



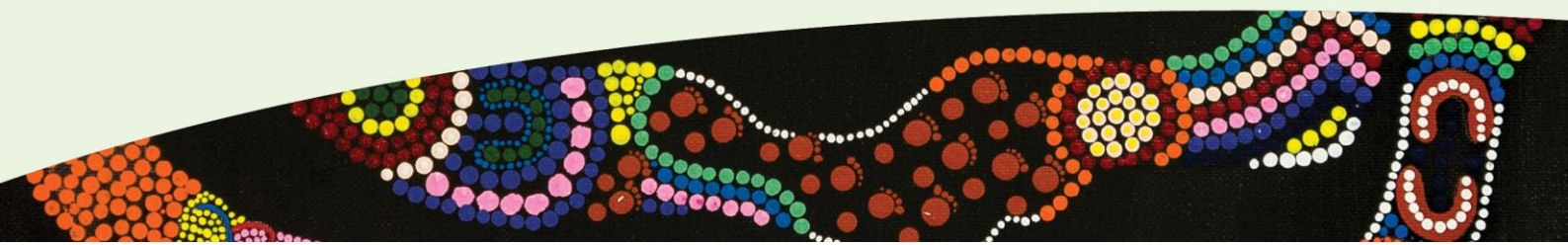
ICS
ACT Inspector
of Custodial
Services

ACT Inspector of Custodial Services

Collection and release of information during reviews policy

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Rainbow Serpent (above and cover detail)
Marilyn Kelly-Parkinson of the Yuin Tribe (2018)

About this document

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ACT Inspector of Custodial Services
GPO Box 1771,
Canberra ACT 2601
T 1800 93 20 10
www.ics.act.gov.au

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We acknowledge the Ngunnawal people as traditional custodians of the ACT, and recognise any other people or families with connection to the lands of the ACT and region. We acknowledge and respect their continuing culture and the contribution they make to the life of this city and this region.

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INTRODUCTION

The ACT Office of the Inspector of Custodial Services (OICS) was established by the *Custodial Inspector Act 2017* (ACT) (CI Act) to provide independent oversight of ACT correctional and youth detention facilities.

This policy sets out the protections and obligations OICS must provide when collecting information through reviews and other work of the office. It should be read in conjunction with other relevant legislation including:

- *Information Privacy Act 2014*
- *Health Records (Privacy and Access) Act 1997*
- *Children and Young People Act 2008*
- *Workplace Privacy Act 2011*
- *Corrections Management Act 2007*
- *Human Rights Act 2004*
- *Territory Records Act 2002*
- *Freedom of Information Act 2016*
- *Public Sector Management Act 1994*
- *Integrity Commission Act 2018*
- *Public Interest Disclosure Act 2012*
- *Ombudsman Act 1989*

This policy should also be read in conjunction with other relevant policies of the office including the *OICS review framework for its review process*, the ACT Justice and Community Safety Directorate's Privacy Policy and the [ACT Government's website privacy policy](#) (as adopted by OICS).

As a public authority under the *Human Rights Act 2004* (HR Act), OICS must act compatibly with human rights and in making a decision, give proper consideration to relevant human rights. Relevant rights are likely to include the protection from cruel, inhuman or degrading treatment or punishment (s 10), right to humane treatment while deprived of liberty (s 19) and rights of the child (s 11).

OICS is committed to child safety and providing a fair and reasonable process.

OPERATING CONTEXT

Mandate/Purpose

OICS was established with the passage of the CI Act. This was in response to a number of critical incidents that had occurred at the Alexander Maconochie Centre (AMC) since it opened in 2009, in particular the death of a detained person at the AMC in May 2016. This prompted an independent inquiry (the Moss review) into his treatment and care. The ACT Government's response to the Moss review included a commitment to establish an independent Inspector of Correctional Services. Another purpose of establishing an independent inspectorate was to provide independent preventive monitoring of adult and youth detention, pursuant to obligations under the Optional Protocol to the Convention Against Torture (OPCAT) that the Commonwealth government ratified in 2017. The ACT Government nominated OICS as part of ACT's National Preventive Mechanism under the OPCAT in

2022, along with the ACT Human Rights Commission and ACT Ombudsman. These three entities are jointly responsible for monitoring places of deprivation of liberty in the ACT to fulfil ACT's obligations under this international human rights treaty.

