining authority for the place of detention. The Bill also provides that the NPM may take any equipment reasonably required to effectively carry out an inspection of the place. These amendments will ensure the NPM is empowered to effectively conduct oversight of places of detention and examine the treatment of detainees. It is important that the NPM is able to conduct visits without notice to ensure that the treatment of detainees is consistent and in accordance with OPCAT and the ACT's human rights obligations at all times.

When the NPM visits a place of detention, the Bill provides that a responsible entity must give the NPM unrestricted access to all parts of the place of detention and any vehicle or equipment used in the place of detention.

However, the Bill provides grounds upon which a responsible entity may refuse a visit: the grounds are restricted to urgent and compelling grounds of national security, public safety, natural disaster or serious disorder in the place of detention, that temporarily prevent access by the NPM. For consistency with OPCAT, the Bill provides that the existence of a state of emergency in itself is not a sufficient ground for refusal. The responsible entity must provide the NPM with reasons for the refusal and allow the NPM access to the place of detention as soon as it is safe to do so.

The Bill also provides that the NPM must identify itself when exercising a function under the Act, which will include conducting a visit. Noting that each of the NPM bodies have other oversight functions in the ACT, the policy intent of this provision is to ensure it is clear to agencies with responsibility for places of detention that the NPM is there in that capacity.

### *Interviews*

The NPM will also be empowered to conduct interviews with people deprived of their liberty (including with a translator and/or support person) as well as any other person in the place of detention. These interviews can be conducted at any time and must take place in private without audio surveillance. A person in detention or any other person has a right to refuse to speak to, or be privately interviewed by, the NPM. Responsible entities for places of detention must provide reasonable assistance to facilitate the NPM to conduct interviews within places of detention.

### *Access to information and information gathering powers*

To effectively fulfill its mandate, the Bill empowers the NPM to have unrestricted

access to all documents or other things in the place of detention that the NPM reasonably believes it requires access to in examining the treatment of detainees in the place. The NPM can also access information and documents relevant to its examination by issuing written notices, including to seek information concerning the number of detainees, the treatment and conditions of detention applying to detainees, and the number and location of places of detention.

The Territory must not prevent or obstruct the provision of the information, document or thing, even if the Territory would be entitled to do so if the examination were a legal proceeding.

The amendments also empower an entity that has information or a document that it believes is relevant to the NPM's functions to provide that information of its own initiative at any time to assist in the NPM's oversight of places of detention. This cannot be restricted by another territory law that prevents or limits the provision of the information or the production of the document.

The NPM will also be able to refer a matter to an investigative entity or official visitor under the *Official Visitor Act 2012* if the NPM believes that it can more appropriately be dealt with by that body. To protect the privacy of individuals, the referral must not identify an individual or contain any identifying information unless the individual in question has given consent, or the NPM is satisfied that referring the matter is necessary and reasonable in the public interest.

### *Information secrecy and sharing*

Article 21(2) of OPCAT provides that confidential information collected by the NPM shall be privileged. NPMs cannot publish any personal data without the express consent of the person concerned. Under OPCAT the NPM also needs to be able to share information with detaining authorities, responsible Ministers, other NPMs, the NPM coordinator and the SPT to provide observations and recommendations, as well as raise issues about the treatment of people in detention or the conditions of detention.

The Bill provides clear protections for the use and disclosure of protected information by the NPM. Protected information is defined in the Bill as information about a person disclosed to or obtained by the NPM in the exercise of its functions.

The Bill provides that it is an offence for the NPM and its staff to make a record of or disclose protected information except in the exercise of its functions or as required under the Act or another territory law, if the person consents, or to disclose to specific entities such as the NPM coordinator, the SPT or another NPM body.

The Bill provides that it is a specific offence to publish protected information about a

person that identifies the person or allows their identity to be worked out, except with the person's consent. NPM bodies must also not disclose identifying information to third parties such as investigative entities without the person's consent unless satisfied that this is necessary and reasonable in the public interest.

The maximum penalty for both offences is 50 penalty units, imprisonment for 6 months, or both. The high penalties will ensure that protected, sensitive and identifying information is handled with the care and caution necessary to protect individual's privacy. The limited exceptions to these offences will allow the NPM to properly carry out its functions and share information where needed, while still ensuring compliance with the requirements of OPCAT.

The Bill also includes a provision that allows for disclosure of any information to the NPM despite the existence of secrecy provisions in other legislation. This is intended to ensure compliance with the unfettered access required by the OPCAT.

### *Reporting and recommendations*

Under Article 22 of OPCAT, following a visit, the NPM provides recommendations, observations or reports to government and agencies with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and ill-treatment.

Following a visit and examination of the treatment of detainees, the Bill provides that the NPM may make recommendations or observations to any entity in a way it considers appropriate.

The Bill does not make it compulsory for the NPM publish a report but if it chooses to make a report public the NPM may publish a report or table it in the Assembly. The Bill provides for reports of the NPM to be tabled both in and out of session.

The Bill provides for a discretionary process for the sharing of draft reports with responsible entities and providing a specified reasonable time to provide comments. It also allows for sharing of drafts with other entities with a direct interest.

Seeking comments from responsible entities is only required if the NPM wishes to share a draft report with an entity that is outside government (other than a responsible entity), or to publish a final report or table it in the Assembly. This process is intended to provide flexibility so that comments need not be sought from responsible entities if the NPM is just making observations and recommendations to responsible entities in an internal report, but provides responsible entities an opportunity to fact check and respond where a report is intended to be published or disseminated more widely.

In addition, the Bill provides a specific requirement that where an adverse comment is



made about any entity that that entity must be given an opportunity to respond before publication.

### *Protections*

Under Article 21 of OPCAT, the NPM and those engaging with the NPM require certain protections to ensure the NPM can effectively carry out its functions, and people can disclose information to the NPM without fear of reprisal.

The Bill extends existing protections against actions in section 15 of the Monitoring of Places of Detention Act to provide that a person is not subject to any civil or criminal liability for giving any information or making any disclosure to the NPM in the course of, and for the purposes of, the NPM performing its mandate under Part IV of OPCAT, and no action, claim or demand may be taken or made of or against the person for giving the information or making the disclosure. It will also extend the existing protection from reprisals in section 16 of the Monitoring of Places of Detention Act to persons who have given or disclose information to the NPM.

These amendments are critical to assuring detainees and others who may engage with the NPM that they will not face adverse consequences for that engagement and feel protected during engagement.

The Bill also includes a provision providing the NPM protection from liability. This means that an official, or anyone engaging in conduct under the direction of an official, under the Act is not personally liable for anything done or omitted to be done honestly and without recklessness in the exercise of a function under the Act or in the reasonable belief that the conduct was in the exercise of a function under the Act. Any civil liability that would attach to an official instead attaches to the Territory. This is an important provision to add to the NPM's independence.

### *Statutory review*

The Bill provides for a statutory review of the operation of the NPM provisions as soon as practicable after 2 years of operation and for the review report to be presented to the Assembly within 12 months of the commencement of the review.

### Amendments regarding the SPT

Section 13(4) of the Monitoring of Places of Detention Act precludes the SPT from inspecting any record that is personal information of a detainee, under ACT privacy law (defined as the *Health Records (Privacy and Access) Act 1997* and *Information Privacy Act 2014*), unless the detainee consents to the inspection.

This provision was originally included in the legislation to minimise the limitations on

the right to privacy under the *Human Rights Act 2004*. However, following the SPT visit to Australia in 2022, it is understood that the SPT specifically requires access to personal information in some circumstances without the individual's consent, to fulfil its mandate.

The Bill amends section 13(4) to allow the SPT unrestricted access to personal information about detainees. This will allow the ACT to fully comply with Australia's international human rights obligations.

### Amendments to the *Inspector of Correctional Services Act 2017*

The *Inspector of Correctional Services Act 2017* (the ICS Act) commenced in December 2017. The ICS Act established a new oversight mechanism and independent statutory authority called the Inspector of Correctional Services (the Inspector), to oversee and critically examine the operations of the adult and youth correctional systems in the ACT with a preventative focus.

Section 39 of the ICS Act requires a review of the operation of the ICS Act to occur as soon as practicable after the end of its fifth year of operation. The Statutory Review, which commenced in May 2023, is due to be tabled in May 2024.

This Bill will implement certain recommendations from the Statutory Review as follows:

- change the title of 'Inspector of Correctional Services', to 'Custodial Inspector' wherever it appears in ACT legislation, to better reflect the scope of the Inspector's oversight responsibilities, which include youth detention places;
- provide for the Inspector to conduct thematic reviews at their discretion, but not more than once every two years, so that these reviews are spaced in line with the capacity of the Inspector and agencies to fully engage with them;
- provide a legislative mechanism to allow the Inspector to delegate their functions found in other ACT legislation, for operational efficiency;
- broaden the conduct captured by 'detrimental action' in section 26(4) so that it clearly protects detained persons and organisations working in correctional centres (as well as corrections staff);
- provide a general, rather than prescriptive, legislative requirement for the content of the Inspector's reports, for operational efficiency and to better support the Inspector's discretion and independence;
- give the Inspector discretion on when to table critical incident reports;
- relax the timeframes for relevant Ministers and directors-general to provide comments on draft reports; and
- allow for the Inspector's reports to be presented to the Legislative Assembly outside of sitting period.

