

2022

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

SENIOR PRACTITIONER AMENDMENT BILL 2022

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
EMMA DAVIDSON MLA
MINISTER FOR DISABILITY**

SENIOR PRACTITIONER AMENDMENT BILL 2022

The *Senior Practitioner Amendment Bill 2022* is **not** a Significant Bill. It has been assessed as unlikely to have significant engagement of human rights and does not require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The *Senior Practitioner Act 2018* (the Act) commenced on 1 September 2018. The Act created a new role of Senior Practitioner, as well as providing a formal framework for the reduction and elimination of restrictive practices.

The amendments contained in the Bill address two issues. Firstly, the removal of Subsection 7(1)(b)(vi) resolves a key issue identified within the Act with the definition of restrictive practice. Subsection 7(1)(b)(vi) defines restrictive practice as including “verbal directions, or gestural conduct, of a coercive nature”. This has caused significant confusion for stakeholders because it gives the impression that verbal directions, or gestural conduct, of a coercive nature could be used.

Verbal direction or gestural conduct of a coercive nature includes a person being threatened in an attempt to force compliance. It may occur when a person is degraded, humiliated or forced into a position of powerlessness, such as a threat to deny access to a mobility or communication aid. This would never be approved by a registered panel as part of an authorised positive behaviour support plan or considered a reasonable response to prevent harm to a person or other people as required by the Act. Conduct of this nature negatively impacts people’s rights as detailed below. Removing this subsection makes clear that coercion is not a restrictive practice that could ever be part of a positive behaviour support plan.

Secondly, the Bill contains an amendment to strengthen the authority of regulations made under the Act. Whilst the power to make regulations was already included in the Act, Section 53(2) now specifies that regulations made under the Act may create offences and fix penalties. This amendment is made to increase the sanctions the Senior Practitioner may bring to bear to enforce regulations and to confirm the serious nature of certain practices or actions as they may be defined. These practices or actions may include those which are deemed to pose too great a risk to a person’s life, safety or wellbeing. The amendment provides a possibility for inclusion of sanctions in a regulation. It does not require a regulation to include sanctions. If a regulation includes sanctions, they would be proportionate to the potential impact on the human rights infringed and risks caused by the practice.

CONSULTATION ON THE PROPOSED APPROACH

The Community Services Directorate (CSD) sought comment from a range of government, non-government and community stakeholders. Invitation to contribute to the consultation was distributed widely to relevant ACT government directorates, unions (the Education Union, Community and Public Sector Union and the Australian Services Union), disability service providers, education providers, care and protection providers and people with disability, their families and carers as well as representatives from the disability sector, including peak disability bodies and disability service providers.

During stakeholder consultation, a consistent theme emerged in relation to the removal of Subsection 7(1)(b)(vi). Whilst removal of “verbal direction or gestural conduct of a coercive nature” was overwhelmingly supported, concerns were raised that the removal of the subsection without a corresponding mechanism to ensure the prevention of its use could lead to further confusion. For example, the removal of the sub-section as a form of restrictive practice could imply it is no longer considered a restrictive practice at all.

This potential unintended consequence has been assessed and it is considered that verbal directions, or gestural conduct, of a coercive nature would still fall within the catch-all definition of restrictive practice at Section 7(1)(a) of the Act. The existing bespoke protections offered by the Act, including the Senior Practitioner’s complaints and investigation functions, as well as the offence provisions, would still apply if coercive conduct was engaged in as a restrictive practice contrary to the Act.

The Restrictive Practices Oversight Steering Group (RPOSG) was briefed on the proposed amendments and provided input based on these consultations. Key government and non-government stakeholders are members of this group.

CONSISTENCY WITH HUMAN RIGHTS

The Bill amends the *Senior Practitioner Act 2018*. The Act contains provisions that both engage and promote or limit human rights in order to regulate and reduce the use of restrictive practices on vulnerable people. 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.

Rights engaged

The Bill primarily engages Section 10– Protection from torture, inhuman or degrading treatment and Section 11 – Protection of the family and children, of the HRA.