The focus of OICS is continual improvement and prevention of ill-treatment in the ACT's adult correctional centres and youth justice facilities. OICS provides oversight by conducting reviews of ACT correctional facilities and services and reviewing critical incidents. In December 2019, OICS' function expanded to include oversight of Bimberi Youth Justice Centre.

Legislation

The functions of OICS are set out in section 17 of the CI Act. They are to:

- examine and review correctional centres¹ and correctional services;
- review critical incidents at correctional centres or in the provision of correctional services, and
- report to the ACT Legislative Assembly on these reviews.

Critical incidents are defined in the Dictionary as 'any event in a correctional centre or in the provision of correctional services that involves any of the following:

- (a) the death of a person;
- (b) a person's life being endangered;
- (c) an escape from custody;
- (d) a person being taken hostage;
- (e) a riot that results in significant disruption to a centre of service;
- (f) a fire that results in significant property damage;
- (g) an assault or use of force that results in a person being admitted to hospital;
- (h) any other incident identified as a critical incident by a relevant Minister or relevant director-general.

The powers of OICS are set out in section 19 of the CI Act and include the power to:

- enter a correctional centre at any time and inspect any part of, or vehicle or equipment used at, a correctional centre;
- inspect any document, including health records, relating to a detainee at the correctional centre or the provision of a correctional service;
- speak to, or privately interview, detainees, staff and visitors at a correctional centre.

¹ Section 7 of the ICS Act defines 'correctional centre' broadly and it includes adult correctional centres and youth detention places.

This includes the power to make unannounced visits to correctional centres. OICS also has powers to require the production of information and for people to attend interviews, discussed further below.

Collection of information

OICS collects information through a variety of channels including:

- Formal data requests to detaining authorities;
- Inspecting registers and records (including audiovisual) held by detaining authorities;
- Interviews, surveys and informal conversations with staff and detained people;
- Submissions from government, stakeholders, civil society and other members of the community.

We collect this information, including personal information, when:

- Required or authorised to do so under the CI Act or other legislation;
- A person participates in consultations, forums, reviews or makes a submission to us and they give us permission to collect that information;
- They contact us to ask for information and we need it to help them or reply to them;
- They are in the office, facility or building covered by CCTV or other monitoring equipment and a recording is provided to OICS.

The ways in which we may collect this information includes through:

- paper or online forms
- letters and emails
- telephone
- Audio and/or visual recording of interviews
- Transcripts of such interviews
- CCTV and other audio/video recording systems.

When collecting information in this way, if possible, OICS will allow people who contact us to remain anonymous, however this may not be possible for us to discharge our functions. If it is impractical or unlawful for us to deal with a person without knowing some of their personal information, we will tell them why we need the information. We will also tell them what it will mean for them if we do not give us the information we need.

OICS recognises that it can be difficult for agency staff to respond to allegations about treatment in detention, whether or not allegations are well-founded. The focus of OICS office is on identifying whether there has been a problem or concern at a systems level and any possible measures to prevent recurrence or to reduce risks, not on apportioning blame to individuals such as staff or detained people. We note the cooperative and constructive approach generally used by detained authorities when dealing with OICS and value this as a means to promote continual improvement in correctional centres and services.

On this basis, wherever practicable, OICS will seek to obtain information through consent.

An exception to seeking consent may be when OICS accesses personal information on databases and other systems used by places of detention, particularly when undertaking systemic reviews. This will often involve reviewing extensive data and records. OICS nonetheless remains bound by its legislative obligations including to not divulge such information.

Power to compel information

OICS has the power to require information and documents to be produced under section 22 of the CI Act and can require attendance at an interview relevant to an examination or review under section 23 of the CI Act. Failure to comply with either of these is an offence, subject to the person demonstrating a reasonable excuse.

The Inspector may only use these powers if the Inspector believes, on reasonable grounds, that a person can provide information or produce a document or something else relevant to an examination or review.

OICS cannot use these powers in relation to a detained adult or a detained child.

OICS will consider its obligations as a public authority under the HR Act prior to exercising these powers. Generally, OICS will only use these powers as a last resort as we would prefer to work constructively with detaining authorities and others. These powers may be especially useful where agencies or people may be reluctant to provide information, the information is particularly sensitive, or there is a statutory secrecy provision that inhibits voluntary disclosure.

