

**2018**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**SENIOR PRACTITIONER BILL 2018**

**REVISED EXPLANATORY STATEMENT**

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## **SENIOR PRACTITIONER BILL 2018**

### **INTRODUCTION**

This explanatory statement relates to the Senior Practitioner Bill 2018 (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

### **BACKGROUND**

The ACT Government has previously agreed to two national frameworks: the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Sector* and the *National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework*. These two imperatives and the associated Regulatory Impact Statement give clear timeframes for the establishment of a Senior Practitioner in the ACT.

The extensive consultation undertaken by JFA Purple Orange in 2017 highlighted uncertainty around the issue of restrictive practices, and found that community members have clear expectations of the benefits a senior practitioner will bring to regulation, adjudication and reduction of restrictive practices.

The Bill will facilitate the creation of a senior practitioner role to enable vulnerable people in the ACT to achieve a better quality of life free of unnecessary and unreasonable interventions that limit their human rights.

The intent of the Bill is not to enable the use of restrictive practices, it is to provide a formal framework for the reduction and elimination of restrictive practices in the ACT. It also provides an operational structure for the senior practitioner which reaffirms and strengthens the rights and responsibilities of vulnerable people and which recognises that this requires support across the government sector and within the community.

This Bill is designed to regulate any restrictive practice, ensuring it is justified and proportionate. The Bill and subsequent guidance from the senior practitioner will provide greater clarity to service providers, clients and carers regarding what is and what isn't captured under the definition of restrictive practice.

A priority for the ACT senior practitioner will be to build strong working relationships with other key oversight agencies with the aim of leveraging and enhancing existing

oversight arrangements. Any restraints or seclusions identified that fall outside of the senior practitioner's role will be reported to the relevant authority.

The Bill will have a broad scope to capture all people who are vulnerable and potentially subject to restrictive practice, not just those with disability. The powers of the ACT senior practitioner will extend, but not be limited to, schools and other education settings, and children and young people in out-of-home care. The only persons who will be excluded from the ACT senior practitioner's remit will be those receiving care under the *Mental Health Act 2015*, the *Mental Health (Secure Facilities) Act 2016* to the extent that Act applies, and those in custodial or prison detention (including the Bimberi Youth Justice Centre). This is due to existing oversight arrangements specific to those settings. There will be a phased implementation in various settings.

## **OVERVIEW OF THE BILL**

The Bill provides a formal framework for the reduction and elimination of restrictive practices. The Bill provides an operational structure for the senior practitioner.

The Bill reflects stakeholder consultation on the most appropriate preventive oversight mechanism model for the new role. It also aims to reflect the requirements and expectations around the *Human Rights Act 2004* (HRA).

The purpose of the Bill is to:

- a) define the functions of an ACT senior practitioner;
- b) empower the ACT senior practitioner to:
  - i) monitor, authorise and disallow the use of restrictive practices;
  - ii) produce and disseminate policies, standards, and guidelines to promote best practice, lead sector capacity building and improve awareness to minimise their use; and
  - iii) capture and record the use of restrictive practices that are deemed to be necessary.

## **HUMAN RIGHTS IMPLICATIONS**

During the Bill's development due regard was given to its compatibility with human rights as set out in the HRA.

The measures introduced in the Bill support the Government's commitment to the reduction and elimination of the use of restrictive practices.

This Bill engages a number of rights protected under the HRA, it:

- supports section 10 – protection from torture, inhuman or degrading treatment and section 11 – protection of the family and children
- may limit section 12 – right to privacy and reputation, section 18 – right to liberty and security of person and section 22 – right to criminal proceedings.

### Section 10 – Protection from torture and cruel, inhuman or degrading treatment etc.

This Bill **supports** section 10 of the HRA, the right to protection from torture and cruel, inhuman or degrading treatment.

Section 10 is based on article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and is consistent with article 5 of the *Universal Declaration of Human Rights*. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) was developed having regard to these two articles<sup>1</sup>.

This Bill establishes mechanisms to reduce and eliminate the use of restrictive practices in a wide range of settings in the ACT.

Restraints to ensure the person’s safety when travelling are acceptable.

### Section 11 – Protection of the family and children

This Bill **supports** sections 11 of the HRA, the right to protection of the family and children.

This Bill establishes a mechanism through which the ACT will meet its positive obligation under this right. It does so by establishing the role of a senior practitioner to support the reduced use of restrictive practices and the increased use of non-restrictive practices.