## **CONSULTATION ON THE PROPOSED APPROACH**

### Consultation on NPM amendments

In 2020, the Justice and Community Safety Directorate convened a roundtable discussion about implementation of OPCAT, including designating the ACT NPM, with civil society organisations. Attendees at the roundtable included representatives from a wide range of organisations, including from the ACT Council of Social Services (ACTOSS), Canberra Community Law, Advocacy for Inclusion, Women’s Centre for Health Matters, St Vincent de Paul Society, ACT Mental Health Consumers Network, Winnunga Nimmityjah Aboriginal Health and Community Services, Legal Aid ACT, Carers ACT, ACT Disability, Aged and Carer Advocacy Service (ADACAS), Aboriginal Legal Service (NSW/ACT) Limited), Prisoners Aid ACT, Alcohol Tobacco and Other Drug Association (ATODA), and Companion House. Issues raised in this roundtable were considered by JACS in policy development and drafting of the Bill.

JACS has worked closely with the ACT NPM bodies and other key agencies, including ACT Corrective Services, the Community Services Directorate, Canberra Health Services and ACT Health to settle aspects of the model and on draft provisions of the Bill.

### Consultation on the amendments to the ICS Act

The amendments to the ICS Act were developed taking into account stakeholder submissions to the Statutory Review. The Statutory Review invited submissions from a range of organisations with expertise in the correctional sector. Submissions were received from the:

- Office of the Inspector of Correctional Services
- ACT Coroner
- ACT Corrective Services
- Community Services Directorate (as the provider of youth justice services)
- Canberra Health Services
- Legal Aid ACT
- Aboriginal Legal Service ACT/NSW
- Winnunga Nimmityjah Aboriginal Health Service
- Justice Reform Initiative
- ACT Council of Social Services

Furthermore, the Office of the Inspector of Correctional Services, ACT Human Rights Commission, ACT Corrective Services, Community Services Directorate and Canberra Health Services were specifically consulted in the development of the Bill.

## **CLIMATE IMPACT**

This Bill will not have any impact on climate change.

## **CONSISTENCY WITH HUMAN RIGHTS**

During the development of the Bill, due consideration was given to its compatibility with human rights as set out in the *Human Rights Act 2004 (ACT)* (HR Act).

An assessment of the Bill against section 28 of the HR Act is provided below. Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

### **Rights Engaged**

The Bill engages the following sections of the HR Act:

- Section 10 – Right to protection from torture, inhuman or degrading treatment (*promoted*)
- Section 12 – Right to privacy and reputation (*limited*)
- Section 16 – Right to freedom of expression (*limited*)
- Section 18 – Right to liberty and security of person (*limited*)
- Section 19 – Right to humane treatment when deprived of liberty (*engaged and promoted*)

The right to humane treatment when deprived of liberty is engaged by the amendment to the ICS Act which gives discretion to the Inspector on when to conduct reviews of correctional services (known as ‘thematic reviews’). The existing provision in the ICS Act provided that the Inspector *must* examine and review a correctional service *at least once every two years*. The Bill changes this provision from being a mandatory to discretionary requirement, and also lengthens the minimum time between each review to two years. This will promote flexibility to ensure the Inspector and ACT Government business units are able to appropriately engage with the issues raised during thematic reviews and there is sufficient timing in between thematic reviews to allow for the functional implementation of accepted recommendations.

The Inspector’s new NPM functions will ensure that in practical terms, the Inspector is not limited in their ability to oversee correctional services where necessary, with the NPM granted broad and unfettered access to places of detention. This means that there is no actual limitation on the right to humane treatment when deprived of liberty. The Inspector’s new NPM functions are complementary to the Inspector’s functions under the ICS Act, which also include mandatory reviews of correctional centres, and will enhance oversight of correctional services.

## ***Rights Promoted***

### Section 10 - Right to protection from torture, inhuman or degrading treatment

Section 10 of the HR Act provides that no one may be tortured or treated or punished in a cruel, inhuman or degrading way. This right imposes an obligation on the government to ensure that everyone is given protection through legislative and other measures against torture, or cruel, inhuman or degrading treatment or punishment, whether inflicted by state authorities or by people acting in a private capacity. The right to be free from torture or cruel, inhuman and degrading treatment or punishment is absolute under international law which means that it cannot be subject to any limitations.

Examples of torture, or cruel, inhuman or degrading treatment in places of detention might include: the excessive use of force by state authorities against protestors or detainees; inhuman detention conditions, such as prolonged solitary confinement; the imposition of excessive punishments, including corporal punishment; and the use of some restrictive practices, such as physical restraints or sedatives including against residents of aged care facilities or persons with disabilities.

### Section 19 – Right to humane treatment when deprived of liberty

Section 19 of the HR Act provides that anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. This right aims to ensure that if people are detained that they are held in conditions befitting their dignity as human beings. Not all places of detention are prisons or correctional facilities that house those accused of or convicted of serious crimes. The definition of place of detention is broad and, under the Monitoring of Places of Detention Act, it includes traditional criminal detention facilities such as prisons and youth justice facilities, and also extends to civil facilities including hospitals and mental health facilities where people may be held involuntarily.

### Discussion of rights promoted

People in places of detention are particularly vulnerable. They are subject to the authority and control of the detaining authority and segregated from the wider community, often with limited or no access to outside support from friends, family and other supports in the community. It may be more difficult for people in places of detention to access essential services such as medical and psychological or psychiatric treatment. People deprived of their liberty have their freedom of movement restricted, and particularly in the case of prisons, may be subject to restrictive practices (for the purposes of security and safety) such as handcuffing and solitary confinement. Thus, it is essential that the rights of these vulnerable people are protected and upheld. The right to humane treatment while deprived of liberty imposes positive obligations on detaining authorities to ensure that conditions of detention or restrictive practices (where inappropriate) do not amount to further punishment in addition to deprivation of liberty.

The Bill promotes the rights in sections 10 and 19 of the HR Act by fully implementing the legislative requirements of Part IV of OPCAT to establish the NPM and facilitating it to conduct oversight of places of detention, specifically to examine and report on the treatment of people in detention and the conditions of places of detention, with a view to strengthening the protections against torture and other cruel, inhuman and degrading treatment or punishment (if necessary). The Bill will ensure the NPM is operationally effective and able to fulfill its mandate under OPCAT. The Bill contains specific provisions for the NPM to be able to report on conditions and treatment of people in places of detention, to make recommendations and observations to relevant authorities, and where necessary, to publish reports and recommendations and table them in the Legislative Assembly to draw public awareness to the treatment of people in detention and conditions of places of detention. These functions will ensure the accountability of the ACT Government and responsible entities, including detaining authorities, and allow relevant authorities to engage in a dialogue with the NPM to improve practices (if needed) to prevent torture and other cruel, inhuman, and degrading treatment or punishment. This preventive function facilitates the active promotion of these rights.

The visiting function of the NPM ensures that there is a body that has unrestricted access to places of detention and can directly interview people in detention to understand their treatment and conditions. This provides a mechanism for people deprived of their liberty to raise issues to the NPM that may otherwise go unreported. While there are pre-existing bodies in the ACT that provide complaints mechanisms for people in detention to raise issues, the NPM has broad preventive powers. This will provide an avenue for the NPM to better understand systemic issues across places of detention (rather than investigating individual complaints) and discover issues that are not the subject of a formal complaint. Similarly, the ability of the NPM to visit all places of detention in the ACT will allow the NPM to understand and report on any systemic issues that may require attention, allowing the whole detention system of the ACT to be improved and protections strengthened for people deprived of their liberty.

In a similar vein, the amendments to section 13(4) of the Monitoring of Places of Detention Act to allow the SPT unrestricted access to personal information about detainees will promote the rights in sections 10 and 19 of the HR Act. This will allow the SPT to fulfil its mandate during visits to Australia when visiting places of detention in the ACT and make recommendations to improve the treatment of persons deprived of their liberty.

The amendments to the ICS Act arising from the Statutory Review similarly promote the rights in sections 10 and 19 of the HR Act. The amendments, taken together, improve the operation of the legislative framework that supports the Inspector of Correctional Services. The object of that Act is to promote the continuous improvement of correctional centres and correctional services, including through systematic review and scrutiny and independent and transparent reporting. This oversight assists in identifying any areas of concern and opportunities for

improvement, supporting humane treatment of detainees and freedom from torture or cruel, inhuman or degrading treatment or punishment.

In particular, the amendment to the definition of 'detrimental action' in the ICS Act promotes the human rights in sections 10 and 19 of the HR Act, by expanding the list of conduct that is considered to be detrimental action against a person who gives (or is proposing to give) information to the Inspector. The new definition will protect a detained person from being tortured, or treated or punished in a cruel, inhuman or degrading way (section 10(1) of the HR Act), by legislating protections from their unfavourable treatment, including in relation to their living conditions, privileges, surveillance or searches, the place where they are held in the correctional centre, and their access to an organisation which promotes their interests or delivers services. By its nature, the new definition will also promote that the detained person is treated with humanity and with respect for their inherent dignity (section 19(1)).

### ***Rights Limited***

#### Section 12 - Right to privacy

##### **1. Nature of the right and the limitation (s28(a) and (c))**

The right to privacy in section 12 of the HR Act provides that everyone has the right not to have their privacy interfered with unlawfully or arbitrarily. The right protects information that may be personal, sensitive or confidential from unlawful or arbitrary interference and ensures individuals have a say in how information relating to them is used and shared.

The right to privacy will be limited by the Bill in five ways.

First, section 8S of the Bill in Division 1A.5 introduces offences for the reckless making of a record of protected information about someone else and the reckless disclosure of protected information to someone else. Protected information is defined as information about a person that is disclosed to, or obtained by, the NPM because of the exercise of a function by the NPM under the Act. However, there are exceptions to these offences which will allow the NPM to disclose and share protected information (that is not identifying information) in some circumstances.

