

2019

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

SENIOR PRACTITIONER AMENDMENT BILL 2019

EXPLANATORY STATEMENT

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INTRODUCTION

This explanatory statement relates to the *Senior Practitioner Amendment Bill 2019* (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. 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 Bill describes the amendments to the *Senior Practitioner Act 2018* (the Act), which came into effect on 1 September 2018.

The Act regulates the use of restrictive practices by persons or other entities who provide any of the following services to another person:

- education;
- disability; and
- care and protection of children.

During early implementation of the Act, a number of issues were identified which required legislative amendment.

OVERVIEW OF THE BILL

The Bill makes the following changes to the Act:

1. It amends the meaning of “restrictive practice” to align the definition of chemical restraint with that used by the National Disability Insurance Scheme (NDIS) National Quality and Safeguarding Framework.
2. It addresses the use of a restrictive practice outside of a registered positive behaviour support plan where use of the restrictive practice is reasonably believed to be necessary to avoid the imminent risk of serious harm.
3. It amends the penalties for the use of a restrictive practice outside of a registered positive behaviour support plan in the circumstances detailed above.
4. It extends the timeframe for the commencement of offences from 1 July 2019 to 1 July 2020.

5. It adds the NDIS National Quality and Safeguards Commission as an entity to which the Senior Practitioner may provide information.

HUMAN RIGHTS IMPLICATIONS

During the Bill's development due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

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

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

- may limit section 10 – protection from torture, inhuman or degrading treatment
- may limit section 11 – protection of the family and children
- may limit section 12 – right to privacy and reputation.

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

Section 10 of the Act 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 articles¹.

This Bill amends section 10 of the Act to recognise the use of restrictive practice outside of a positive behaviour support plan in an emergency situation, where imminent serious physical harm or death is reasonably expected. This amendment **may limit** section 10 of the HRA, the right to protection from torture and cruel, inhuman or degrading treatment.

To limit the impact on an individual's right to be protected from torture and cruel, inhuman or degrading treatment, conditions on the use of restrictive practice in these situations have been included in the Bill to ensure that the usage is necessary, applied for the shortest period, is the least restrictive of the person in the circumstances and is reported to the Senior Practitioner.

The amendment has been made with the intent of protecting individuals from imminent risk of serious physical harm or death in emergency situations. The intention of the reporting requirements in s 10A is to enhance provider engagement with the Senior Practitioner and to ultimately facilitate the reduction of the use of restrictive practice in the ACT.

Section 11 – Protection of the family and children

¹ [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.

In amending section 10 of the Act to recognise the use of restrictive practice outside of a positive behaviour support plan in particular circumstances, section 11 of the HRA, the right to protection of the family and children **may also be limited**. The *Senior Practitioner Act 2018* defines ‘providers’ as persons or entities who provide services to another person including education, disability and the care and protection of children (s 8). Consequently, it is possible for emergency use restrictive practices to be used against children receiving services from such entities, where a child poses an imminent risk of death or serious physical injury to themselves or others.

As stated above, conditions on the use of restrictive practice in these situations are included in the Bill to ensure that the usage is necessary, applied for the shortest period, is least restrictive of the person in the circumstances, and is reported to the Senior Practitioner. The Bill includes additional protections for children which require providers to inform the Senior Practitioner about the age of any child who is subjected to an emergency use restrictive practice. This will allow the Senior Practitioner to closely monitor and track the use of emergency use restrictive practices against children.

Section 12 – Right to privacy and reputation

The Bill **may limit** an individual’s right to privacy. This is because clause 8 of the Bill adds the NDIS Quality and Safeguards Commission to the list of entities to which the Senior Practitioner may give protected information under section 42 of the Act.

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.

Under section 42, the Senior Practitioner is required 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. This requirement is included to help to ensure the limitation on the right to privacy takes the least restrictive approach and assists in justifying the limitation on the human right to privacy. This is line with other ACT legislation.

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

CLAUSE NOTES

Clause 1 Name of Act

This clause is a formal provision setting out the name of the new Act as the *Senior Practitioner Amendment Bill 2019*.

Clause 2 Commencement

This clause provides that the Act will commence on the day after its notification, other than sections 9, 10 and 11 which relate to the commencement date of offences under clause 4.

Clause 3 Legislation amended

This clause specifies that this Act amends the *Senior Practitioner Act 2018*.

Clause 4 New section, Section 2 (2)

This clause amends the commencement date for offences from 01 July 2019 to the later date of 01 July 2020.

Clause 5 Meaning of restrictive practice Section 7 (2), a definition of chemical restraint, paragraph (a)

This clause amends the definition of chemical restraint to align with the definition used by the NDIS National Quality and Safeguards Commission which will apply nationally.

Clause 6 Section 10

This clause recognises the use of restrictive practices in situations where imminent harm is likely, whether there is a positive behaviour support plan in place for the person or not. New section 10A details reporting requirements for providers if a restrictive practice is used under the circumstances mentioned in section 10.

Clause 7 Provider to monitor and record use of restrictive practices

This clause amends the requirement to notify the Senior Practitioner about the use of restrictive practices, so that the Senior Practitioner must be notified in accordance with new Section 10A and guidelines made under Section 12 or Section 27, rather than only being notified in accordance with guidelines made under Section 12.

Clause 8 Senior practitioner may give information to particular entities New section 42 (1) (ja)

This clause adds the NDIS Quality and Safeguards Commission established under the National Disability Insurance Scheme Act 2013, section 181A as an entity for information sharing purposes.

Clause 9 Section 46 heading

This clause amends the title of section 46 from use of restrictive practice 'other than under a positive behaviour support plan' to be 'other than in accordance with the Act'.

Clause 10 New section 46 (1) and (2) and note

This clause removes the penalty of 6 months imprisonment under section 46 of the Act. A maximum penalty of 50 penalty units applies for failing to comply with section 10 and section 10A of the Act.

This clause also removes the defence to a prosecution if the defendant believes that on reasonable grounds the use of restrictive practice was necessary to prevent serious and imminent injury or illness to any persons under Section 46 (1) (b). This is now covered under section 10 (b).

Clause 11 Section 46 (4)

This clause removes the definition of ‘relevant person’ for the purpose of section 46 (3). Section 46 (3) has been removed under clause 10 as it relates to the defence to a prosecution (now covered under section 10 (b)). A definition for ‘relevant person’ is now included in the dictionary under clause 13.

Clause 12 Dictionary, definition of positive behaviour support panel

Clause 12 corrects the dictionary reference to the section of the Act that positive behaviour support panels are registered under. The clause removes reference to section 21 and substitutes section 22.

Clause 13 Dictionary, new definition of relevant person

This clause adds the following definition of ‘relevant person’ for a provider, to the dictionary:

‘means an employee, agent, contractor or other person acting under the direction or on behalf of the provider.’