Close family members who provide a service in relation to another person are exempt from the coverage of the senior practitioner (see clause 8 of the Bill).

Reasonable action to monitor and protect a child from harm are exempt from the coverage of the senior practitioner (see clause 7(1)(c) of the Bill). These include holding a child’s hand while crossing a road and fencing around a primary school.

### Section 12 – Right to privacy and reputation

Clause 33 of the Bill **may limit** an individual’s right to privacy. This is because it provides that if the senior practitioner believes on reasonable grounds that restrictive practices are being used by a provider at a particular place or in relation to a particular person (the recipient), or the senior practitioner receives a complaint about

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<sup>1</sup> [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, ratified by Australia 8 August 1989.

restrictive practices used at a particular place or in relation to a recipient, the senior practitioner may:

(a) enter the place, other than a part of the place used for residential purposes unless that part is also the place restrictive practices are being used; and

(b) carry out an investigation into the restrictive practices used by the provider

The senior practitioner may also, on their own initiative, investigate the use of a restrictive practice by a provider (clause 31 of the Bill).

Additionally, clause 34 of the Bill grants the Senior Practitioner the power to ask for information, documents and other things when conducting investigation.

Furthermore, clause 42 of the Bill allows the senior practitioner to give protected information to a range of specified persons necessary to the exercise of the senior practitioner's functions.

The right to privacy is relative and may be limited to the extent necessary, reasonable and proportionate to achieve a demonstrated and justifiable purpose (UN Human Rights Committee, General Comment 16). Such limits must not be 'unlawful' or 'arbitrary'. This means that interferences must only be authorised by precise and circumscribed law (including clear and necessary criteria) and must not give overly broad or unnecessary discretion to authorities.

Requiring the senior practitioner to be satisfied on reasonable grounds that providing the information is necessary for the exercise of the senior practitioner's or entity's functions prior to giving them protected information will help to ensure the limitation on the right to privacy takes the least restrictive approach. This requirement helps to justify the limitation on the human right to privacy.

The purpose of this limitation is to ensure that the senior practitioner is able to undertake its mandate.

In order to protect against harm occurring from the improper or unjustified use of restrictive practices, a proactive inspection regime is required. This acts as a more effective prevention measure than simply responding to allegations of harm once they have occurred.

Without the required level of access to places where restrictive practices are potentially being used and necessary information, the senior practitioner will not be able to effectively carry out its role.

In view of the purpose of this Bill, it is also appropriate and necessary that the senior practitioner may give protected information to a range of necessary entities.

### Section 18 – Right to liberty and security of person

This Bill **may limit** section 18 of the HRA, the right to liberty and security of person.

This Bill establishes a mechanism through which the ACT will meet its positive obligation under this right. It does so by establishing the role of a senior practitioner to support the reduced use of restrictive practices and the increased use of non-restrictive practices.

In regulating and authorising the use of restrictive practices the Bill does engage and potentially limit the right to liberty and security of person in section 18, as well as the right to privacy. However, the Bill has been carefully designed to ensure that any restrictive practices permitted in positive behaviour support plans are the least restrictive way of protecting the person or other people from harm. Also the Bill includes a range of safeguards including the requirement for authorisation of the plan by a panel, in accordance with guidelines and clear principles, consideration and registration by the Senior Practitioner, limited timeframes for operation and review, reporting and monitoring requirements and clear complaint and independent review mechanisms.

### Section 22 - Rights in criminal proceedings

This Bill **may limit** section 22 of the HRA, rights in criminal proceedings.

This is because section 22(1) of the HRA holds that “Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.”

Clause 47 of the Bill holds that a provider commits an offence if the provider fails to comply with a direction from the senior practitioner. This is a strict liability offence, which means that there is no requirement to prove a fault element, such as intention or recklessness. Thus the strict liability offence in clause 47 of the Bill will engage the right to presumption of innocence in Section 22(1) of the HRA. There is however a defence of reasonable mistake of fact.

The objective of the penalty is to protect the human rights of persons potentially subject to restrictive practices from a serious failure to comply with a direction from the senior practitioner.

Therefore strict liability for failing to comply with a direction under clause 47 of the Bill is warranted, to provide timely enforcement powers for the regulation of the use of restrictive practices in order to promote the human rights of vulnerable people.

## CLAUSE NOTES

### Part 1 – Preliminary

Part 1 of the Bill comprises clauses 1 to 5 dealing with formal matters including commencement, key definition, notes and offences against the Act.