Second, section 8S(3)(e) also provides for the circumstances where identifying information about a person can be disclosed. This includes only to the specific entities defined as 'permitted information recipients' and in circumstances where the NPM is satisfied that the disclosure is necessary and reasonable in the public interest.

Third, the Bill amends section 13 and section 8 of the Act to allow the SPT unrestricted access to personal information about detainees. The amendment to section 8 of the Act omits the words 'other than an ACT privacy law' from the provision. This will provide that an ACT privacy law has no effect on the exercise of functions by the Subcommittee and no effect to the extent of any inconsistency with the Act. This

amendment will work in conjunction with the amendment to section 13 which removes the prohibition that currently prevents the Subcommittee from inspecting any record that is personal information of a detainee under an ACT privacy law.

Fourth, the insertion of section 8T into the Act, which provides that Territory laws which prevent or limit the provision of information, or the production of a document to the NPM (which is believed to be relevant to the NMP's functions) do not have effect.

Finally, the Bill inserts a new section 17A into the Act which provides protection against any civil or criminal liability and prevents any adverse action from being taken against a person for disclosing information to the SPT or the NPM. This protection will be extended despite any duty of secrecy or confidentiality or any other restriction under Territory law that may be applicable. This will protect those people from civil or criminal liability should they choose to make disclosure to the NPM or SPT which may derogate from their usual duties of secrecy, confidentiality or any other restriction that may be applicable. Such disclosure may involve the sharing of sensitive or personal information which would limit the right to privacy.

## **2. *Legitimate purpose (s28(b))***

The purpose of the Bill is to enable the NPM and the SPT to effectively conduct visits of places of detention, to provide oversight to places of detention and to strengthen the human rights protections for people in detention, and ensure their protection from torture or other cruel, degrading and inhuman treatment or punishment.

## **3. *Rational connection between the limitation and the purpose (s28(d))***

To effectively fulfill this purpose both the NPM and SPT may need access to information about a person, including personal health records or identifying information to determine whether people in detention have been humanely treated and whether the conditions of detention are appropriate. The amendments will allow the NPM and SPT to fulfil its mandate under OPCAT to make recommendations to improve the treatment of persons deprived of their liberty.

The NPM and SPT may need to gather this information from Government officials, public servants and other people employed in relation to places of detention, as well as from people who are detained. These categories of people may be subject to Territory laws and duties which prevent or limit the provision of information or the production of documents. Without provisions in the Bill to make clear that these laws do not have effect when people are providing information or producing documents to the NPM and SPT, the NPM and SPT may be hampered in conducting a full and proper inspection of places of detention and the information necessary to determine whether people in detention have been properly treated.



It is essential that in general, duties of secrecy and confidentiality under Territory laws are upheld and enforced. These protections are highly important to ensure that confidential and protected information is handled appropriately. However, the right to privacy is not absolute, and narrow exceptions can be justifiable where there is a necessity for confidential and protected information to be shared and the benefits outweigh the potential risks of sharing the information, provided there are adequate safeguards. The insertion of section 8T into the Act will provide for people who may usually be subject to requirements and duties in other Territory laws that prevent or limit the provision of information or the production of documents to be able to share this information and documents with the NPM or SPT, if they believe they are relevant to the NPM's functions.

Without the protection to be inserted by section 17A, people who are subject to secrecy or other duties may feel unable to engage with the NPM or SPT for fear of reprisal, adverse action or criminal liability. If the NPM and SPT cannot receive potentially protected, sensitive or confidential information, they may not be able to properly assess the treatment of people in detention. This would ultimately undermine the effectiveness of the oversight provided by the NPM and SPT and the efficacy of their visits and inspections.

To effectively strengthen protections for people in detention, the SPT and NPM also need to be able to share this information, so that they can properly report on issues and raise concerns with the relevant authorities or others who are better positioned to investigate or deal with the matter. The Bill enables protected information to be shared with responsible entities, the SPT, the NPM coordinator and other NPM bodies operating in other jurisdictions. The disclosure may involve reporting and making recommendations on the treatment of specific people in detention or notifying relevant authorities about systemic issues involving many detainees or the conditions of multiple places of detention. The NPM is also empowered by the Bill to refer certain matters to other entities for investigation where appropriate. To properly facilitate this referral, the NPM may need to make records of protected information, share and disclose it to the receiving entity.

The Bill contains offences to protect the making of a record and disclosing protected information, however there are exceptions to these offences that will allow the NPM to share, make records, disclose and publish these types of information in certain circumstances. The purpose of this is so that the NPM can share information to coordinate oversight of places of detention and contribute to the overall purpose of the Bill.

#### **4. *Proportionality (s28 (e))***

The limitations to the right to privacy in the Bill are considered reasonable and proportionate because they are framed only to the extent that they allow the NPM and the SPT to effectively operate, and do not allow these entities to disclose, share or publish protected and identifying information beyond these purposes.

The amendments also do not allow people providing information to the NPM or SPT to disclose, share or publish protected and identifying information beyond these purposes. The amendments will allow the ACT to fully comply with Australia's international human rights obligations under OPCAT. Critically, they provide the NPM and SPT with the ability to examine the treatment of persons deprived of their liberty, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment, including by accessing information and documents.

The NPM's ability to share and disclose information under the Bill are limited to the extent that disclosure is only lawful in the following circumstances:

- where the information is disclosed under the Monitoring of Places of Detention Act or another territory law;
- in relation to the exercise of a function of the NPM;
- the information is disclosed to only the list of entities set out in the legislation: a detaining authority, a responsible Minister, the SPT, the NPM coordinator or an NPM of another jurisdiction; or
- the information is disclosed with the consent of the person in question.

The NPM will only be able to disclose identifying information with the consent of the person in question or if the NPM is satisfied that the disclosure is necessary and reasonable in the public interest.

For reports, including draft reports, that may be disclosed under sections 8Q and 8R of the Bill, protected information will only be able to be shared for the confined circumstances as set out in section 8S(3). The disclosure of identifying information will only be permitted if it is being shared with a permitted information recipient, including responsible entities (such as relevant Ministers and detaining authorities), and the NPM is satisfied the disclosure is necessary and reasonable in the public interest. A further safeguard included in the Bill is that reports are to follow an examination of the treatment of detainees in *a place of detention*. That is, it is not expected the NPM will be preparing reports that include identifying information about detainees across multiple detention settings.

Where the NPM or its staff purports to disclose protected information outside of one of the exceptions, the offence will apply, and the maximum penalty is 50 penalty units or imprisonment for 6 months or both. This penalty will act as a deterrent to prevent the unauthorised disclosure of protected information and to encourage the sensitive handling of information.

Similarly, the Bill makes it an offence to publish identifying information or information from which a persons' identity could be reasonably worked out, with a maximum penalty of 50 penalty units or imprisonment for 6 months or both. There is a limited exception to the offence, and the NPM will only be able to publish identifying information in confined circumstances where it has the explicit consent of the person in question.

Likewise, the protections against liability and reprisal in section 17A of the Bill only extend to the provision of information, a document or thing by a person in the course of, and for the purposes of, the SPT and the NPM exercising their mandates. The limitation on the right to privacy is narrow in that it only applies where it is necessary for the SPT and NPM to fulfill their functions. Any disclosure or provision of information and documents outside of this context will still be subject to civil and criminal liability and any other relevant available enforcement mechanisms.

New section 8T which allows the provision of information to the NPM, despite a provision of another Territory law, will only operate to the limited extent that a person or entity provides information or produces a document or something else to the NPM where they believe it is relevant to the exercise of the NPM's functions. Where a person or entity purports to share information outside of this context, they will need to abide by the provisions of other Territory laws which may protect that information or prevent its disclosure.

In this way, the least restrictive approach to limiting the right to privacy is taken. The Bill provides exceptions where disclosure, sharing and publication of protected and identifying information will not be unlawful in restricted circumstances that are grounded in necessity for the effective operation of the NPM or accompanied by explicit consent. Ultimately, the limitations on the right to privacy will only occur where there is a corresponding action that aims to promote other human rights of people in detention, such as the NPM disclosing protected information to alert a detaining authority to an issue regarding the treatment of a person in detention, or to report to the Government and the public about ways the conditions of places of detention could be improved.

In relation to the SPT's ability to access protected information, including personal records, provided by the amendments to sections 13 and 8 of the Act, there are safeguards relevant to the limitation on the right to privacy in the SPT's guidelines.<sup>1</sup> This includes that all information gathered by the SPT in relation to a visit shall be and shall remain confidential; no personal data shall be published without the express consent of the person concerned; and members of the SPT, experts and other persons accompanying the SPT are required, during and after their terms of office, to uphold the confidentiality of the facts or information of which they have become aware during the discharge of their duties. Additionally, visits by the SPT to Australia will be infrequent, minimising the impact on the right to privacy.

## Section 16 - Right to freedom of expression

### **1. Nature of the right and the limitation (s28(a) and (c))**

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<sup>1</sup> Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties under article 11(a) of the Optional Protocol, 4 February 2015, CAT/OP/5, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/5&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/OP/5&Lang=en).

Section 16(2) of the HR Act recognises that everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information. This right is relevant to obligations of public authorities to provide access to government held information and is relevant when considering ACT freedom of information laws.

