

2018

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

**Monitoring of Places of Detention (Optional Protocol to
the Convention Against Torture) Bill 2018**

SERIAL NO. 53

EXPLANATORY STATEMENT¹

GENERAL OUTLINE

The Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2018 establishes the necessary legislative arrangements for the United Nations Subcommittee (the Subcommittee) to inspect places of detention in the Northern Territory to fulfil its mandate under Article 11(a) of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (the Optional Protocol) as it relates to places of detention.

The Bill:

- (a) defines places of detention for the purpose of Subcommittee visits;
- (b) sets out the relationship between the Bill and other laws of the Territory;
- (c) provides for arrangements for the Subcommittee visits including establishment of Ministerial arrangements for the purpose of facilitating Subcommittee visits;
- (d) sets out the duties of detaining authorities and the responsible Minister;
- (e) provides for the Subcommittee to access places of detention, access information and interview detainees and other people; and
- (f) protects against action for giving information and against reprisal for disclosing information.

¹ Acknowledgement that this Statement is based upon the Statement made by the Australian Capital Territory in relation to the ACT *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018*

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1. Short title

This is a formal clause, which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018*.

Clause 2. Commencement

This is a formal clause that provides that the commencement of the Bill will occur on a day fixed by the Administrator by notice published in the Gazette.

Clause 3. Interpretation

This clause contains definitions for terms used in the Act.

Clause 4. Meaning of *place of detention*

Clause 4(1) defines the scope of the term 'place of detention' by reference to Article 4 of the Optional Protocol, under which the Territory 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) of the Optional Protocol 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) specifies certain places of detention without limiting clause 4(1).

Clause 5. Act binds the Crown

This is a standard clause that provides that the Bill is intended to apply to the Crown. It is arguably clear that the Act binds the Crown by necessary implication, since it is nearly entirely directed to visits to places of detention that are subject to the jurisdiction and control of the Territory. The provision is included for clarity.

Clause 6. Relationship to other laws

Clause 6 provides that other Territory laws that prevent or limit the exercise of any function of the Subcommittee have no effect to the extent of any inconsistency. The purpose of this clause is to ensure that the Subcommittee's mandate under the Optional Protocol is not limited by Territory laws that are inconsistent with this Act.

This clause is not expressed, and does not intend, to limit future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Legislative Assembly at any time like other pieces of legislation and the Legislative Assembly could make another law that overrides this law if necessary.

Clause 7. Application of Criminal Code

Clause 7 provides that Part IIAA of the Criminal Code applies to offences under the Act. Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.

Part 2 Visits by Subcommittee

Clause 8. Object of Part

Clause 8 states that the object of Part 2 is to enable the Subcommittee to fulfil its mandate under Article 11(a) of the Optional Protocol as it relates to places of detention. Article 11(a) 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 9. Ministerial arrangements

Clause 9 allows the Minister to enter into Ministerial arrangements with the Commonwealth Attorney-General to support the Subcommittee to exercise its functions within the Territory under the Act. In addition to allowing arrangements to be made for the Subcommittee's visits, this clause also seeks to ensure that the Territory retains responsibility and authority for the care, safety and security of the place of detention and detainees.

Clause 9(2) lists matters about which a Ministerial arrangement may be made. This list is not exhaustive and does not limit clause 9(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;
- h) the appointment of persons to assist the Subcommittee.

Clause 9(3) seeks to ensure that Ministerial arrangements are consistent with the Optional Protocol and reasonably appropriate and adapted for implementing the Optional Protocol.

Clause 9(4) allows a detaining authority to exercise the functions under a Ministerial arrangement in order to give effect to the Optional Protocol.

Clause 9(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 10. Duties of detaining authority and responsible Minister for places of detention

Clause 10 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 the Optional Protocol.

Clause 11. Subcommittee's access to places of detention

Clause 11 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, 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', as set out in Article 14(2) of the Optional Protocol. Clause 11(2) provides that the detaining authority may prohibit or restrict access to a place of detention so that the Territory may 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 11(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 removed or otherwise resolved.

Clause 12. Access to information

Clause 12(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 information requested must only be given to members of the Subcommittee and any accompanying experts, not to 'assistants'.

Clause 12(2) states the information to be provided in relation to the place of detention on request includes the number of detainees, the treatment of detainees and the conditions of detention in that place.

Clause 12(3) provides that access includes the right to inspect any record that is under the control of the responsible Minister or the detaining authority.

Clause 12(4) provides that a provision of any Act or other law that restricts or denies access to records does not prevent the responsible Minister or detaining authority from complying with this clause. This clause is not expressed, and does

not intend, to limit future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and the Assembly could make another law that overrides this law if necessary.

Clause 12(5) defines 'record'.

Clause 13. Subcommittee may interview detainees and other persons

Clause 13 provides that, if the Subcommittee requests access to a place of detention, the responsible Minister or detaining authority must ensure that the Subcommittee and any accompanying experts are given reasonable assistance to interview any detainee or other person at the place of detention, as chosen by the Subcommittee, without witnesses.

In addition, 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.

The requirement that a person be interviewed without any witnesses 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.

In addition, clause 13(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 14. Protection against actions etc.

Clause 14 protects a person from any civil or criminal action for giving information to the Subcommittee when the Subcommittee is performing its mandate under the Optional Protocol. This protection applies despite any duty of secrecy or confidentiality. However, this clause does not act to restrict the power of the Legislative Assembly to amend or repeal this clause, or make another law overriding this clause.

Clause 15. Protection against reprisals

Clause 15(1) provides that it is an offence for a person to intentionally take detrimental action against another person because they believe that the other person has given or disclosed information to the Subcommittee. This provision applies whether the detrimental action was taken wholly or partly because the other person was believed to have given information to the Subcommittee.

Clause 15(2) provides that a detaining authority that engages in conduct that would constitute an offence under clause 15(1) is deemed to have engaged in misconduct that justifies taking disciplinary action against it.

Clause 15(3) makes it clear that the provision extends to a case where a person takes action against another person even if the other person did not, in fact, disclose information to the Subcommittee.

Clause 15(4) defines what is meant by the term 'detrimental action'.

Part 3 Miscellaneous

Clause 16. Directions of responsible Minister

Clause 16 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 17. Regulations

Clause 17 provides that the Administrator may make regulations for the Act.