#### Clause 1 Name of Act

This clause is a formal provision setting out the name of the new Act as the *Senior Practitioner Act 2018* (the Act).

#### Clause 2 Commencement

This clause provides that the Act (other than part 8), will commence on 1 September 2018. Part 8 (Offences) commences on 1 July 2019.

#### Clause 3 Dictionary

This clause is a formal provision identifying the dictionary and explaining conventions used to define words and terms for the purposes of the Act.

#### Clause 4 Notes

This clause is a formal provision explaining the status of notes in the Act.

#### Clause 5 Offences against Act—application of Criminal Code etc.

This clause clarifies that other legislation applies to this Act and in particular notes the operation of the *Criminal Code 2002*, which applies to all offences against the Act, and the *Legislation Act 2001*, which provides for interpretation, common definitions, and legislative machinery for the Bill and applicable offence penalty units.

### Part 2 – Objects and important concepts

Part 2 of the Bill comprises clauses 6 to 9 dealing with objects of the Act, the meaning of important terms and the principles to be followed by decision-makers.

#### Clause 6 Objects of Act

Clause 6 describes the main object of the Act, to establish the role of the senior practitioner to support the reduction and elimination of the use of restrictive practices and the increased use of non- restrictive practices.

The objects of the Bill also reflect the requirements and expectations around two agreed national frameworks: the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Sector* and the *National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework*.

### **Clause 7    Meaning of *restrictive practice***

This clause defines a restrictive practice for the purpose of this Act as any of the following:

- chemical restraint
- environment restraint
- mechanical restraint
- physical restraint
- seclusion
- verbal directions, or gestural conduct, of a coercive nature

This definition ensures a practice that restricts the rights or freedom of movement of a person for the primary of protecting the person or others from harm is covered by the scope of this Act.

Reasonable action to monitor and protect a child from harm are exempt from the coverage of the senior practitioner (see clause 7(1)(c) of the Bill). These include holding a child's hand while crossing a road and fencing around a primary school.

Note that ***mechanical restraint*** does not include the use of the device —

- (i) to ensure the person's safety when travelling; or
- (ii) for therapeutic purposes.

Note that ***chemical restraint*** does not include the use of a chemical substance that is—

- (i) prescribed by a medical practitioner or nurse practitioner for the treatment, or to enable the treatment, of a mental or physical illness or condition in a person; and
- (ii) used in accordance with the prescription.

Note that ***physical restraint***—

- (b) does not include a reflex action of reasonable physical force and duration intended to guide or direct a person in the interests of the person's safety where there is an imminent risk of harm.

### **Clause 8    Meaning of *provider***

This clause defines a provider for the purpose of this Act as a person or other entity who provides any of the following services to another person:

- (a) education;
- (b) disability;
- (c) care and protection of children;
- (d) an area prescribed by regulation.



Provider does not include a close family member of the other person or an informal carer for the other person or an exempt entity.

Exempt entity means –

- (a) a person exercising a function under 1 or more of the following:
  - (i) the *Corrections Management Act 2007*; or
  - (ii) the *Children and Young People Act 2008*, chapters 4 to 9 (the criminal matters chapters); or
  - (iii) the *Mental Health Act 2015*; or
  - (iv) the *Mental Health (Secure Facilities) Act 2016*; or
- (b) a police officer acting under lawful authority; or
- (c) a person or other entity prescribed by regulation.

### **Clause 9 Principles for providers**

This section sets out principles to be taken into account by providers in providing services to people with behaviour that causes harm to themselves or others.

### **Part 3 – Restrictive practices and positive behaviour support plans**

Part 3 of the Bill comprises clauses 10 to 23 dealing with behaviour support plans and behaviour support panels.

### **Clause 10 Restrictive practice must be under positive behaviour support plan**

This clause requires that provider must not use a restrictive practice on a person other than in accordance with a registered positive behaviour support plan.

### **Clause 11 Meaning of *positive behaviour support plan***

This clause holds that a positive behaviour support plan is a plan for a person that describes the strategies to be used in supporting the person's behaviour, including strategies to—

- (a) build on the person's strengths and increase their life skills; and
- (b) reduce the intensity, frequency and duration of behaviour that causes harm to the person or others.

### **Clause 12 Guidelines for positive behaviour support plans**

Clause 12 compels the senior practitioner to make guidelines about positive behaviour support plans.

### **Clause 13 Preparation of positive behaviour support plan**

Clause 13 holds that a provider may prepare a positive behaviour support plan for a person and give the plan to a panel for approval.