The Bill limits the right to freedom of expression as it amends Schedule 1 to the *Freedom of Information Act 2016* (FOI Act) creating a presumption that the release of information in the possession of the NPM that has been obtained or generated in relation to a function under the Act is contrary to the public interest. The effect of this presumption means that information held by the NPM and the custodial inspector may be limited from the scope of information disclosed to an FOI applicant.

Information in the possession of the custodial inspector appointed under the Custodial Inspector Act obtained in relation to an examination or review is already included in schedule 1 and the amendments are solely to reflect the change of name to custodial inspector.

## **2. *Legitimate purpose (s28(b))***

The purpose of the Bill is to enable the NPM to effectively conduct visits of places of detention, to provide oversight to places of detention and to strengthen the human rights protections for people in detention, and ensure their protection from torture or other cruel, degrading and inhuman treatment or punishment.

## **3. *Rational connection between the limitation and the purpose (s28(d))***

Excluding information held by the NPM means that any information that has been obtained or generated by them in relation to an examination (or a review, in the case of the custodial inspector) is taken to be contrary to the public interest to disclose under the FOI Act. Alongside other provisions in the Bill that specify who can receive this information, a controlled and limited pool of people is formed.

The NPM may hold in their possession information that includes identifying information, health records, and sensitive information relating to detaining or investigative authorities about their practices or procedures. Some of this information must be kept confidential, either to protect the privacy of individuals or the integrity and effectiveness of certain practices, such as special police procedures relating to crime prevention and investigation.

Expanding Schedule 1 of the FOI Act avoids the need to apply the public interest test to information in the possession of the NPM. Including information in Schedule 1 'deems' it to be contrary to the public interest to disclose' thus creating a more efficient, automatic and appropriate means for deciding access to sensitive information.

Excluding this information from the FOI Act would provide an additional layer of assurance to those people that their information is not being distributed in an ad hoc manner. It is rationally connected to protecting the right to privacy of people whose

information is held by the NPM and to the NPM providing effective oversight of places of detention.

#### **4. *Proportionality (s28 (e))***

The inclusion of information held by the NPM and custodial inspector in Schedule 1 of the FOI Act is necessary for the purposes of this Bill to protect the privacy of those people who may be subject to an examination (or a review, in the case of the custodial inspector).

The application of the public interest test, and the weighing of factors for and against disclosure would be a less restrictive means of managing access to this kind of information. Due to the sensitive nature of NPM examinations and their interaction with vulnerable people and collection of sensitive personal information, it is likely that much of this information would already be prevented from release as sensitive personal information under the public interest test. However, it would assist both the NPM and the people who engage in their investigations, to know that this information is not required to be disclosed under FOI. The proper flow of information between the NPM and people engaged in their examinations is essential for implementation of OPCAT. Providing certainty that this information is not required to be disclosed under FOI encourages people to participate in the process as fully as possible. It would also support and protect the right to privacy of people who share their sensitive personal information with the NPM. Under the Bill, the NPM will need to exercise careful judgment regarding the publication of information in its reports. This independent oversight role could potentially be affected by investigation information being sought through the FOI process. Similar protections are already in place for the Human Rights Commission's complaint handling functions as well as the custodial inspector.

The FOI Act contains safeguards to ensure the release of information if it identifies corruption, the commission of an offence by a public official, or the scope of a law enforcement investigation has exceeded the limits imposed by law (section 16(2)). In addition, if open access information under the FOI Act is not made available because it is contrary to the public interest information, the agency or Minister must public a description of the information except in the circumstances listed in section 24(2)). If an FOI application is refused, the FOI Act obtains a process for a decision notice to be issued (section 54).

Accordingly, although these provisions limit human rights protected under the HR Act, these limits are reasonable and demonstrably justifiable in a free and democratic society in accordance with section 28 of the HR Act

#### **Section 18 – Right to liberty and security of person**

##### **1. *Nature of the right and the limitation (s28(a) and (c))***

The right to liberty and security of person in section 18 of the HR Act provides that everyone has the right to liberty and security of person, no- one may be arbitrarily arrested or detained, and no one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The right to liberty is limited by the Bill by the offences contained in sections 8S and 17B of the Bill as both offences have a maximum penalty that includes imprisonment, and therefore could lead to the deprivation of a person's liberty if that person is convicted of one of the offences and sentenced to a term of imprisonment.

Section 8S makes it an offence for the NPM or its staff to make a record of or disclose protected information and an offence for the NPM or its staff to publish identifying information without consent. Both offences have a maximum penalty of 50 penalty units, imprisonment for 6 months, or both.

Section 17B of the Bill provides that an entity (which includes a person as provided for in the definition of 'entity' in the *Legislation Act 2001*) commits an offence if it intentionally takes detrimental action against someone and the action is taken wholly or partially because the person provided information or made a disclosure to the NPM or the SPT, the person proposed to provide information or the entity believes the person has provided or proposed to provide information to the NPM or the SPT. Detrimental action is defined in the Bill in section 17B(3) and means action causing, comprising or involving any of the following: injury, damage or loss; change of the conditions of detention; change to the treatment of a detainee; intimidation or harassment; discrimination, disadvantage or adverse treatment, including in relation to employment; dismissal from, or prejudice in, employment; disciplinary proceeding; unfavourable treatment or proposed unfavourable treatment of a person or relevant organisation in any other way. The maximum penalty for this offence is 110 penalty units, imprisonment for 2 years, or both.

## **2. *Legitimate purpose (s28(b))***

The purpose of the Bill is to enable the NPM and the SPT to effectively conduct visits of places of detention, to provide oversight to places of detention and to strengthen the human rights protections for people in detention, and ensure their protection from torture or other cruel, degrading and inhuman treatment or punishment.

## **3. *Rational connection between the limitation and the purpose (s28(d))***

The offences contained in section 8S of the Bill are intended to protect the private and sensitive information of individuals that may be examined by the NPM in the course of its visit or examination of places of detention. The maximum penalties include imprisonment to reflect the seriousness of the offences.

The NPM and its staff may have access to information that includes identifying information, health records, and sensitive information relating to detaining or investigative authorities about their practices or procedures. Some of this information must be kept confidential, either to protect the privacy of individuals or the integrity

and effectiveness of certain practices, such as special police procedures relating to crime prevention and investigation. The offences in section 8S and the maximum penalties attached to those offences ensure that when handling this information, the NPM will operate with caution and ensure information is protected and dealt with appropriately. The offences will ensure that information is not disclosed or published and that records are not made unless the conduct falls within a specific exception under the Bill.

The offence contained in section 17B of the Bill is to protect people who may provide information, produce documents or otherwise disclose information or other things to the NPM to assist in the NPM's examination of the conditions of places of detention and the treatment of people in detention. To effectively strengthen protection against torture and other inhuman or degrading treatment the NPM is empowered to conduct interviews and receive information from people. However, given the sensitive nature of information that may be disclosed to the NPM, such as evidence of treatment of detainees or conditions in places of detention that do not meet the standards of UNCAT, people who engage with the NPM may be fearful of reprisal. The offence specifically protects people who engage with the NPM from being subject to detrimental action because of their engage, or because an entity believes they have engaged with the NPM. The offence and the maximum penalty attached to the offence is important not only to protect those who do provide information to the NPM, but also to empower people to engage with the NPM in the first instance, in the knowledge that they are protected against adverse action should they choose to make a disclosure. Without these protections, the NPM may not be able to effectively conduct oversight of places of detention, because people may be reluctant to be interviewed or to provide information to the NPM.

#### **4. Proportionality (s28 (e))**

Given the NPM may deal with highly sensitive information from time-to-time in exercising its functions, the offences and the maximum penalties in section 8S are considered proportionate to reinforce the sensitive nature of the information and to effectively deter conduct which may record, disclose or publish this information beyond the legislative framework. Unauthorised disclosure of protected and identifying information can have wide ranging effects, for example, a detainee's private medical information could be made public, or the identity of a detainee or person who has engaged with the NPM could be disclosed, which may lead to adverse action or detrimental towards that person for engaging with the NPM. The highly sensitive nature of the information being handled by the NPM means that conduct which discloses this information in an unauthorised manner requires more serious penalties that correspond to the importance of the information and the significant impact of unauthorised disclosure.

The NPM may need to make records, disclose or publish information to properly carry out its mandate under the Bill and OPCAT. The exceptions to the offences in section

8S in the Bill will operate to ensure that the NPM and its staff are still able to carry out its functions, properly examine information relevant to the conditions and treatment of people in places of detention, and share information to aid investigations or highlight systemic issues. The NPM will be authorised to make a record of protected information or disclose protected information under this Act or another Territory law, in relation to the exercise of a function under this Act or another Territory law, to a responsible entity, the subcommittee, the NPM coordinator or an NPM of another jurisdiction or with the consent of the person in question. The NPM and its staff will be able to publish identifying information with the consent of the person in question. Ensuring the primacy of consent will protect the agency of those who engage with the NPM.

The approach taken by the Bill in section 8S aligns with Article 21(2) of OPCAT which provides that confidential information collected by the NPM shall be privileged and is modelled on the secrecy and information sharing provisions in the Tasmanian *OPCAT Implementation Act 2021*. Anecdotally, it is understood that the secrecy and information sharing provisions are operating effectively in Tasmania to protect sensitive information. Given the NPM bodies of various jurisdictions may need to collaborate and all need to report to the NPM Coordinator, it is important that a consistent approach is taken to information sharing across jurisdictions.