If a person is required to provide information or produce a document, or is required to answer a question at interview, the person cannot rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to provide the information, produce the document or other thing or answer the question.

However, any information, document or other thing obtained, directly or indirectly, because of providing the information, the producing of the document or other thing, or the answering of the question is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for—

- an offence under section 22 or section 23; or
- any other offence in relation to the falsity of the information, document, other thing or answer.

Therefore, relevant rights in the Human Rights Act the Inspector will consider in exercising these powers include the rights in criminal proceedings (s 22), right to privacy and reputation (s 12) and fair trial (s 21). OICS will also consider what effect compelling this information will have on other legal processes, such as coronial inquests or criminal investigations, given the information may be inadmissible in those proceedings.

Nonetheless, these are important powers OICS may need to use at times to discharge our obligations under the CI Act. These functions are also relevant to upholding rights in the Human Rights Act, including to humane treatment when deprived of liberty (s 19), protection from torture and cruel, inhuman or degrading treatment (s 10) and protection of children (s 11).

At times, the rights of victims of crime might also need to be considered, including because detained people are often victims of crime themselves, prior to coming into custody, and in some cases, becoming victims during their time in custody.

Particular consideration for interviewees

People required to attend an interview with OICS and answer questions will always be offered the chance to have a support person present, however that person cannot answer questions for the person.

Where relevant, the interviewee will also be informed verbally and in writing that, while they are required to answer all relevant questions, any information they provide cannot be used against them in a civil or criminal proceeding (except in relation to an offence against the CI Act or in relation to providing false information).

All interviewees will also be reminded that under s26 of the CI Act, they are protected from any detrimental action being taken against them for speaking with our office. They will be invited to advise OICS immediately if they feel they have suffered negative consequences as a result of talking to us.

Those who attend voluntarily may also have a support person present if they wish.

For all interviewees, OICS will also facilitate any necessary support and/or assistance for the person to fully participate in an interview. This may include access to communication devices, interpreter services, sign language, appropriate information materials, and/or translated information.

Interviews will begin by OICS staff explaining background to the review, and why OICS is speaking to the interviewee. The person will be informed that all reports of the Inspector must be tabled in the ACT Legislative Assembly, but that we do not name individuals in our reports. The focus of our reports is to work out, in relation to incidents, what happened, how it happened and if any things can be done to prevent similar things occurring in the future. Our work also includes systemic review and preventive visits. The focus of our work is on systems and processes.

It is the usual practice of OICS to record interviews to assist us with note taking. This is also best investigative practice as it ensures accuracy, productivity, quality and impact. Recorders will usually be in plain view.

Informed consent from the interviewee is required to digitally record their statement. Informed consent includes advising of the purpose for recording and who will have access to the recording or any transcript thereof.

OICS will never surreptitiously record an interview. If a person refuses to be recorded, OICS will take as detailed notes as possible instead. If a person withdraws their consent during the interview, recording will also cease. A formal transcript of interview is not usually prepared.

The interviewee will be informed in general terms that the information they provide will generally be treated confidentiality subject to some important exceptions (see release of information below). The interviewee will have an opportunity to respond to questions, and to ask questions they might have.

Special considerations for children and young people

OICS will generally not ever compel a child to speak to us.

Allegations regarding the treatment of children may have to be released under law (see release of information below).

Release of information

Privacy considerations

In undertaking its statutory functions, the OICS may receive highly sensitive information about correctional centres and correctional services, including as part of interviews or documents required to be provided under to the Inspector under sections 22 and 23 of the CI Act.

OICS is subject to strict privacy obligations and will wherever possible maintain confidential material and protect anonymous sources. Under s 37 of the CI Act, it is an offence for OICS to divulge information about a person received under the Act except in specific circumstances. This includes circumstances in which the Inspector or a member of staff divulges information about someone else and is reckless about whether that would result in the information being divulged to someone else.

The Explanatory Statement to the ICS Bill suggests the purpose of s 37 is to ensure ‘that any information a person has access to because of the Act, remains confidential’. Further, that ‘this is an important provision intended to ensure an individual’s right to privacy is protected and the security of correctional centres is maintained’.

