



Minister for Climate Change and Sustainability
Minister for Corrections and Justice Health
Minister for Justice, Consumer Affairs and Road Safety
Minister for Mental Health
Member for Kurrajong

Mrs Giulia Jones MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Jones

I write in response to the Standing Committee on Justice and Community Safety's Report No 34 of 10 September 2019, which comments on the Official Visitor Amendment Bill 2019 (the Bill).

The Committee recommends that the explanatory statement be amended to address aspects of the Bill that may limit the right to privacy under section 12 of the *Human Rights Act 2004*. I acknowledge the Committee's concerns and advise that a revised explanatory statement has been prepared to address the issues raised by the Committee. I intend to table this revised explanatory statement during debate on the Bill. I also address the Committee's comments below.

Right to privacy and reputation

The Committee has noted that the explanatory statement for the Bill provided human rights justification for the proposed changes to consent requirements for official visitor access to records in Clause 10 of the Bill and referred this statement to the Assembly.

The Committee has referred to the amendments to the *Disability Services Act 1991* and *Mental Health Act 2015* in clauses [1.8] and [1.23] of the Bill, which extend the in which extend the consent of an entitled person to a visit by an official visitor. The Committee also referred to the amendments to the *Housing Assistance Act 2007* in clauses [1.11] and [1.12] which authorise the visit of an official visitor to a visitable place without notice to the operating entity, and in some circumstances without the consent of the entitled person, where there is a risk of abuse or harm. The Committee noted that the explanatory statement did not discuss the potential human rights implications of these amendments and recommended that consideration be given to amending the explanatory statement to address this issue.

ACT Legislative Assembly

London Circuit, Canberra ACT 2601, Australia GPO Box 1020, Canberra ACT 2601, Australia
Phone +61 2 6205 0005 Email rattenbury@act.gov.au



@shanerattenburymla



ShaneRattenbury



shanerattenbury



The purpose of these amendments is to align the consent provisions for visits and access to records in particular circumstances. These provisions apply to entitled people who are at locations that are not considered a 'visitable place' for the purposes of the legislation. The amendments apply to a situation where an entitled person in this particular location has made an initial complaint about a specialist disability service or the treatment, care or support for a mental disorder, the official visitor then attends the place but the entitled person at that point may be unable to consent to the visit (for example where an entitled person has fluctuating capacity related to a psycho-social disability).

An official visitor cannot use these provisions to expressly override an entitled person's express wishes regarding the visit. While these provisions engage the right to privacy, they include appropriate safeguards to protect the entitled person. A visit will only be made where the entitled person has made a complaint to the official visitor. An official visitor can only proceed with a visit if the official visitor makes reasonable attempts to seek consent and the entitled person has not told, or otherwise indicated to, the official visitor that the person does not consent. These provisions are only applicable where the official visitor reasonably believes that a visit to the place is necessary and appropriate.

The Committee has referred to the amendments to the *Housing Assistance Act 2007* in clauses [1.11] and [1.12] of the Bill, which authorise the visit of an official visitor to a visitable place without notice to the operating entity, and in some circumstances without the consent of the entitled person, where there is a risk of abuse or harm. The Bill expands the definition of 'visitable place' in the Housing Assistance Act to allow the Homelessness Official Visitor to visit entitled people residing in single occupancy accommodation provided by specialist homelessness services funded by the ACT Government. This provision is not intended to apply to public housing or community housing. The Bill allows an official visitor to attend the premises without seeking prior consent from the entitled person or notifying the operating entity, in very limited circumstances. The official visitor may only do this in circumstances where the official visitor reasonably believes that there is a serious risk to the health or welfare of the entitled person. While this does engage the right to privacy, this engagement is justified on the grounds that this lack of consent only applies in very serious situations, where it may be difficult to seek the entitled person's consent prior to the visit.

The Committee has referred to new section 23DB of the Official Visitor Act, which requires the relevant Director-General to keep a register with details of visitable places. The Committee noted that the Director-General has the power to approve providing information in the register to anyone if satisfied that giving the information is reasonable in the circumstances. This provision replaces a requirement in the Official Visitor Act, which required information about visitable places to be included in the visit and complaint guidelines. Section 23(1) of the Official Visitor Act requires the visit and complaint guidelines to include a schedule that sets out each visitable place that an official visitor must visit and the frequency of the visits. These guidelines are a publicly notified disallowable instrument. The schedule must be remade every time a new visitable place is approved or revoked, which requires the Minister to approve and notify a new disallowable instrument. Visitable places change over time, particularly in areas such as homelessness, disability and residential care and protection. It is procedurally difficult for operational areas to update visitable places regularly. This may also be sensitive information, and there are privacy concerns associated with publishing details of certain places such as residential out of home care facilities.

The Bill supports the right to privacy by replacing the guideline requirement with a requirement for the Director-General of an operational Directorate to maintain a register of visitable places. This register is not publicly available. While the register may contain certain personal information about the names of entitled people and the names, phone numbers and email addresses of an employees or volunteers based at the place, this information is subject to important safeguards. The Director-General may only give the information on the register to specified people in specified circumstances, where it is necessary for these specified people to carry out their functions. The Director-General must give information on the register to an official visitor of a visitable place under the operational Act, the public advocate, senior practitioner, the official visitors board or the official visitor executive office. The Director-General may also give information to other specified people (for example a member of the emergency services, a carer or legal representative of the entitled person) if satisfied that giving the information is reasonable in the circumstances. As a public servant, the Director-General is subject to public authority obligations under the *Human Rights Act 2004 (ACT)* and is required to have proper regard to the right to privacy in releasing such information.

Thank you for bringing these matters to my attention.

Yours sincerely

Shane Rattenbury MLA
Minister for Justice, Consumer Affairs and Road Safety