

**OMBUDSMAN AMENDMENT (NATIONAL PREVENTIVE MECHANISM)
REGULATIONS 2019**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Ombudsman Act 1976* (the Act) establishes and outlines the functions, powers and duties of the Commonwealth Ombudsman (the Ombudsman).

Section 4(2)(a) of the Act outlines the functions of the Ombudsman to investigate complaints made under the Act and perform other such functions conferred on the Ombudsman.

Section 38 of the Act provides that the Governor-General may make regulations prescribing all matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Ombudsman Amendment (National Preventive Mechanism) Regulations 2019* (the Regulations) is to formally confer on the Ombudsman the roles and functions of the National Preventive Mechanism (NPM) Coordinator and of the NPM Body for places of detention under the control of the Commonwealth under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

Australia ratified OPCAT on 21 December 2017. It entered into force on 20 January 2018. OPCAT establishes a system of independent monitoring for places of detention to prevent torture and other cruel, inhuman or degrading treatment or punishment.

In implementing OPCAT, Australia is obliged to:

- set up, designate or maintain a NPM (a domestic body or bodies to inspect places of detention under Australia's jurisdiction and control), and
- facilitate visits to Australia, including places of detention under Australia's jurisdiction and control, by the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

Australia's NPM will be a network of Commonwealth, state and territory inspectorates (each referred to as NPM Bodies) responsible for inspecting and making recommendations about places of detention within their jurisdiction. The network will be coordinated by the Ombudsman as the NPM Coordinator. The Ombudsman commenced as Australia's NPM Coordinator on 1 July 2018.

The Ombudsman has also been designated as the NPM Body responsible for oversight of places of detention under the Commonwealth's jurisdiction and control.

The Regulations specify that, as the NPM Body, the Ombudsman is responsible for undertaking inspections of places of detention under the Commonwealth's jurisdiction and control. This includes

inspections of immigration detention facilities, Australian Defence Force facilities and Australian Federal Police cells in Australia's external territories. The Ombudsman already inspects immigration detention facilities under its existing inspection function.

The Regulations specify that the Ombudsman's NPM Body function includes giving information to the SPT to facilitate the inspection of places of detention by the SPT.

The Regulations clarify that, as Australia's NPM Coordinator, the Ombudsman has national oversight of arrangements to prevent torture and mistreatment in places of detention under Australia's jurisdiction and control.

The Regulations clarify that the NPM Coordinator performs a facilitative and collaborative role for the NPM Network and assists, but must not compel or direct, NPM Bodies in their work.

The Regulations specify the functions of the NPM Coordinator.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Office of the Commonwealth Ombudsman was consulted on the Regulations throughout the drafting process. The Department of Home Affairs and the Department of Defence were previously consulted on how OPCAT would be implemented in Australia. The proposed Regulations operationalise the decisions made from this previous consultation and therefore no further consultation was required.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation was consulted and advised that a Regulatory Impact Statement is not required because the Regulations operationalise the previous decision of the Australian Government to ratify OPCAT. The amendments contained in the Regulations are unlikely to have a regulatory impact on businesses, community organisations or individuals (OBPR ID 25035).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Ombudsman Amendment (National Preventive Mechanism) Regulations 2019

1. This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Disallowable Legislative Instrument

1. The *Ombudsman Regulations 2017* currently provide the matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the *Ombudsman Act 1976*.

2. The *Ombudsman Amendment (National Preventive Mechanism) Regulations 2019* (the Regulations) will amend the *Ombudsman Regulations 2017* to formally confer on the Ombudsman the roles and functions of the National Preventive Mechanism (NPM) Coordinator and of the NPM Body for places of detention under the control of the Commonwealth under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

3. Australia ratified OPCAT on 21 December 2017. It entered into force on 20 January 2018. OPCAT establishes a system of independent monitoring for places of detention to prevent torture and other cruel, inhuman or degrading treatment or punishment.

4. In implementing OPCAT, Australia is obliged to:

- set up, designate or maintain an NPM (a domestic body or bodies to inspect places of detention under Australia's jurisdiction and control), and
- facilitate visits to Australia, including places of detention under Australia's jurisdiction and control, by the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

5. Australia's NPM will be a network of Commonwealth, state and territory inspectorates (each referred to as NPM Bodies) responsible for inspecting and making recommendations about places of detention within their jurisdiction. The network will be coordinated by the Ombudsman as the NPM Coordinator. The Ombudsman commenced as Australia's NPM Coordinator on 1 July 2018.

6. The Ombudsman has also been designated as the NPM Body responsible for oversight of places of detention under the Commonwealth's jurisdiction and control.

7. The Regulations specify that, as the NPM Body for places of detention under the Commonwealth's jurisdiction and control, the Ombudsman is responsible for undertaking inspections within its legislated mandate under the Act. This includes inspections of immigration detention facilities, Australian Defence Force facilities and Australian Federal

Police cells in Australia's external territories. The Ombudsman already inspects immigration detention facilities under its existing allocation.

8. The Regulations specify that the Ombudsman's NPM Body function includes giving information to the SPT to facilitate the inspection of places of detention by the SPT.