Similarly, without the protection of the offence in section 17B of the Bill, the consequences of detrimental action taken against an individual for engaging with the NPM are highly serious. People who engage with the NPM, for example, people who are in detention, are highly vulnerable, and could be subject to inappropriate restrictive or other practises in reprisal for disclosing information to the NPM. This could have serious impact on their treatment and conditions of detention and in very extreme situations their health, safety and life. Similarly, employees of responsible entities may also want to provide information to the NPM but may be fearful of termination of employment or other adverse employment related consequences for their engagement with the NPM. This could impact a person's ability to work and their livelihood.

It is vital that the Government ensures people are protected from detrimental action and that people who engage in detrimental action are subject to penalties commensurate with the very serious individual consequences that can arise from detrimental action. Given this, the high maximum penalty for the offence in section 17B is viewed as proportionate to the seriousness of the offence, the harm that could result from such conduct and communicates an appropriate level of deterrence.

Additionally, both the offences in section 8S and in section 17B provide for an alternative penalty of a fine. This means that penalties of imprisonment will likely only be used by a court in more serious circumstances where the unlawful conduct in question is at the highest level of offending.



## CLAUSE NOTES

### Part 1 — Preliminary

#### Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act is *Monitoring of Places of Detention Legislation Amendment Act 2024*.

#### Clause 2 — Commencement

This clause provides that the Act (other than section 4) will commence on the day after its notification day. Section 4 commences on this Act's notification day.

#### Clause 3 — Legislation Amended

This is a formal clause identifying that the Act amends the following legislation:

- *Inspector of Correctional Services Act 2017*, and
- *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (Monitoring of Places of Detention Act).

Other legislation consequently amended by this Act is set out in Schedule 1 of the Act as indicated in the note to this clause.

#### Clause 4 — New Monitoring of Places of Detention (Optional protocol to the Convention Against Torture) Regulation — sch2

This clause provides that the new regulation set out in schedule 2 is taken to be a regulation under the Monitoring of Places of Detention Act, section 18, which provides for the power to make regulations.

The regulation is taken to be notified under the *Legislation Act 2001* on the day the Act is notified and commences on the commencement of schedule 2. The regulation is not required to be presented to the Legislative Assembly and the regulation may be amended or repealed as if it had been made under section 18 of the Monitoring of Places of Detention Act.

Subsection (3) provides that the Act is taken to be an amending law for the *Legislation Act 2001*, section 89, which provides for the definition of amending law and allows for the automatic repeal of certain laws and provisions, despite this section not being included in section 89.

## **Part 2 – Inspector of Correctional Services Act 2017**

### **Clause 5 — Long title**

This clause replaces the title of ‘Inspector of Correctional Services’ in the long title of the Act with ‘Custodial Inspector’. The new title reflects the breadth of Inspector’s oversight functions including in relation to youth detention places, as introduced in 2019. Youth detention places are not considered to be correctional centres.

### **Clause 6 — Section 1**

This clause replaces the title of ‘Inspector of Correctional Services’ in the name of the Act with ‘Custodial Inspector’. The new title reflects the breadth of Inspector’s oversight functions including in relation to youth detention places, as introduced in 2019. Youth detention places are not considered to be correctional centres.

Consequently, this clause changes the title of the Act to *Custodial Inspector Act 2017*.

### **Clause 7 — Part 2 heading**

### **Clause 8 — Section 9 heading**

### **Clause 9 — Section 9 (1) and notes**

These clauses replace the title of ‘Inspector of Correctional Services’ in the headings to part 2 and section 9 of the Act, and in section 9 (1), with ‘Custodial Inspector’. The new title reflects the breadth of Inspector’s oversight functions including in relation to youth detention places, as introduced in 2019. Youth detention places are not considered to be correctional centres.

### **Clause 10 — Delegation Section 16**

This clause creates a mechanism for the Inspector to delegate their functions found in other ACT legislation. The Inspector can delegate their functions to a member of their staff or a contractor they engaged. This amendment will facilitate appropriate and efficient functioning of the Inspector’s office by allowing the Inspector to delegate their functions appropriately as needed.

### **Clause 11 — Functions—generally Section 17 (2)**

This clause removes section 17(2) which contained the definition of ‘critical incident’.

Section 17(2) set out the full definition of critical incident. As a consequence of the amendments made by this Bill, the term ‘critical incident’ is now used in sections 27 and 30. In accordance with ACT drafting practice, the full definition of critical incident has been relocated, unamended, to the dictionary section of the Act, and the sectional definition in section 17(2) has been omitted. The full definition, now set out

in the dictionary, continues to apply to the use of the term 'critical incident' in section 17. This is a technical drafting amendment and the definition itself has not changed.

### **Clause 12 — Functions—examination and review Section 18 (1) (b)**

This clause amends section 18(1)(b) to change the mandatory requirement for the Inspector to conduct an examination and review of a correctional service, to a discretionary requirement. The amendment also imposes a new periodic timeframe, that such an examination and review cannot occur more than once every two years.

This amendment provides the Inspector and ACT Government business units with sufficient flexibility to engage with the issues arising from the examination and review and implement recommendations from the Inspector's reports.

### **Clause 13 — Section 18 (3)**

This clause removes section 18(3) which contained a signpost definition referencing the full definition of 'critical incident' in section 17(2).

As a consequence of the amendments made by this Bill, the term 'critical incident' is now used in sections 27 and 30. In accordance with ACT drafting practice, the full definition of critical incident has been relocated, unamended, to the dictionary section of the Act, and the sectional definition in section 17(2), which section 18(3) referenced, has been omitted. The full definition, now set out in the dictionary, continues to apply to the use of the term 'critical incident' in section 18. This is a technical drafting amendment and the definition itself has not changed.

### **Clause 14 — Offence—taking detrimental action Section 26 (4)**

This clause broadens the types of conduct that can be considered as 'detrimental action' by section 26(4). The new definition includes:

- (a) discriminating against a person by treating, or proposing to treat, the person unfavourably, in relation to the person's access to a correctional centre or a detainee;
- (b) discriminating against a detainee by treating, or proposing to treat, the detainee unfavourably, in relation to their living conditions, privileges, surveillance or searches, or the place where they are held in the correctional centre;
- (c) treating, or proposing to treat, an organisation unfavourably, including in relation to its funding, access to a correctional centre or detainee, or conditions on its service delivery to the correctional centre; or
- (d) treating, or proposing to treat, a person unfavourably in any other way.

This amendment supports protection of all people or organisations who choose to disclose information to the Inspector from retaliation against them for making the disclosure.

### **Clause 15 — Section 27**

This clause restructures section 27(1) following amendments to remove the mandatory timeframe to provide critical incident reports to the Speaker. Section 27(1) now simply requires the Inspector to prepare a report after conducting an examination and review of correctional centres, detention places, correctional services, and critical incidents. The timeframe for providing these reports have been relocated to section 30.

This clause also amends section 27(2) to require that the Inspector's reports contain recommendations that further the objects of the Act. This amendment provides a more general requirement for what the Inspector must include in the reports, and ensures that the requirements are functional for all types of reports. This amendment removes the prescriptive criteria for the Inspector's reports, as it was not suitable for some reports.

Section 27(3) is relocated to section 30.

### **Clause 16 — Draft report to relevant Minister and director-general Section 29 (1) and (2)**

This clause changes the time period for the Ministers and directors-general responsible for the *Corrections Management Act 2007* and *Children and Young People Act 2008* to provide comments on the Inspector's draft reports. Rather than providing comments to the Inspector's draft reports within a six-week period, the new amendment allows the Ministers and directors-general to be given a reasonable opportunity to comment on the draft report of six weeks or another period as agreed between the Inspector and the Ministers and directors-general.

This clause also removes the existing requirement under section 29(1) for the Inspector to give the draft report to the Ministers and directors-general at least six weeks before giving the report to the Legislative Assembly on the basis it is replaced with the approach above.

### **Clause 17 — Section 30**

The timeframe requirement under section 27(1) is relocated to section 30(1)(a). Section 30(1)(a) requires the Inspector to give to the Speaker a report they prepared for an examination and review of a correctional centre, detention place, or correctional services, within six months of completing the examination and review. The timeframe in section 27(3) is relocated to Section 30(2) and allows for an

extension of up to 12 months if granted by the Minister. This amendment does not change the timeframes from sections 27(1) and 27(3).

Section 30(1)(b) is a new amendment that removes the six-month timeframe and extension to present critical incident reports to the Legislative Assembly. The amendment gives the Inspector discretion on when to present a critical incident report to the Speaker. The aim of this amendment is to provide greater flexibility in the timing of tabling critical incident reports to assist with any resource strain and potentially allow for the larger review reports to take priority, noting that they are a mandatory function of the Inspector.

Section 30(3) preserves the requirement in section 30(2) that, if the Legislative Assembly is sitting, the Speaker must present the Inspector's report to the Legislative Assembly within five sitting days of receiving the report.

Section 30(4) creates a new mechanism that allows for the Inspector's reports to be presented to the Legislative Assembly outside of its sitting days. The Inspector can give the report to the Speaker and have it considered as presented to the Legislative Assembly. After receiving the report, the Speaker distributes the report to the Legislative Assembly. The Speaker is required to formally present the report to the Legislative Assembly on the next sitting day. This amendment will reduce the resourcing strains involved in preparing the report by not constraining its presentation to the sitting year calendar.

#### **Clause 18 — Dictionary, note 2**

This clause is a technical amendment to include the word 'body' into the dictionary in the list of terms that are defined in the *Legislation Act 2001*. The word 'body' is used in the definition of 'relevant organisation' in section 26(4).

#### **Clause 19 — Dictionary, note 2**

This clause is a technical amendment to update the signpost definition of 'person' to section 160 of the *Legislation Act*.