Release with consent

OICS will release information with consent including in situations where we are referring a person to another agency that can better address their concerns, for example in assisting them to engage with complaint handling bodies about making a complaint.

Mandatory release of information

While OICS strives to keep the information it collects confidential (other than as published in its reports), there are exceptions. For example, section 37 states that the offence of releasing protected information does not apply if the information is used or divulged:

- under the CI Act or another territory law; or
- in relation to the exercise of a function, as a person to whom this section applies, under this Act or another territory law; or
- in a court proceeding; or
- protected information about a person with that person’s consent.

Therefore, unless the person to whom the information relates consents to its disclosure, it will be necessary for the Inspector to satisfy themselves that the disclosure of protected information about a person is authorised under territory law or is otherwise used or divulged in relation to the exercise of a function under a territory law, or in a court proceeding. Examples of such situations **may** include:

- In response to a subpoena issued by a court or tribunal;
- In response to a warrant;
- Mandatory corruption notification to the Integrity Commissioner under the *Integrity Commission Act 2018* (IC Act);
- Information requested by another agency such as by the Integrity Commissioner (under s 89 or s 90 of the IC Act), Inspector of the Commission (s 269 of the IC Act), to the Human Rights Commission (HRC) (under s 73 of the *Human Rights Commission Act 2005*) or Ombudsman (under s 11 of the *Ombudsman Act 1989*);

- Disclosable conduct to the Integrity Commissioner under the *Public Interest Disclosure Act 2012*;
- Work-related notifiable incidents to WorkSafe ACT.

There are also particular reporting requirements for allegations involving children:

- To the Ombudsman as part of the Reportable Conduct Scheme. Reportable conduct covers allegations or convictions of child abuse or misconduct towards children. Organisations must report allegations of reportable conduct by an employee or volunteer.²
- To the police for matters concerning child sexual abuse under s 66AA of the *Crimes Act 1900*.
- Potentially as a mandatory reporter under the *Children and Young People Act 2008*.

Further, OICS may divulge ‘protected information’ to a court if “necessary to do so for the CI Act or another law applying to the territory”.

Wherever possible and appropriate, OICS will inform the source of the information about such release.

Discretionary Release

At times the CI Act or another territory law may provide OICS discretion to release information without consent. This will usually only arise in situations where the Inspector is concerned that the information relates to a risk to the health and safety of anyone. This may include:

- Risks of self-harm
- Voluntary report under the *Children and Young People Act 2008*.

Nonetheless, if practicable, OICS will notify the person concerned of the release.

Sharing information with external contractors

Sometimes OICS contracts private service providers to help deliver its functions, particularly external experts to assist with our reviews.

In some circumstances, it may be necessary for us to share information with these service providers to allow them to do their work efficiently and effectively.

In such situations, we protect personal information by only entering into contracts with private entities that agree to comply with the Territory requirements for the protection of personal information and ensuring any release is only in relation to the exercise of a function under the CI Act.

OICS also asks contractors to return all printed documentation at the conclusion of these reviews so that OICS can ensure it is filed securely or destroyed.

Release of information to interviewees

At times, OICS may undertake interviews with witnesses contemporaneous to an incident. Those witnesses may reasonably seek to draw upon recordings of their interview to prepare statements or

² OICS may also become aware of information about reportable conduct allegations by an employee of another designated entity. In this case, it would not be a mandatory notification from OICS under the *Ombudsman Act*, but an discretionary sharing of information under section 863C of the *Children and Young People Act 2008*.

give evidence in later legal proceedings, and may elect not to participate in those proceedings until the recording is provided. Under s 31(1)(f) of the CI Act, the Inspector is obligated to ensure the exercise of their functions in a way that does not delay or unnecessarily duplicate the exercise of functions by a coroner, police and others.

This may constitute an exception to s 37 of the CI Act, in that the person to whom the information relates consents to its disclosure.

However, a relevant consideration in releasing information to an interviewee is the privacy and reputation of any third party discussed in the interview, if the information is further disclosed. This is a particular risk in circumstances where the Inspector has not yet provided any third party with the opportunity to provide comment on any adverse comment discussed during the interview. Section 29 of the CI Act also requires the Inspector to provide draft reports to relevant Ministers and Directors for comment. However, the Inspector may elect not to include in any draft report adverse material about a third party discussed in a recorded interview.