9. The Regulations clarify that, as Australia's NPM Coordinator, the Ombudsman has national oversight of arrangements to prevent torture and mistreatment in places of detention under Australia's jurisdiction and control.

10. The Regulations clarify that the NPM Coordinator performs a facilitative and collaborative role for the NPM Network and assists, but must not compel or direct, NPM Bodies in their work.

11. The Regulations specify the functions of the NPM Coordinator.

Human rights implications

12. This Disallowable Legislative Instrument engages the following human rights:

- prohibition on torture and cruel, inhuman or degrading treatment or punishment (article 7 of the International Covenant on Civil and Political Rights (ICCPR) and articles 1, 2, 3, 13, 14, 15 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT))
- the right to humane treatment in detention (article 10 of the ICCPR)
- protection from exploitation, violence and abuse (article 19(1) of the Convention on the Rights of the Child (CRC) and article 16(1) of the Convention on the Rights of Persons with Disabilities (CRPD))

Prohibition on torture and cruel, inhuman or degrading treatment or punishment

13. Article 7 of the ICCPR states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

14. Articles 1, 2, 3, 13, 14, 15 and 16 of the CAT state that the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

15. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

16. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

17. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The right to humane treatment in detention

18. Article 10 of the ICCPR states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

19. The right to humane treatment in detention complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment.

Protection from exploitation, violence and abuse

20. Article 19(1) of the CRC states that all appropriate legislative, administrative, social and educational measures shall be taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

21. Article 16(1) of the CRPD states that all appropriate legislative, administrative, social, educational and other measures shall be taken to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

Analysis of the rights engaged

22. The Regulations engage the rights detailed above by modifying existing powers and creating new powers for the Ombudsman to carry out their oversight and inspection functions as NPM Coordinator and NPM Body for places of detention under Commonwealth's jurisdiction.

23. The Regulations promote these rights by establishing enhanced oversight and inspection of Australian places of detention, and improvement in conditions in detention, in accordance with Australia's obligations under OPCAT.

24. The purpose of OPCAT is to establish a system of independent monitoring for places of detention to encourage states to meet their obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to prevent acts of cruel, inhuman or degrading treatment or punishment.

25. The oversight and inspection functions conferred by the Regulations on the Ombudsman will inform communications with the SPT, which will strengthen accountability in relation to the fulfilment of Australia's obligations under OPCAT and CAT.

26. The Regulations accordingly promote the prohibition on torture and cruel, inhuman or degrading treatment or punishment, the right to humane treatment in detention, and the right to protection from exploitation, violence and abuse.

Conclusion

27. The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.

NOTES ON SECTIONS

PART 1 – Preliminary

Section 1 – Name

Section 1 provides that the title of the instrument is the *Ombudsman Amendment (National Preventive Mechanism) Regulations 2019*.

Section 2 – Commencement

This section provides that the instrument will commence on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the instrument is made under the *Ombudsman Act 1976* as allowed by section 38.

Section 4 – Schedules

This section outlines that the instrument specified in Schedule 1, the *Ombudsman Regulations 2017*, will be amended or repealed as set out in the Schedule.

SCHEDULE 1 – Amendments

Ombudsman Regulations 2017

Section 1 – Section 5

Item 1 inserts into section 5 of the *Ombudsman Regulations 2017*, the definition of National Preventive Mechanism (NPM) Network.

Section 2 – At the end of the regulations

Item 2 would insert a new part, Part 4, which provides the roles and functions of the Ombudsman as NPM Coordinator and of the NPM Body for places of detention under the control of the Commonwealth under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

PART 4 – National Preventive Mechanism functions

Division 1 – National Preventive Mechanism Body function

Division 1 of Part 4 would provide the role and function of the Ombudsman as the NPM Body for places of detention under the control of the Commonwealth under OPCAT.

Section 16 – National Prevention Mechanism Body function

Subsection (1) would provide that for the purposes of section 4(2)(a) of the *Ombudsman Act 1976*, the NPM Body function is conferred on the Ombudsman.

Subsection (2) would provide that the NPM Body function is to be performed for the purposes of giving effect to the Commonwealth's obligations under OPCAT, so far as those obligations relate to places of detention under the control of the Commonwealth.

Subsection (3) would outline the functions of the NPM Body.

Subsection (4) would provide that the Commonwealth's obligations under OPCAT do not include the obligations of each of the States and Territories under OPCAT.

Division 2 – National Preventive Mechanism Coordinator function

Division 2 of Part 4 would provide the role and functions of the Ombudsman as NPM Coordinator.

Section 17 – National Preventive Mechanism Coordinator function

Subsection (1) would provide that for the purposes of section 4(2)(a) of the Act, the function of NPM Coordinator is conferred on the Ombudsman.

Subsection (2) would provide that the function of NPM Coordinator is to be performed for the purposes of giving effect to Australia's obligations under OPCAT.

Subsection (3) would outline the functions of the NPM Coordinator.

Subsection (4) would provide that in performing the function of NPM Coordinator, the Ombudsman must not compel or direct a person or body that is part of the NPM Network.