#### **Clause 20 — Dictionary, new definition of *critical incident***

This clause is a technical amendment. Section 17(2) set out a full definition of 'critical incident', which was also signposted in section 18(3). As a consequence of the amendments, the term 'critical incident' is now used in sections 27 and 30. In accordance with ACT drafting practice, the full definition of critical incident has been relocated, unamended, to the dictionary section of the Act, and the sectional definitions in sections 17(2) and 18(3) have been omitted.

#### **Clause 21 — Dictionary, definition of *inspector***

This clause replaces the title of ‘Inspector of Correctional Services’ in the definition of ‘inspector’ in the dictionary with ‘Custodial Inspector’. The new title reflects the Inspector’s oversight functions in relation to youth detention places, introduced in 2019. Youth detention places are not considered to be correctional centres.

### **Part 3 — Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018**

#### **Clause 22 — Meaning of *detaining authority* — Section 6(2)**

This clause substitutes a new section 6(2) to provide that a ‘detaining authority’ for the purposes of this Act includes an entity engaged by or on behalf of a detaining authority or the territory to provide services as, or on behalf of, a detaining authority or the Territory. This broadens the scope of entities that may be characterised as a detaining authority for the purposes of the Monitoring of Places of Detention Act.

Two examples are provided for clarity: a non-government organisation that is contracted to provide education services on behalf of the detaining authority and the provision of health services to detainees at a place of detention by a different administrative unit to the one that is responsible for the place of detention.

This amendment will allow the NPM to access documents and information and make recommendations to entities that provide services within places of detention but are independent from the detaining authority in charge of the place of detention or responsible for its day-to-day care and control. In practice, this could include, for example, ACT Health and Winnunga Nimmitjyah that operate health clinics for detainees inside the Alexander Maconochie Centre that may hold relevant information or employ staff that the NPM may reasonably seek to access.

#### **Clause 23 — New section 6A**

This clause inserts a new section 6A - *Responsible entities for places of detention* - into the Act.

Section 6A(1) provides that a ‘responsible entity’ for a place of detention includes the responsible Minister for a place of detention, the responsible director-general for the place of detention, and the detaining authority for the place of detention. The purpose of providing an overarching definition which captures Ministers, directors-general and detaining authorities is to ensure that for some of the less traditional places of detention that may not be the responsibility of the government, the requirements under the Act, including to assist the NPM to provide documents and access to places of detention, will apply.

Section 6A(2) provides that where the responsible entity is referred to in the Act and is required to do a thing, and the particular responsible entity is not stated for the requirement, any responsible entity for the place of detention may do the thing. If the responsible Minister for the place of detention does not do the thing—the responsible Minister must ensure the thing is done. This is necessary given the potential number

of entities which may be defined as a ‘responsible entity’ for the Act for a singular place of detention.

#### **Clause 24 — Meaning of place of detention — Section 7**

This clause amends the meaning of a ‘place of detention’ in section 7 of the Act and inserts the words ‘NPM or’ before the word ‘subcommittee’ to expand the definition of place of detention to provide that it includes any place that the NPM must be allowed to visit under article 4 of OPCAT, that is subject to the jurisdiction and control of the Territory.

#### **Clause 25 — Relationship to other laws — section 8**

This clause omits the words ‘other than an ACT privacy law’ from section 8 to provide that an ACT privacy law has no effect on the exercise of functions by the Subcommittee in relation to a detainee or place of detention under this Act and has no effect to the extent of any inconsistency with this Act. This ensures an ACT privacy law cannot interfere with the operations of the Subcommittee and ensures full compliance with the requirements of OPCAT by providing the SPT with unfettered access to the information it requires.

#### **Clause 26 — Section 8**

This clause inserts the words ‘NPM or’ before the word ‘Subcommittee’ so that the provision also has effect regarding the exercise of functions of the NPM. Similarly to clause 25, this will ensure full compliance with the requirements of OPCAT.

#### **Clause 27 — New Part 1A — National Preventative Mechanism**

This clause inserts a new Part 1A ‘ACT National Preventative Mechanism’ into the Act. The purpose of this clause is to establish the ACT NPM and to provide for its functions, operations, privileges and immunities.

#### **Division 1A.1 Preliminary**

Division 1A.1 deals with preliminary matters, including by setting out the objects and definitions for Part 1A.

Section 8A outlines the object of Part 1A which is to enable an NPM to be established and maintained to fulfill the ACT’s international human rights obligations under Part IV of OPCAT.

Section 8B contains definitions relevant to the operation of new Part 1A, including:

- custodial inspector;
- Commonwealth Ombudsman;

- investigative entity;
- NPM coordinator; and
- staff of the NPM.

## **Division 1A.2 Establishment and functions of the NPM**

Division 1A.2 sets out the sections providing for the establishment and functions of the NPM.

Section 8C establishes the ACT NPM and provides that it is comprised of each entity prescribed by regulation. Pursuant to the regulations, the NPM is comprised of the Human Rights Commission, the ACT Ombudsman and the Custodial Inspector.

Section 8D sets out the functions of the ACT NPM. This section is designed to emulate the required functions of an NPM under Article 19 of OPCAT. The NPM must exercise its functions for the purpose of improving the treatment and conditions of detainees in places of detention and strengthening the protection of detainees against torture and other cruel, inhuman or degrading treatment or punishment. In summary, the functions of the NPM include examining the treatment of detainees in places of detention, making recommendations and observations to responsible entities for places of detention, and submitting proposals and observations concerning existing or draft legislation that relate to detainees or places of detention, as well as any other function given to the NPM under this Act or another Territory law.

Section 8E requires the NPM to make guidelines about the way in which it exercises its functions. The guidelines are a notifiable instrument and must be made available on the NPM's website. Section 8E(2) requires that the guidelines be consistent with, and reasonably appropriate and adapted for implementing OPCAT. Pursuant to section 8E(3), the guidelines may provide for procedures of the NPM, including how the NPM will conduct visits, how it will ensure that visits will respect the sensitivity or care required when carrying out an examination of the treatment of detainees or in a particular place of detention, and how the NPM will work with the NPM Coordinator, the SPT and investigative entities. The guidelines must also provide for any procedures of the NPM prescribed by regulation. The regulations include a requirement that the guidelines must include details of how the entities that comprise the NPM will work together to efficiently and effectively exercise functions as the NPM (regulation 3). Section 8E(4) states that before making the guidelines, the NPM must consult with the responsible directors-general for each place of detention and the chief police officer. The NPM is required to consider any advice or recommendations received during this consultation process.

The guidelines will ensure the NPM entities can work together effectively to carry out its functions, the NPM can coordinate with other entities, and the procedures for



visiting places of detention, particularly those that are not traditional places of detention and may require certain care, such as mental health facilities, are clear for responsible entities.

Section 8F establishes the independence and impartiality of the NPM. Section 8F(1) provides that the NPM is not subject to the direction of anyone else in relation to the exercise of a function under this Act. Staff of the NPM can only be directed by the NPM or another member of staff of the NPM authorised by the NPM to give the direction (section 8F(2)). Section 8F(3) clarifies that no one may require the NPM or staff of the NPM to act other than independently and impartially in the exercise of a function under the Act. This implements Article 18.1 of OPCAT.

Section 8G provides for the staffing of the NPM and allows the NPM to make arrangements with the head of service to use the services of a public servant or any persons prescribed by regulation. This will allow for the NPM to engage those prescribed in the regulations in circumstances where the NPM may comprise of an entity that engages staff outside of the ACT public service.

Section 8H provides for the NPM to engage consultants and contractors. However, pursuant to section 8H(2) the NPM cannot enter into a contract of employment under this section.

Section 8I empowers the NPM to delegate a function under this Act to a member of staff of the NPM. This will allow the NPM to delegate any of its powers and functions to facilitate its effective operation.

### **Division 1A.3 Examination of detainees in places of detention**

Division 1A.3 sets out the functions, powers and operations of the NPM when conducting a visit to a place of detention.

Section 8J provides for when the NPM can inspect a place of detention. This provision implements Article 20(c) of OPCAT. Section 8J(1) and (2) provide that the NPM may visit a place of detention at any time for an inspection to examine the treatment of detainees, with or without notice. The NPM may give notice at its own discretion by making publicly available a schedule of the dates on which it intends to visit a place of detention (section 8J(3)). Section 8J(4) provides that the NPM can take into the place of detention any equipment reasonably necessary to effectively carry out an inspection, with two examples of equipment provided: a recording device and a camera.

Section 8K applies if the NPM visits a place of detention to inspect it and sets out the obligations of the responsible entity for the place of detention to provide access to the place of detention and things in the place of detention to the NPM. Section 8K(2) provides that the responsible entity must ensure that the NPM is given unrestricted access to all parts of the place of detention and any vehicle and equipment used in

the place of detention. Section 8K(3) provides that the responsible entity must also provide unrestricted access to all documents or other things in the place of detention that the NPM reasonably believes it requires access to. This will ensure the NPM can properly inspect the entirety of a place of detention and any relevant documents or information relating to the treatment of people in detention, and partially implements Article 20(b) of OPCAT.

Section 8K(3) provides urgent and compelling grounds upon which the responsible entity for the place of detention may refuse access by the NPM to all or part of a place of detention. The grounds listed in section 8K(3)(a) align with the grounds specified by Article 14.2 of OPCAT and include national security, a risk to public safety, a natural disaster, and serious disorder in the place of detention. Refusal of access may only temporarily prevent access to the place of detention by the NPM. Additionally, section 8K(4) requires that a refusal of access be made in writing, include a statement of reasons for the refusal and if practicable, set out when access will be allowed. Section 8K(5) clarifies that the existence of a state of emergency is not itself a reason to refuse access under section 8K(2). The term 'state of emergency' is defined in section 8K(6).