Rights Promoted

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

This Bill:

1. Removes “verbal direction, or gestural conduct of a coercive nature” from the list of restrictive practices defined within Section 7 the Act.

Under Section 10 of the HRA, no-one may be treated or punished in a cruel, inhuman or degrading way. This right obliges government to protect all people through legislative and other means against torture, or cruel, inhuman or degrading treatment or punishment, whether inflicted by state authorities or by people acting in a private capacity.

As previously specified, coercion includes threatening, degrading and humiliating a person into a position of powerlessness, in an attempt to force compliance. Its inclusion in the Act gives the impression that verbal directions, or gestural conduct, of a coercive nature could be used.

In keeping with the right to protection from torture and cruel, inhuman or degrading treatment, coercion would never be approved as part of an authorised positive behaviour support plan. Neither would it reasonably be referred to as part of an emergency response in a duty of care situation. Use of such a practice would be unlikely to constitute an action of last resort or be the least restrictive way of ensuring the safety of the person or others, as required under Section 9(2)(g) of the Act.

Removal of subsection 7(1)(b)(vi) makes clear that coercion is not an acceptable restrictive practice that could be part of a positive behaviour support plan and is therefore intended to reduce and eliminate its use on vulnerable persons. Removing coercive conduct from the definition of restrictive practice is intended to remove the confusion that it could be suitable to include in a positive behaviour support plan. It is not the intent of the Bill that coercive conduct no longer be considered a restrictive practice at all.

Concern raised during consultation that removing subsection 7(1)(b)(vi) could imply coercion is no longer considered a restrictive practice and the corresponding potential risk that this may limit the right to protection from torture and cruel, inhuman or degrading treatment, is averted by existing provisions within the Act. As previously noted, this is because the bespoke protections offered by the Act, including the Senior Practitioner’s complaints and investigation functions, as well as the offence provisions, would still apply if coercion was used as a restrictive practice contrary to the Act, because verbal directions, or gestural conduct, of a coercive nature could still fall within the broader definition of restrictive practice in section 7(1)(a).

The amendment is not intended to facilitate or increase the use of coercion, but to signal the inappropriateness of its use in positive behaviour support plans

2. Strengthening the authority of regulations made under the Act by specifying that a regulation may create offences and fix penalties recognises the seriousness of some practices or actions as defined. These actions and practices will likely include those considered dangerous to life, safety and wellbeing; many of which infringe on this right by inflicting cruel, inhuman or degrading treatment of people.

Providing for the prescription of offences and penalties in regulation increases the ability to enforce regulations. This is intended to discourage certain actions and practices deemed a serious risk to vulnerable persons, thereby reducing their use and protecting the human rights of people who may be subject to restrictive practices.

Both amendments contained in the Bill enhance the right to protection from torture and cruel, inhuman or degrading treatment.

Section 11 – Protection of the family and children

1. Children have particular rights under the HRA which take into account their particular vulnerabilities. Section 11 of the HRA states that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

In amending Section 7 of the Act to remove “verbal direction, or gestural conduct of a coercive nature” from the list of restrictive practices, the right to protection of the family and children (Section 11, HRA) is enhanced.

The *Senior Practitioner Act 2018* (Section 8) defines ‘providers’ as persons or entities who provide services to another person including education, disability and the care and protection of children. The removal of subsection 7(1)(b)(vi) enhances the rights of the child by making clear that threatening, degrading and humiliating treatment through coercive practice is not acceptable and would never be included in a positive behaviour support plan.

Due to its unacceptable nature, if coercion were used in relation to a child or young person, it would likely be referred to another oversight body, such as the ACT Ombudsman (Reportable Conduct Scheme), for a more appropriate response. Reportable conduct under the scheme covers allegations or convictions of child abuse or child related misconduct. The ombudsman can share information with police and other organisations to better protect children from abuse and may investigate an allegation or conviction in some circumstances. The Reportable Conduct Scheme does not extend to adults.