The Inspector must also give proper consideration to human rights under the *Human Rights Act 2004* prior to making a decision about releasing such material. Relevant rights are likely to include the right to humane treatment when deprived of liberty (s 19), protection from torture and other degrading treatment (s 10) and the rights of the child (s 11). The rights to security (s 18), privacy (s 12) and life (s 9) may also be relevant to a person potentially subject to reprisal or privacy breach.

Careful consideration must be given to the contents of the recording and the circumstances in which it was obtained. The Inspector cannot be reckless about information being divulged to someone else.

Balancing these interests, and in particular to ensure no information is recklessly released to a third party, if the Inspector receives a request for an audio recording of an interview from the person to whom the information relates (eg the person interviewed), generally the Inspector will, due to the risk of further release, not provide a person an electronic copy of a recording or transcript.

However, in appropriate circumstances, OICS will ask the person to sign a confidentiality agreement, and on that basis, invite the person to attend OICS' office to listen to the recording and take notes based on that recording for their own purposes. The person will be informed about relevant protections, particularly s 37 of the CI Act, and required to agree that the notes they take are used only for their purposes (eg in preparing their statement for another legal proceeding) and not released, divulged or published in any other way.

In some circumstances, OICS may not require the person to sign a confidentiality agreement, for example where a detained person or member of the public has only provided information about what they observed, experienced or felt.

Inadmissibility of evidence

A person who has provided information to the Inspector under s 22 of the CI Act is entitled to an immunity which prevents any information obtained from them that may incriminate them being used against them in civil or criminal proceedings (except for proving an offence under the CI Act or in relation to deliberately providing false or misleading information) (s 25, CI Act).

Accessing and correcting personal information

Anyone has the right to ask for access to any personal information we hold about them.

A person may request that we correct any of their personal information that we hold, if they believe it is incomplete, incorrect, out of date, or misleading. If we cannot correct this personal information,

they may request that we attach a statement to the record indicating that the person believes the information held is incorrect, inaccurate, incomplete, irrelevant, out of date or misleading. A person will be told if this is not possible.

Requests to access or correct your personal information should be submitted by email to

ics@act.gov.au

If you are unable to access email, the form can be sent to:

Deputy Inspector
Inspector of Custodial Services
GPO Box 1717
Canberra ACT 2601

If you contact us to request access to your personal information, we must, if it is reasonable and practical to do so, provide you with access in the way you request.

Under certain circumstances defined by law, we may refuse a request for access to information. We may also refuse a request if it is not reasonable or practicable to give access in the way it is asked.

We must respond in writing to such requests within 20 working days. If we refuse the request, we must tell the person why.

In most circumstances, we will not charge fees for making the request or for providing a person with access to your information.

Freedom of information

Anyone also has the right under the *Freedom of Information Act 2016* to request access to any of the documents that we might hold. Please note, Schedule 1.15 of Act provides that information in the possession of the Inspector that has been obtained or generated in relation to an examination or review conducted under s 18 is taken to be contrary to the public interest to disclose.

Storage of information

In order to minimize the risk of personal information being inadvertently accessed or released, including through a data breach, OICS will take the following measures to protect personal information stored electronically:

- Only record or copy material held in a detaining authority's electronic database on our systems where absolutely necessary for the purposes of a review;
- Refer to personal information about a person, including detained people and staff, in a way that avoids recording any more information that is required including by using initials rather than full names.
- Avoid wherever possible recording other personal information such as date or birth or address.
- Avoid using names in electronic communication such as email and the way folders and files are named.

Complaints

Complaints about how we handle personal and other information may be made to:

ics@act.gov.au

If you are unable to access email, please write to:

Deputy Inspector
Inspector of Custodial Services
GPO Box 1717
Canberra ACT 2601

If you are not satisfied with our response, you may ask for a review by a more senior officer or you can make a formal privacy complaint to the Office of the Australian Information Commissioner (OAIC).

The OAIC is an independent body that can assess your complaint and decide whether our actions intruded on your privacy. If your complaint is upheld by the OAIC, you may be able to seek a remedy in the ACT Magistrates Court. Information on how to make a complaint to the OAIC is available at www.oaic.gov.au or by contacting 1300 363 992.