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Consultation paper for the purposes of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013 (Northern Territory)

This document summarises the content of, and background to, the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013* (Northern Territory).

The structure and material in this summary is largely drawn from the Explanatory Statement for the ACT's *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013.*

Background

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

On 8 June 2011, the Commonwealth Government accepted six recommendations from the United Nations Human Rights Council's Universal Periodic Review of Australia's human rights performance.

In April 2012, the Standing Council on Law and Justice agreed to:

> "work towards ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, in particular, to prioritise the preparation of jurisdictional legislation to provide for visits to Australia by the United Nations Subcommittee on the Prevention of Torture."

On 21 June 2012, the Australian Parliament Joint Standing Committee on Treaties tabled its review of OPCAT recommending that Australia take "binding treaty action" (recommendation 6); and that the Australian Government work with the states and

territories to implement a national preventative mechanism fully compliant with the OPCAT as quickly as possible on ratification.

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

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

The Bill is based on a national model Bill drafted by the Parliamentary Counsel's Committee and developed with the collaboration of all Australian States and Territories.

In summary, the Bill:

- defines 'places of detention' for the purpose of subcommittee visits (clause 3(2);
- sets out the relationship between the Bill and other laws in the NT (clause 6);
- provides for arrangements for subcommittee visits, including establishment of Ministerial arrangements for the purpose of facilitating subcommittee visits (clause 8);
- sets out the duties of detaining authorities and the responsible Minister (clause 9);
- provides for the subcommittee to access places of detention, access information and interview detainees and other people (clauses 10-12); and
- protects against action for giving information and against reprisal for disclosing information (clauses 13 and 14).

The operation of this proposed Bill needs to be considered in conjunction with the provisions in OPCAT together with the *Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment* and the subcommittee's *Outline of a regular SPT visit*, which provide clarity about the conduct of the subcommittee during visits.

Summary of the NT Bill

Objectives

The objective of OPCAT is to "establish a system of regular visits undertaken by independent and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment"[1]

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

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

Timetable for the enactment of the NT legislation

It is currently proposed that the legislation be ready for introduction into the Legislative Assembly during August 2013. Actual timing will depend on any responses to the release of the draft Bill and progress in other states and territories, and the Commonwealth, concerning the OPCAT. To date (June 2013) only the ACT has introduced legislation.

Notes on clauses in the NT Bill

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

Part 1 – Preliminary

Clause 1 Short title

Clause 1 sets out the name of the proposed legislation.

Clause 2 Commencement

Clause 2 provides that the Bill will commence on a day fixed by the Administrator. This will be day sometime after when the day on which the Commonwealth Government lodges ratification of OPCAT.

Clause 3 Definitions

Clause 3(1) sets out the key defined terms that are used in the Bill. They are:

Deprivation of liberty
Detaining authority (see also clause 3(2))

Clause 3(2) extends the definition of 'detaining authority' to include an entity engaged for or on behalf of a detaining authority to provide services under contract on behalf of the authority. This provision is necessary to cover places of detention such as contracted services to transport detainees.

Detainee
Entity
Expert
Function
Ministerial arrangement
Optional Protocol
Place of detention (see also clause 4(1))
Responsible Minister
Subcommittee

Clause 4 Places of detention

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

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

Clause 4 (2) provides a list of places of detention that are subject to the jurisdiction and control of the Territory. This list is not exhaustive and does not limit clause 4 (1).

These places include:

- Correctional centres, prisons, detention centres and other similar places
- Hospitals and similar places
- Police station and court cell complexes
- Vehicles used or operated to convey detainees

Question: Despite clause 4(2) not providing an exclusive list, are there any other places of detention in the NT that should be included?

Clause 5 Act binds the State

This clause provides that the Crown in right of the NT must comply with the legislation. It also provides that as far as it is possible under NT constitutional law the crown in right of its other capacities is also bound by the legislation. This does not mean that the Crown can be prosecuted for breach of the legislation.

Clause 6 Relationship to other laws

Clause 6 provides that any other NT law that prevents or limits the exercise of any function of the subcommittee has no effect to the extent of any inconsistency.

The purpose of this clause is to ensure that the subcommittee's role under OPCAT is not limited by Territory laws that are inconsistent with this Act.

Clause 6A Application of the Criminal Code

Clause 6A provides that the principles of criminal responsibility contained in Part IIAA of the Criminal Code apply in relation to offences against the Act. Part IIAA is the NT version of the Model Criminal Code (which is also in place in the ACT and for Commonwealth criminal laws).