#### **Clause 14 Approval of positive behaviour support plan**

Clause 14 holds that a panel that receives a positive behaviour support plan for approval under section 13 must assess the plan and decide whether or not to approve the plan.

In regulating and authorising the use of restrictive practices the Bill does engage and potentially limit the right to liberty and security of person (s.18 of the Human Rights Act 2004 refers).

Clause 10 of the Bill provides a ban on the use of restrictive practices other than in accordance with a registered positive behaviour support plan.

Clause 46 of the Bill criminalises the use of a restrictive practice other than in accordance with a registered positive behaviour support plan.

#### **Clause 15 Registration of positive behaviour support plan**

This clause allows a provider to apply to the senior practitioner for registration of a positive behaviour support plan approved under section 14.

On application, the senior practitioner must either—

- (a) register the positive behaviour support plan; or
- (b) refuse to register the plan.

#### **Clause 16 Copy of positive behaviour support plan to be given to person etc**

Clause 16 provides that on registration of a positive behaviour support plan, the provider in relation to the plan must give a copy of the plan to:

- (a) the person who is the subject of the plan;
- (b) if the person has a guardian – the person’s guardian; and
- (c) if the person is a child —
  - (i) each person with parental responsibility for the child; and
  - (ii) the public advocate.

#### **Clause 17 Review and amendment of positive behaviour support plan**

Clause 17 holds that a provider in relation to a registered positive behaviour support plan must keep the plan under review and take steps to have it amended whenever necessary to reflect a change in circumstances.

The provider must review the plan at any time on written request of the person who is the subject of the plan.

If the person has difficulty putting the request in writing, the provider must give the person reasonable assistance to do so.

**Clause 18 Positive behaviour support plan expires after 12 months**

This clause holds that a registered positive behaviour support plan expires 12 months after the day the plan is registered.

**Clause 19 Register of positive behaviour support plans**

This clause requires the senior practitioner to keep a register of positive behaviour support plans registered under section 15.

**Clause 20 Provider to monitor and record use of restrictive practices**

This clause holds that the provider in relation to a registered positive behaviour support plan must -

- (a) monitor and make a record of any use of restrictive practices under the plan; and
- (b) notify the senior practitioner about the use of restrictive practices in accordance with the guidelines made under section 12.

**Clause 21 Guidelines about positive behaviour support panels**

This clause requires that the senior practitioner must make guidelines about the composition of positive behaviour support panels, including the experience, qualifications and membership needed.

A guideline is a disallowable instrument.

**Clause 22 Registration of positive behaviour support panels**

A person may apply to the senior practitioner for registration of a positive behaviour support panel.

The application must be in writing and meet the requirements of this section.

On application, the senior practitioner must either—

- (a) register the panel; or
- (b) refuse to register the panel.

**Clause 23 Register of positive behaviour support panels**

The senior practitioner must keep a register of positive behaviour support panels registered under section 22.

**Part 4 – Senior practitioner**

Part 4 of the Bill comprises clauses 24 to 27 dealing with the appointment of the senior practitioner, delegation by the senior practitioner, functions of the senior practitioner and the making of guidelines by the senior practitioner.

#### **Clause 24 Appointment of senior practitioner**

Clause 24 specifies that the director-general may appoint a person as the senior practitioner only if satisfied that the person has the appropriate qualifications, clinical experience and personal qualities necessary to exercise the senior practitioner's functions.

#### **Clause 25 Delegation by senior practitioner**

Clause 25 states that the senior practitioner may delegate the senior practitioner's functions under this Act to another public servant.

#### **Clause 26 Functions of senior practitioner**

Clause 26 provides for several functions of the senior practitioner. These functions include to promote the reduction and elimination of the use of restrictive practices by providers to the greatest extent possible, to disseminate information, and provide education about restrictive practices and the rights of people subject to restrictive practices.

#### **Clause 27 Senior practitioner may make guidelines**

This provision allows the senior practitioner to make guidelines for this Act consistent with its objects, including guidelines in relation to the use of restrictive practices.

### **Part 5 – Complaints and investigations**

Part 5 of the Bill comprises clauses 28 to 41 dealing with required processes to make complaints, steps the senior practitioner must take to investigate a complaint, power to enter premises to conduct an investigation, power to ask for information, documents and other things when conducting investigation, privileges against self-incrimination and exposure to civil penalty and directions to provider.