2. Children and young people have the right to special protection in addition to all other rights because of their particular vulnerabilities. Enabling the creation of offences and penalties within regulations recognises the unacceptable nature of dangerous, inhuman and degrading conduct. Increasing the ability to enforce regulations defining and deterring these practices could further protect the human rights of people subject to restrictive practices, including children and young people.

Removing Section 7(1)(b)(vi) and increasing clarity that coercion is not a restrictive practice that could be part of a positive behaviour support plan; and strengthening the authority of regulations made under the Act, enhances the protection of the family and children.

Rights Limited

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 21 – Right to a fair trial

The amendment that enables offences to be prescribed in regulation is likely to engage and limit rights, but only if a regulation includes those offences. Providing the possibility of including offences does not require a regulation to do so. An explanatory statement for such a regulation would be required to address limitations on human rights. Offence provisions themselves can affect a number of limitations on human rights, particularly to the presumption of innocence and the right to a fair trial, depending on the nature of the offence. These limitations on rights are permissible under the Human Rights Act, but section 28 requires those to be reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Part of this requirement is that legislation should be clear and accessible. Because this broadly construed authority to prescribe offences in regulation is unspecific and potentially enables a wide range of offences under the Act, there is a risk that the limitations on rights effected by the Bill are arbitrary. However, as discussed in more detail below, the limitations are proportionate and in pursuit of a legitimate aim.

2. Legitimate purpose (s 28(2)(b))

Enabling the possibility of the creation of offences and application of penalties within regulations made under the Act is intended to convey the unacceptable and serious nature of certain practices or actions as they may be defined. These are envisaged to be those which endanger a person's life and/or seriously impact their wellbeing.

Providing the possibility of sanctions to enhance the ability to enforce regulations seeks to reduce and prevent dangerous, degrading and inhuman practices, further protecting the welfare, safety and human rights of people who may be subject to restrictive practices. The application of proportionate penalties could deter dangerous and unacceptable conduct from occurring.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

Increasing the possible sanctions that may be brought to bear to enforce regulations seeks to protect the safety and human rights of people subjected to restrictive practices. Certain practices, such as dangerous and degrading conduct, compromise people's safety and wellbeing and infringe on their rights. The ability to apply penalty units to certain practices or actions is anticipated to act as a deterrent while increasing the ability to enforce regulations should the need arise.

4. Proportionality (s 28(2)(e))

As discussed throughout, the ability to make offences and apply penalties is intended to allow the enforcement of certain practices as defined, such as dangerous, degrading and inhuman conduct. This conduct puts the safety of often vulnerable people at risk and compromises their human rights. The Bill enables the potential for a regulation to be made incorporating a maximum of 30 penalty units to be applied for the most serious of these practices. This equates to \$2,000 for an individual and \$10,000 for a corporation.

Penalty units would be applied in proportion to the seriousness of the practice or action defined within a regulation. The courts would retain discretion to impose penalties that take into account the individual circumstances of alleged offending, and are proportionate to the seriousness of the conduct. Importantly, the application of penalties would primarily be intended to discourage the use of certain conduct, further safeguarding people who may be subject to restrictive practices.

Although the current amendment allowing the making of offences and application of penalties within regulations is necessarily broad, the making of any future regulation will be subject to due process and the consideration of human rights implications. As statutory instruments, regulations are reviewed by scrutiny committee to ensure, amongst other matters, no undue trespasses on rights previously established by law. Any regulation containing offences will require justification for specific human rights limitations affected.

Similarly, should offences be instigated against individuals or providers, these also would be subject to due process and existing rights and protections within the criminal justice system, including fair treatment under the law.

Senior Practitioner Amendment Bill 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Senior Practitioner Amendment Bill 2022**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA
Attorney-General

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 2022*.

Clause 2 Commencement

This clause provides that the Act will commence on a day fixed by the Minister by written notice.

Clause 3 Legislation amended

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

Clause 4 Meaning of *restrictive practice* Section 7(1), definition of restrictive practice, paragraph (b)(vi)

This clause removes Section 7(1)(b)(vi) from the Act.

Clause 5 Regulation-making power New section 53(2)

This clause specifies that a regulation may create offences and fix penalties of not more than 30 penalty units.