Section 8L outlines how the NPM will engage with detainees and other people to examine the treatment of detainees in a place of detention and conduct interviews. This provision deals with Article 20(d) and (e) of OPCAT. Section 8L(1) provides that the NPM can privately interview any detainee or other person in the place of detention, either personally or through an interpreter, to examine the treatment of detainees in a place of detention. Section 8L(2) states that a detainee or other person has the right to refuse to speak to or be privately interviewed by the NPM. The interviewee may have a nominated support person during the interview and section 8L(4) provides that this may be at the request of the person and with the agreement of the NPM. The responsible entity for a place of detention must facilitate these private interviews at any time and must give reasonable assistance to the NPM to conduct private interviews, pursuant to section 8L(3). The responsible entity must not, without the consent of the interviewee, read, copy or remove any correspondence between the interviewee and the NPM (section 8L(5)). The term 'privately interview' is defined in section 8L(6) to mean speaking with a person without the presence of any other person and without audio surveillance by electronic or other means. This definition reflects that some places of detention may have audio visual recordings that are unable to be turned off for security reasons.

Section 8M provides a process for the NPM to access information, documents and other things if it believes on reasonable grounds that an entity can provide information, or produce a document or something else relevant to the NPM's examination of the treatment of detainees in a place of detention. Together with section 8K, this fully implements Article 20(b) of OPCAT. The intention of this section is to facilitate the NPM's examinations and oversight of places of detention and ensure the NPM has access to information relevant to the treatment of detainees

including: the number of detainees in a place of detention, the conditions of detention applying to detainees and the number or location of places of detention. This section is primarily designed to operate if the NPM needs to request documents, information or things outside of a visit to a place of detention. The default is that when visiting a place of detention, the NPM is granted unrestricted access to all documents, information or things on the premises and can seek that material without a notice under section 8K(3).

Section 8K(2) provides that the NPM may require the entity to provide the information or produce the document or thing by written notice to the entity, the notice must state the reasons why the NPM believes the information, document or thing is relevant to its examination. The Territory must not obstruct the provision of this information or the production of the document or other thing, even if the territory would be entitled to do so if the examination were a legal proceeding, pursuant to section 8K(3).

Section 8N further facilitates the provision of information, documents and other things to the NPM. The section provides that any entity that has information, a document or something else they believe is relevant to the NPM's examination of the treatment of detainees in a place of detention may provide it to the NPM on their own initiative at any time. Examples of entities are provided, which include a responsible entity, an investigate entity, the SPT and the NPM coordinator. This is to expressly authorise the provision of relevant information to the NPM. This is complemented by section 8T.

Section 8O outlines how the NPM must handle documents or things given to it under sections 8M and 8N so that the NPM can take possession of them, make copies or take extracts. The NPM may also keep the document or other thing for a period necessary for the consideration of the contents of the document or thing. The NPM must under section 8O(2) allow anyone who would usually be entitled to access or inspect the document or thing, if it were not in the possession of the NPM, to inspect it, and if needed, make copies or take extracts of it. Section 8O(3) provides that the NPM must return documents or other things as soon as it is no longer necessary for the NPM's consideration.

#### **Division 1A.4 Recommendations and reporting about treatment of detainees in places of detention**

Division 1A.4 provides for the process for the NPM to make recommendations and observations regarding the treatment of people in detention and the conditions of places of detention. This implements Articles 19(b) and 22 of OPCAT.

Section 8P provides a process for the NPM to provide recommendations and observations. Following an examination of a place of detention, the NPM may make a recommendation or make observations to any entity the NPM considers appropriate in any way the NPM considers appropriate. Recommendations and

observations are provided with the aim of improving the treatment and the conditions of persons deprived of their liberty and to prevent torture and ill-treatment. This is intended to provide a process for providing recommendations and observations outside of more formal reports.

Section 8Q provides a process for the NPM to prepare a report about its examination of a place of detention and the treatment of detainees, as well as any recommendations or observations given under section 8P and any steps to be taken in response to the recommendation or observations. Section 8Q(2) provides that the NPM may give a draft copy of the report to any responsible entity for the place of detention. If the NPM gives an entity a draft copy of the report the NPM may invite comments on the draft report and must consider any comments given by the entity pursuant to section 8Q(3).

Under section 8Q(4), the NPM may also give a copy of the draft report or a copy of part of the draft report to any other entity the NPM is satisfied has a direct interest in the report. However, pursuant to section 8Q(5), the NPM may only provide a copy of the draft report to a non-public sector entity if it has followed the process set out in sections 8Q(2) and (3) with:

- each responsible entity mentioned in the report; and
- each responsible entity that is, or is likely to be, directly affected by the report; and
- any other responsible entity prescribed by regulation.

This will ensure that any responsible entity referred to and with a direct interest in the report is provided with a copy and given an opportunity to comment prior to it being disseminated to a non-public sector entity.

Section 8R provides the process for publication or presentation of a report made under 8Q. Section 8R(1) provides that the NPM can give the report to a responsible entity, publish the report, give the report to the Speaker to table in the Legislative Assembly, and give the report to any other entity. The NPM can only publish or present a report to the Legislative Assembly and provide it to any other entity (beyond a responsible entity) if it has first provided each responsible entity mentioned in the report, each responsible entity that is, or is likely to be, directly affected by the report, and any other responsible entity prescribed by regulation, with an opportunity to respond to the draft report and considered their comments pursuant to the process in sections 8Q(2) and (3). In a similar vein to section 8Q, this is designed to ensure that responsible entities have had an opportunity to consider the report prior to it being disseminated more broadly.

Sections 8R(3) and (4) provide a process for the NPM to give the report to the Speaker to be tabled in the Legislative Assembly, either in or out of session. The

Speaker must present the report to the Legislative Assembly within 5 sitting days after receiving the report. Section 8R(4) provides the process to be taken if the Legislative Assembly is not sitting when the report is provided to the Speaker. Section 8R(5) clarifies the process if the Speaker is unavailable.

Article 22 of OPCAT seeks to ensure the recommendations of the NPM are examined by the relevant authorities and a dialogue is entered into on possible implementation measures. It is expected that responsible entities will engage in a dialogue with the NPM about the steps to be taken to implement recommendations. As part of this process, the NPM will also be able to seek information from responsible entities about steps that have been, or are proposed to be, taken, or if no such steps have been and are not proposed to be taken, the reasons why.

### **Division 1A.5 Information secrecy and sharing**

Division 1A.5 outlines protections relating to the sharing of information. Article 21(2) provides that confidential information collected by the NPM shall be privileged. Under OPCAT, the NPM also needs to be able to share information with detaining authorities, responsible Ministers, other NPMs, the NPM coordinator and the SPT to provide observations and recommendations, as well as raise issues about the treatment of people in detention or the conditions of detention.

Section 8S creates offences relating to secrecy and information sharing. Section 8S(1) creates offences for a person to make a record of protected information about someone else or disclose protected information about someone else. The fault element for this offence is recklessness and the maximum penalty is 50 penalty units, imprisonment for 6 months, or both.

Protected information is defined in the Bill as information about a person disclosed to or obtained by the NPM in the exercise of its functions.

Section 8S(2) provides a list of exceptions to the offence in section 8S(1)(a) relating to making a record of protected information. Section 8S(3) contains a list of exceptions to the offence in section 8S(1)(b) relating to the disclosure of protected information.

The offences do not apply if the record is made or the information is disclosed:

- with the person's consent;
- under the Act or another Territory law;
- in relation to the exercise of a function under the Act or another Territory law to a person to whom the section applies.

For protected information that is not identifying information, which is defined as information that identifies the person or allows the person's identity to be worked out,

an exception applies if the information is provided to a 'permitted information recipient' as defined in section 8S(7) (section 8S(3)(d)).

The purpose of these exceptions is to allow the NPM to make records of and disclose protected information where it is necessary to effectively discharge its functions, while ensuring sensitive information, particularly identifying information is protected.

For protected information that is identifying information, an exception to the offence in section 8S(1)(b) applies, if the information is:

- provided to a permitted information recipient;
- by the NPM or a member of staff of the NPM; and
- the NPM is satisfied the disclosure is necessary and reasonable in the public interest.

This provides additional protection for information that is identifying information so that it can only be disclosed if the NPM is satisfied that the disclosure is necessary and reasonable in the public interest. This will apply to any identifying information to be disclosed under the Act, including for example, under sections 8Q and 8R relating to the reports of the NPM.

Section 8S(4) creates a further offence that a person must not publish protected information about a person that identifies the person or allows the persons' identity to be worked out. The maximum penalty for this offence is 50 penalty units, imprisonment for 6 months, or both. Section 8S(5) provides that this offence does not apply if the information is published with the person's consent. In practice this means that identifying information can only be published with the person's consent.

Additionally, section 8S(6) prevents a person to whom section 8S applies from being compelled to disclose protected information to a court or produce a document containing protected information to a court.

Section 8S(6) provides definitions to terms used in section 8S.

Section 8T provides that laws preventing or limiting the provision of information, documents or other things by an entity to the NPM relevant to the NPM's functions have no effect. The entity providing the information or documents must hold a belief that the materials are relevant to exercise of the NPM's functions. This is intended to ensure compliance with the unfettered access required by the OPCAT.