#### **Clause 28 Making a complaint**

A person may complain to the senior practitioner about –

- (a) anything done by a provider in relation to a positive behaviour support plan that permits the use of a restrictive practice, including its development or implementation; or
- (b) the use of a restrictive practice by a provider.

Generally, the complaint must be in writing, but may be made orally if the senior practitioner is satisfied on reasonable grounds that exceptional circumstances justify action without a written complaint.

The complaint need not include the complainant's name and address if the senior practitioner is satisfied on reasonable grounds that exceptional circumstances justify action without the complainant's name and address.

### **Clause 29 Withdrawing a complaint**

A complainant may withdraw the complaint at any time by written notice to the senior practitioner. If the complainant withdraws the complaint, the senior practitioner need not, but may, take further action on the complaint.

A complaint must be in writing, or if made orally, the senior practitioner must make a written record of the complaint as soon as possible. This is so all necessary review bodies can be certain the complaint has been recorded. The senior practitioner may make arrangements to provide assistance for people with particular communication needs as they may have difficulties in putting their complaint in writing.

### **Clause 30 Request for further information or verification**

The senior practitioner may at any time request a complainant to give the senior practitioner further information about the complaint; or a written statement verifying all or part of the complaint.

### **Clause 31 Investigation of complaint**

The senior practitioner must take reasonable steps to investigate each complaint made to the senior practitioner.

However, the senior practitioner need not investigate a complaint if satisfied that the complaint—

- (a) is frivolous, vexatious or was not made honestly; or
- (b) lacks substance; or
- (c) cannot be made under this Act; or
- (d) would be better dealt with by another entity; or
- (e) is otherwise not appropriate for the senior practitioner to investigate.

Clause 31(5) provides that the senior practitioner must not disclose a particular detail of a complaint if doing so may have an adverse effect on the 'relevant person for a complaint,' and may instead include a general statement about the detail.

A 'relevant person for a complaint' is defined at Clause 31(6) to protect the interests of persons subjected to a restrictive practice that is then raised as a complaint to the senior practitioner by a third party.

### **Clause 32 Investigation without complaint**

This clause gives the senior practitioner power, on their own initiative, to investigate the use of a restrictive practice by a provider.

An investigation initiated by the senior practitioner must, as far as practicable, be conducted as if it were an investigation of a complaint.

### **Clause 33 Power to enter premises to conduct investigation**

If the senior practitioner believes on reasonable grounds that a restrictive practice is being used by a provider at a particular place or the senior practitioner receives a complaint about a restrictive practice used at a particular place, the senior practitioner may enter the place and carry out an investigation.

However, the senior practitioner cannot enter a place used for residential purposes unless that part is also the place restrictive practices are being used. This exception supports section 11 of the HRA, the right to protection of the family and children. It also supports section 12(a) of the HRA, the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

### **Clause 34 Power to ask for information, documents and other things when conducting investigation**

This clause applies if the senior practitioner believes on reasonable grounds that a person can provide information or produce a document or something else necessary to an investigation under this division.

The senior practitioner may, by written notice given to the person, require the person to provide the information or produce the document or other thing. The notice must state how, and the time within which, the person must comply with the requirement.

### **Clause 35 Power to ask for assistance**

The senior practitioner may ask a provider for assistance in the exercise of the senior practitioner's functions, including asking a provider to produce a document or thing or provide an answer to a question.

### **Clause 36 Senior practitioner may keep document or other thing etc**

The senior practitioner may take possession of, make copies of, or take extracts from, the document or may take possession of the other thing, but must return it if no longer entitled or no longer needs the document or thing.

### **Clause 37 Privileges against self-incrimination and exposure to civil penalty**

If a person is required by a notice under clause 34 to produce a document or a thing or provide an answer to a question, this clause holds that the person cannot rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to produce the document or other thing or answer the question.

### **Clause 38 No action to be taken**

If, after investigating a complaint, the senior practitioner is not satisfied that any action needs to be taken in relation to the provider, the senior practitioner must—

- (a) tell the complainant, in writing, that the senior practitioner will take no further action on the complaint; and
- (b) take no further action on the complaint.

### **Clause 39 Directions to provider**

This clause applies if, after investigating a complaint, the senior practitioner is satisfied on reasonable grounds that action needs to be taken in relation to the provider.

The senior practitioner may give the provider a direction in relation to any of the following:

- (a) a positive behaviour support plan, including amending the plan or preparing a new plan;
- (b) the use of a restrictive practice, including changing or stopping the use of a restrictive practice;
- (c) a matter prescribed by regulation.