Part 2 Visits by subcommittee

Clause 7 Object of Part 2

Clause 7 provides that the object of Part 2 is to enable the subcommittee to fulfil its mandate under article 11(a) of OPCAT as it relates to places of detention. Article 11 sets out the subcommittee's mandate to visit places of detention and "make recommendations ... concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman, degrading treatment or punishment."

Clause 8 Ministerial arrangements

Clause 8 allows the Minister to enter into Ministerial arrangements with the Commonwealth Attorney-General to facilitate the subcommittee exercising its functions within the NT under the Act. In addition to allowing arrangements to be made for the subcommittee's visits, this clause also seeks to ensure that the NT retains responsibility and authority for the care, safety and security of the place of detention and detainees.

Clause 8(2) lists matters about which a Ministerial arrangement may be made. This list is not exhaustive and does not limit clause 8(1).

The list includes matters relating to:

(a) the care, direction, control and management of detainees or other people within places of detention;

(b) the safety and security of places of detention;

(c) access to, and disclosure of, information;

(d) publication of information;

(e) the privacy of individuals or their rights to the confidentiality of personal information about them;

(f) the special needs of children and other vulnerable people;

(g) urgent and compelling risks to public health caused by outbreaks of infectious diseases.

Clause 8(3) seeks to ensure that the Ministerial arrangements are consistent with OPCAT and reasonably appropriate and adapted for implementing OPCAT.

Clause 8(4) allows a detaining authority to exercise the functions under a Ministerial arrangement in order to give effect to OPCAT.

Clause 8(5) allows the Minister to enter into arrangements with the Commonwealth in relation to places of detention and detainees under the control and jurisdiction of the Commonwealth.

Clause 9 Duties of detaining authority and responsible Minister for places of detention

Clause 9 provides that, if the subcommittee requests access to a place of detention, the responsible Minister and detaining authority must ensure that the subcommittee and any accompanying expert or assistant are given access and are able to exercise their functions in accordance with OPCAT.

Clause 10 Subcommittee's access to places of detention

Clause 10(1) provides that, if the subcommittee requests access to a place of detention, the responsible Minister and detaining authority must ensure that the subcommittee and any accompanying expert or assistant are given unrestricted access to every part of the place of detention.

However, Article 4(2) of OPCAT provides that the ability to access places of detention is limited in circumstances where there are "urgent or compelling grounds of national defence, public safety, natural disaster or serious disorder".

Clause 10(3) provides that the detaining authority may prohibit or restrict access to a place of detention so that the NT Government has time to request the Commonwealth Attorney-General to object to the visit and allow time for the Commonwealth Attorney-General to decide whether or not to object.

Clause 10(3)) also allows a detaining authority to prohibit or restrict access if an objection has been made by the Commonwealth Attorney-General and the objection has not yet been resolved.

Clause 11 Access to information

Clause 11(1) provides that if the subcommittee requests access to a place of detention, the responsible Minister and detaining authority must provide all relevant information requested by the subcommittee for evaluating the needs and measures to strengthen, if necessary, protection of detainees against torture and other cruel, inhuman or degrading treatment or punishment.

The subcommittee's guidelines contain a number of guidelines in relation to access to information and the manner in which the subcommittee is to deal with information. Guideline 8.23 states that "As a general rule, the Subcommittee considers that photo documentation from places of detention is unnecessary and does not use this modality." If, in exceptional circumstances, this is regarded as essential express acceptance must be gained from the head of the delegation.[2]

Guidelines 24 and 25 provide that the guiding principle for the subcommittee is to highlight generic and systemic issues, rather than individual issues. The subcommittee may only "address the State party about individual cases, if it deems it necessary in order ... to avoid irreparable damage to the person(s) concerned" and then only with the consent of the individual concerned[3].

Part III of the guidelines sets out the subcommittee's confidentiality obligations, including that information gathered by the subcommittee is and must remain confidential and that no personal data is to be published without the express consent of the person concerned. Members of the subcommittee, experts and other people accompanying the subcommittee have an express obligation to uphold confidentiality in relation to any information that they become aware of while carrying out their duty[i45].

Clause 11(2) provides that the information to be provided in relation to the place of detention on request includes the number of detainees, the treatment of detainees and conditions of detention in that place.