Section 8U empowers the NPM to refer a matter to an investigative entity or an official visitor if the NPM believes that it can be more appropriately dealt with by that entity or official visitor under the *Official Visitor Act 2012*. Section 8U(2) provides that the NPM may decide to refer the matter together with any relevant documents,

information or other things in the NPM's possession or control. The referral must not include identifying information unless the individual has given consent or the NPM is satisfied that referring the matter is necessary and reasonable in the public interest (section 8U(3)). Under section 8U(5), the NPM may enter into arrangements with the investigative entity or official visitor about the referral of matters. However, the investigative entity or official visitor is not required to deal with the referred matter under this section, pursuant to section 8U(4). Section 8U(5) defines 'investigative entity' and 'matter' for the purposes of the section.

Section 8V prohibits the NPM from publishing an adverse comment in relation to a person, unless the NPM has given the person a reasonable opportunity to respond to the proposed comment. Section 8V(2) clarifies that this applies to the publication of a report under section 8R.

### **Division 1A.6      Miscellaneous**

Section 8W requires the NPM and its staff to identify themselves when carrying out a function under the Act. The intention of this provision is to ensure that the NPM must identify itself when conducting a visit and indicate the functions it is proposing to take under the Monitoring of Places of Detention Act. Noting that each of the NPM bodies have other oversight functions in the ACT, the policy intent of this provision is to ensure it is clear to agencies with responsibility for places of detention that the NPM is there in that capacity.

Section 8X provides for statutory review of the amendments. The Minister must review the operation of this part as soon as practicable after the end of its second year of operation. Section 8X(2) provides that the Minister must present a report of the review to the Legislative Assembly within 12 months after the day the review is started. This section expires 5 years after its commencement.

### **Clause 28 — Section 11 heading**

This clause substitutes the heading of section 11 of the Act, amending it from *duties of detaining authority and responsible Minister for places of detention* to *duties of responsible entities for places of detention*.

### **Clause 29 — Sections 11 to 13**

This clause amends sections 11, 12 and 13 and omits references to 'the responsible Minister' and 'detaining authority' and substitutes it with 'a responsible entity'.

### **Clause 30 — Section 13(4) and (5)**

This clause substitutes 13(4) to remove the prohibition in section 13(4)(b) that currently prevents the Subcommittee from inspecting any record that is personal information of a detainee under an ACT privacy law, unless the detainee consents to the inspection.

This clause omits the words ‘other than an ACT privacy law’ from section 13(5) to clarify that an ACT privacy law that restricts or denies access to records cannot be relied upon by the responsible entity for a place of detention as grounds to not comply with the Subcommittees’ entitlement to inspect any record under the control of the responsible entity.

The intention of this amendment is to enable the Subcommittee to inspect records of personal information under an ACT privacy law without the consent of the person when the Subcommittee conducts a visit to places of detention in the ACT.

The amendment ensures that the Subcommittee can inspect personal records that are personal information of a detainees. The new section 13(5) clarifies that a provision of any Act or other law that restricts or denies access to records does not prevent a responsible entity from complying with this section.

### **Clause 31 — Subcommittee may interview detainees and other people — Section 14(2)**

This clause amends section 14(2) and omits references to ‘the responsible Minister’ and ‘detaining authority’ and substitutes it with ‘a responsible entity’.

### **Clause 32 — Sections 15 and 16**

This clause omits section 15 and 16 from the Act.

### **Clause 33 — New section 17A to 17C**

This clause inserts new sections 17A, 17B and 17C into the Act.

Section 17A provides protection against adverse actions for people providing information to the NPM and the Subcommittee. A person is not subject to any civil or criminal liability and no action, claim or demand may be taken or made of against the person for providing information, producing a document or thing or making a disclosure to the NPM or the Subcommittee for the purposes of both entities performing their respective mandates under OPCAT. Section 17A(2) provides that this section has effect despite any duty of secrecy or confidentiality or any other restriction on the giving or disclosure of information applicable to the person.

Section 17B provides protection against reprisals for people who provide information to the NPM or the subcommittee. Section 17B creates an offence if an entity intentionally takes detrimental against someone wholly or partially because the person provided information or produced a document or thing or made a disclosure to the NPM or the Subcommittee, or proposed to do so, or the entity believes the person has done any of these things. The maximum penalty for this offence is 110 penalty units, imprisonment for 2 years, or both.



Additionally section 17B(2) provides that a detaining authority that engages in conduct constituting the offence in 17B(1) is also taken to have engaged in conduct constituting misconduct in the performance of the detaining authority's duties. The detaining authority may be liable to disciplinary action under a Territory Act or a contract of employment or services that governs the employment or service of the detaining authority, because they engaged in this misconduct. Section 17B(3) defines terms relevant to this section, including 'detrimental action' and 'relevant organisation'.

Section 17C protects officials and others from personality liability. It provides that an official or anyone engaging in conduct under the direction of an official is not personally liable for anything done or omitted to be done honestly and without recklessness in the exercise of a function under this Act or if they reasonably believed the conduct was in the exercise of a function under this Act. Any civil liability that exists will attach to the Territory, rather than the official. Section 17C(3) defines 'official' for the purposes of part 1A of the Act.

These provisions implement Article 21 of OPCAT, which provides that the NPM and those engaging with the NPM require certain protections to ensure the NPM can effectively carry out its functions, and people can disclose information to the NPM without fear of reprisal. These amendments are critical to assuring detainees and others who may engage with the NPM that they will not face adverse consequences for that engagement and feel protected during engagement.

#### **Clause 34 — Regulation-making power — New section 18(2)**

Section 18 of the Act provides for the power to make regulations under the Act. This clause inserts a new subsection 18(2) to provide that before a regulation is made prescribing an entity as the NPM the Minister must give public notice of the proposed regulation, invite public submissions on the proposal and the Executive must consider any written submissions received. The intention of this amendment is to ensure that the Government engages in consultation and considers any submissions made before altering the composition of the NPM. This will enhance the independence of the NPM that is required under Article 18.1 of OPCAT.

#### **Clause 35 — Dictionary, note 2**

This clause is a technical amendment to update note 2 in the dictionary to include that the *Legislation Act 2001*, dictionary, pt 1 defines the terms *public notice*, *official visitor* and *chief police officer*.

#### **Clause 36 — Dictionary, definition of *ACT privacy law***

This clause is a technical amendment that omits reference to *ACT privacy law* in the dictionary.

#### **Clause 37 — Dictionary, new definitions**

This clause is a technical amendment that inserts new definitions into the dictionary for *custodial inspector*, *Commonwealth Ombudsman*, *disclose*, *information*, *investigative entity*, *NPM coordinator*, *NPM*, *responsible director-general*, and *responsible entity*.

### **Clause 38 — Dictionary, definition of *responsible Minister***

This clause provides a substituted definition of *responsible Minister*.

### **Clause 39 — Dictionary, new definition of *produce***

This clause inserts and provides for a new definition of *produce*.

## **Schedule 1 – Consequential amendments**

Schedule 1 includes amendments to the following Acts to replace the title of ‘Inspector of Correctional Services’ with ‘Custodial Inspector’, and replaces the name of the Act, *Inspector of Correctional Services Act 2017*, with the name of *Custodial Inspector Act 2017*, wherever they were used (see clauses 5-9):

- *Auditor-General Act 1996*
- *Children and Young People Act 2008*
- *Corrections Management Act 2007*
- *Freedom of Information Act 2016*
- *Human Rights Commission Act 2005*
- *Ombudsman Act 1989*
- *Remuneration Tribunal Act 1995*

## **Part 1.4 – Freedom of Information Act 2016**

### **[1.1] – Schedule 1, section 1.15**

This clause replaces the title of ‘Inspector of Correctional Services’ in section 1.15 with ‘Custodial Inspector’.

This clause also replaces the name of the Act, *Inspector of Correctional Services Act 2017*, with the name of *Custodial Inspector Act 2017* in section 1.15. The new Act title is a result of the change to the Inspector’s title.

This clause inserts a new section 1.16 into Schedule 1 to include information in the possession of the ACT NPM into the list of ‘information disclosure which is taken to be contrary to the public interest’ in the Act. The information in question relates to information obtained or generated in relation to an examination of the treatment of

detainees in places of detention under the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018*. The inclusion of this information in Schedule 1 of the FOI Act creates a presumption that the release of information in the possession of the NPM that has been obtained or generated in relation to a function under the Act is contrary to the public interest.

## **Schedule 2 – New Monitoring of Places of Places of Detention (Optional Protocol to the Convention Against Torture) Regulation 2024**

### **Clause 1 — Name of regulation**

This is a technical clause that names the short title of the Regulation. The name of the Regulation is the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Regulation 2024*.

### **Clause 2 — National preventative mechanism entities — Act, s 8C(2)**

This clause prescribes the entities that comprise the NPM. It provides that the NPM is comprised of the Custodial Inspector, the Human Rights Commission and the Ombudsman.

### **Clause 3 — Functions of the NPM — guidelines — Act, s 8E(3)(c)**

This clause prescribes a requirement that the guidelines under 8E must provide for how the entities that comprise the NPM work together to efficiently and effectively exercise functions as the NPM. This recognises that the NPM may consist of multiple entities and will cover a range of places of detention.

### **Clause 4 — Arrangements for staff — Act, s 8G**

This clause applies if the Commonwealth Ombudsman is the Ombudsman and provides for the NPM to arrange with the head of service to use the services of a person who is a member of the Ombudsman staff under section 30(2)(b) of the *Ombudsman Act 1989*.