Changing or stopping restrictive practices or amending a positive behaviour support plan are within the power of a provider, and are important to protect the human rights of potentially vulnerable persons. Therefore strict liability for failing to comply with a direction under clause 47 of the Bill is warranted, to provide enforcement powers for the regulation of the use of restrictive practices. The provider is required to register a positive behaviour support plan and will be advised of the offences through the education process that will be undertaken by the Senior Practitioner prior to the commencement of the Offences provisions in Part 8. Part 8 will commence 9 months after the commencement of the remainder of the Act to ensure sufficient preparation and education of providers.

### **Clause 40 Senior practitioner may cancel registration**

This section applies if—

- (a) the senior practitioner gives a direction to a provider under section 39 in relation to a positive behaviour support plan; and
- (b) the provider fails to comply with the direction.

The senior practitioner must give the provider notice of the senior practitioners' intention to cancel the plan.

The notice must be in writing and state that—

- (a) the senior practitioner intends to cancel the registration of the plan because of the provider's failure to comply with the direction; and
- (b) the provider may give a written submission to the senior practitioner showing cause why the registration should not be cancelled; and
- (c) a submission may be given to the senior practitioner within a period stated in the notice.

### **Clause 41 Cancellation notice**

This section applies if the senior practitioner decides to cancel the registration of a positive behaviour support plan under section 40.

The senior practitioner must give a written notice (a cancellation notice) to the provider cancelling the registration starting on the date stated in the notice.

If the senior practitioner gives a cancellation notice to the provider, the senior practitioner must also take reasonable steps to tell any person whose interests are affected under the positive behaviour support plan about the cancellation.

The cancellation notice must be given to the provider before the date of cancellation stated in the notice.

### **Part 6 – Information sharing**

Part 6 of the Bill comprises only clause 42 which deals with the senior practitioner giving information to particular entities.

#### **Clause 42 Senior practitioner may give information to particular entities**

Clause 42 of the Bill allows the senior practitioner to give protected information to a range of specified persons necessary to the exercise of the senior practitioner's functions.

The senior practitioner may also give protected information to the chief police officer if the senior practitioner is satisfied on reasonable grounds that the information is necessary to an investigation into the commission of an offence against a territory law.

This clause has been drafted to give appropriate regard to the human right to privacy. Hence the need for the information given by the senior practitioner to be necessary rather than just relevant. Thus the senior practitioner may give protected information to particular entities but with a safeguard so that the right to privacy is limited to the least extent.

Requiring the senior practitioner to be satisfied on reasonable grounds that providing the information is necessary for the exercise of the senior practitioner's or entity's functions prior to giving them protected information will help to ensure the limitation on the right to privacy takes the least restrictive approach. This requirement helps to justify the limitation on the human right to privacy.

This clause aims to ensure a coordinated approach to the oversight of restrictive practices in the ACT.

It facilitates the cooperation and referral between the senior practitioner and other oversight agencies and investigative entities by authorising the sharing of necessary information necessary to appropriately accept, respond or deal with the matter.

### **Part 7 – Notification and review of decisions**

Part 7 of the Bill comprises only clauses 43 to 45 which deals with notification and review of decisions.



### **Clause 43 Meaning of reviewable decision—pt 7**

This clause states that in Part 7 of the Act reviewable decision means a decision mentioned in schedule 1, column 3 under a provision of this Act mentioned in column 2 in relation to the decision.

### **Clause 44 Reviewable decision notices**

If a person makes a reviewable decision, the person must give a reviewable decision notice to each entity mentioned in schedule 1, column 4 in relation to the decision.

The person must also take reasonable steps to give a reviewable decision notice to any other person whose interests are affected by the decision (see *ACT Civil and Administrative Tribunal Act 2008*, s 67A).

The requirements for reviewable decision notices are prescribed under the *ACT Civil and Administrative Tribunal Act 2008*.

### **Clause 45 Applications for review**

The following people may apply to the ACAT for review of a reviewable decision:

- (a) an entity mentioned in schedule 1, column 4 in relation to the decision;
- (b) any other person whose interests are affected by the decision.

## **Part 8 – Offences**

Part 8 of the Bill comprises only clauses 46 to 49 which deals with offences relating to using a restrictive practice other than under positive behaviour support plan, failing to comply with direction, criminal liability of partner and criminal liability of executive officer. Part 8 will commence 9 months after the commencement of the other parts of the Act to ensure sufficient preparation and education of providers. Those to whom offences under this part may apply is deliberately broad to ensure that those responsible for the governance and management of providers using restrictive practices take an active role in the oversight of the reduction in and use of those practices in order to promote the human rights of vulnerable people.