Clause 11(5) prevents the subcommittee from accessing the following records relating to a person who is or was a detainee: a record held by a registered health practitioner

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[2] *Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment*, guideline 8, para 23

[3] *Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment* guideline 8, paras 24-26

[4] The value of a penalty unit is currently $141. It will rise to $144 on 1 July 2013 – See *Penalty Units Act* and Penalty Units Regulations

[5] *Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment*, part III, guideline 14

concerning private health care to a person who is or was a detainee; a record held by an Australian[6] lawyer (as defined in the *Legal Profession Act)* in relation to legal advice to a client who is or was a detainee; and records held by any other person who acted in a professional capacity where there is an express or implied obligation under law not to disclose any information or confidence arising out of that relationship.

Clause 11(6) protects a professional from civil or criminal liability if the responsible Minister or detaining authority gives access to such documents to the subcommittee.

Clause 12 Subcommittee may interview detainees and other people

Clause 12 provides that if the subcommittee requests access to a place of detention, the responsible Minister or detainee authority must ensure that the subcommittee and any accompanying expert are given reasonable assistance to interview any detainee or other person at the place of detention, as chosen by the subcommittee, without witnesses.

Clause 12(2) provides that the responsible Minister must give the subcommittee reasonable assistance to interview anyone the subcommittee believes may be able to assist with relevant information about the place of detention, the treatment of detainees at that place or the conditions of detention.

Clause 12(3) sets out the requirement that a person can be interviewed without any witnesses. The purpose is to ensure that interviewees have an opportunity to provide information to the subcommittee without fear of reprisal or any undue pressure from a representative of the detaining authority being present. It does not preclude the subcommittee from interviewing a person through an interpreter.

Clause 12(3) specifically allows a support person nominated by the interviewee to be present at the interviewee's request and with the agreement of the subcommittee. A person who objects or does not consent is not required to participate in an interview with the subcommittee.

Clause 13 Protection against actions etc

Clause 13 protects a person from any civil or criminal action for giving information to the subcommittee when the subcommittee is performing its role under OPCAT. This protection applies despite any duty of secrecy or confidentiality.

Clauses 14 Protection against reprisals

Clause 14(1) provides that it is an offence for a person to intentionally take detrimental action against another person because the other person has given or disclosed information to the subcommittee, or if they believe that the other person has given or disclosed information to the subcommittee.

[6] "Australian" in this context refers to a type of lawyer (ie one who holds a practising certificacte) rather than the nationality of the lawyer

The maximum penalty for breach of section 14(1) is 100 penalty units[ii] and/or 2 years imprisonment.

This provision applies whether the detrimental action was taken wholly or partially because the other person gave, or was believed to have given, information to the subcommittee. Clause 14(3) makes it clear makes it clear that it does not matter (for proving the offence) that no information was in fact, disclosed to the Subcommittee.

Clause 14(2) extends the application of the offence clause 14(1) to a detaining authority who engages in conduct that would constitute an offence under that clause and provides for disciplinary action against the detaining authority.

Clause 14(4) defines what is meant by the term 'detrimental action'.

Question: Section 14 appears to require that the prosecution prove that the defendant took reprisal action because of the belief that the victim gave or disclosed information. This belief may be difficult to prove. Is there some other way of drafting this offence? For example, allow for some kind of vicarious liability provision, or otherwise some positive onus on the place of detention to ensure no detriment. An example of a current reprisal section in NT legislation is section 15(2) of the *Public Interest Disclosure Act.* It provides:

(2) A person must not commit an act of reprisal against another.

Fault elements:

The person:

(a) knows or believes a person has acted, or intends to act, as described in subsection (1)(a); and

(b) intends to discourage, or obtain retribution for, that act or intended act.

Maximum penalty: 400 penalty units or imprisonment for 2 years.

(3) It is a defence to a charge of an offence against subsection (2) for the defendant to prove that the prohibited reason was not a substantial reason for the conduct on which the charge is based.

Question: should the legislation also provide for damages and injunctive relief concerning acts of reprisal.

The *Public Interest Disclosure Act* provides for liability in damages (section 16) arising from reprisals and for the Supreme Court to provide injunctive relief concerning an act of reprisal or an apprehended act of reprisal (section 17).

Part 3 Miscellaneous

Clause 15 Directions of responsible Minister

Clause 15 provides that the responsible Minister for a place of detention may give directions for the purpose of the Act and that the detaining authority must comply with those directions.

Clause 16 Regulations

Clause 16 provides that the Administrator may make regulations for the purposes of the Act.