### **Clause 46 Using restrictive practice other than under positive behaviour support plan**

A provider, or a necessary person for a provider, commits an offence if—

- (a) the provider or necessary person uses a restrictive practice on another person;
- and
- (b) the use of the restrictive practice, or the way in which the restrictive practice is used, is not permitted under a registered positive behaviour support plan for the other person.

The maximum penalty is 50 penalty units, imprisonment for 6 months or both.

It is a defence to a prosecution for an offence against this section if the defendant proves that the defendant believed on reasonable grounds that the restrictive practice was necessary to prevent serious and imminent injury or illness to any person.

The defendant has a legal burden in relation to the matters mentioned in s (2) (see Criminal Code, s 59). This means that the defendant has the burden of proving the existence of the matter. This is therefore a reversed onus of proof provision. Section s.28(1) of the *Human Rights Act 2004* allows that “Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.” The reversed onus of proof is justified and proportionate in that people who are subject to restrictive practices are vulnerable and their rights to be protected from serious and imminent injury or illness due to the actions or omissions of others also needs to be respected.

This section does not apply to a necessary person for a provider if the person was acting reasonably under the instruction or direction of the provider or otherwise in accordance with the provider’s policy.

The defendant has an evidential burden in relation to the matters mentioned in s (3) (see Criminal Code, s 58).

#### **Clause 47 Failing to comply with direction**

A provider commits an offence if—

- (a) the senior practitioner gives the provider a direction under section 39; and
- (b) the provider fails to comply with the direction.

The maximum penalty is 50 penalty units.

An offence against this section is a strict liability offence. This means that there is no requirement to prove a fault element, such as intention or recklessness. There is however a defence of reasonable mistake of fact.

The strict liability offence this section of the Bill will engage the right to presumption of innocence in Section 22(1) of the Human Rights Act 2004. That holds that “Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.”

The objective of the penalty is to protect the human rights of persons potentially subject to restrictive practices from a serious failure to comply with a direction from the senior practitioner.

Therefore strict liability for failing to comply with a direction under clause 47 of the Bill is warranted, to provide timely enforcement powers for the regulation of the use of restrictive practices in order to promote the human rights of vulnerable people.

It is essential that strict liability offences are only made in a context where the person knows, or ought to know, their legal obligations.

The provider is required to register a positive behaviour support plan and will be advised of the offences through the education process at that point. Education will also be undertaken by the Senior Practitioner prior to the commencement of the Offences provisions in Part 8.

Part 8 will commence 9 months after the commencement of the other parts of the Act to ensure sufficient preparation and education of providers.

The penalty will only apply to defined service providers rather than be applicable to the general public.

The severity of the penalty, which is non custodial and constitutes a fine to service providers amounting to approximately \$37,500, provides sufficient disincentive for a corporation to infringe a human right without being too onerous.

#### **Clause 48 Criminal liability of partner**

This clause sets out the circumstances in which a partner, servant or agent of a partnership personally commits an offence under this Act. Each partner in the partnership is taken to have committed the offence, but subclause 48(3) sets out the circumstances in which a defence may be available to a “liable partner”.

This section applies if a partnership through a partner, servant or agent—

- (a) engages in conduct; and
- (b) the conduct is an offence against this Act.

Each partner (a liable partner) in the partnership is taken to commit the offence.

It is a defence to a prosecution for an offence against this Act if a liable partner proves that—

- (a) the partner did not know about the conduct that constituted the offence; and
- (b) either—
  - (i) the partner took reasonable precautions and exercised appropriate diligence to ensure the partnership did not engage in the conduct; or
  - (ii) the partner was not in a position to influence the partnership in relation to the conduct.

The defendant has a legal burden in relation to the matters mentioned in s (3) (see Criminal Code, s 59).

#### **Clause 49 Criminal liability of executive officer**

Clause 49 provides that executive officer of a corporation is criminally liable for offences committed by the corporation. This is intended to allow prosecution of executive officers of corporations for the acts and omissions of its employees, so that

the executive officers cannot stand behind the corporate shield. As a safeguard, an executive officer will escape liability if he or she exercised due diligence to prevent the necessary act or omission that constitutes the offence. The executive officer will also have available any defence open to the corporation.

This section holds that an executive officer of a corporation is taken to commit an offence if—

- (a) the corporation commits an offence against this Act (a necessary offence); and
- (b) the officer was reckless about whether the necessary offence would be committed; and
- (c) the officer was in a position to influence the conduct of the corporation in relation to the commission of the necessary offence; and
- (d) the officer failed to take reasonable steps to prevent the commission of the necessary offence.

The maximum penalty is the maximum penalty that may be imposed for the commission of the offence by an individual.

The above does not apply if the corporation would have a defence to a prosecution for the necessary offence. The defendant has an evidential burden in relation to the matters mentioned (see Criminal Code, s 58).

In deciding whether the executive officer took (or failed to take) reasonable steps to prevent the commission of the offence, a court must consider any action the officer took directed towards ensuring the following (to the extent that the action is necessary to the act or omission):

- (a) that the corporation arranges regular professional assessments of the corporation's compliance with the provision to which the offence relates;
- (b) that the corporation implements any appropriate recommendation arising from such an assessment;
- (c) that the corporation's employees, agents and contractors have a reasonable knowledge and understanding of the requirement to comply with the provision to which the offence relates;
- (d) any action the officer took when the officer became aware that the offence was, or might be, about to be committed.

The above in (a) to (d) do not limit the matters the court may consider.

This section applies whether or not the corporation is prosecuted for, or convicted of, the necessary offence.

## **Part 9 – Miscellaneous**

Part 9 of the Bill comprises only clauses 50 to 54 which deals with various matters not necessary to other Parts of the Act. This comprises reporting, protection of officials from liability, protection of others from liability, regulation- making power and review of the Act.

### **Clause 50 Senior practitioner must report**

The senior practitioner must, as soon as practicable after the end of a financial year, prepare a written report on the exercise of the senior practitioner’s functions for the year.

The senior practitioner must give a copy of the report to the director-general.

The director-general must include the report in the director-general’s annual report under the Government Agencies (Annual Reports) Act 2004, section 7.

The purpose of this provision is to ensure the accountability and transparency of the senior practitioner.

### **Clause 51 Protection of officials from liability**

This clause holds that an official is not civilly liable for anything done or omitted to be done honestly and without recklessness—

(a) in the exercise of a function under this Act; or

(b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

Any civil liability that would, apart from the above, attach to an official attaches instead to the Territory.

### **Clause 52 Protection of others from liability**

Clause 52 holds that civil or criminal liability is not incurred only because of any of the following done honestly and without recklessness:

(a) the making of a complaint under this Act;

(b) the making of a statement, or the giving of a document or information, as required or permitted under a territory law, to the senior practitioner.

### **Clause 53 Regulation-making power**

Clause 53 is a formal provision giving the Executive power to make regulations under the Act.

Regulations are intended to provide for more detailed rules and operation of an Act where necessary.

The existence of a regulation making power does not oblige the Executive to make regulations. Any regulations made must be consistent with any provisions of the Act.

## **Clause 54 Review of Act**

Clause 50 requires the Minister to arrange for the review of the operation of the Act as soon as practicable after the end of its third year of operation.

This review will include any statutory instruments made or in force under the Act, including a regulation.

As this Act establishes the role of senior practitioner and an oversight and support mechanism to reduce the use of restrictive practices in the ACT, it is important that the legislation empowering the senior practitioner is reviewed to ensure the Government's purpose, scope and objectives of the role are met.

There will be no further reviews thereafter.

## **Schedule 1 Reviewable decisions**

This Schedule sets out matters which comprise reviewable decisions under the Act, as mentioned in Part 7 of the Act.

A reviewable decision is a decision made by the senior practitioner mentioned in schedule 1, column 3 under a provision of this Act mentioned in column 2 in relation to the decision.

There are five kinds of reviewable decisions as follows:

- register positive behaviour support plan;
- refuse to register positive behaviour support plan;
- refuse to register positive behaviour support panel;
- give direction; and
- cancel registration of positive registered behaviour support plan.

An entity mentioned in schedule 1, column 4 in relation to the decision under column 3 may apply to ACAT for review of a reviewable decision.

Item 5, column 4 of Schedule 1 provides that a person who is the subject of a plan may apply to ACAT for review of the senior practitioner's decision to cancel registration of a positive behaviour support plan.

Any other person whose interests are affected by the decision may also apply to ACAT for review of a reviewable decision.

## **Dictionary**

The dictionary contains definitions for terms used in the Act.