



Emma Davidson MLA

Minister for Disability
Minister for Justice Health
Minister for Mental Health
Minister for Veterans and Seniors
Assistant Minister for Families and Community Services

Member for Murrumbidgee

Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Our ref: M-22/1777

Email: Scrutiny@parliament.act.gov.au

Dear Mr Cain

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report 20, September 2022. In particular, to respond as requested to the Committee's comments about the Senior Practitioner Amendment Bill 2022 (1.15 -1.17, p.4).

The Committee's concerns centre on the amendment which would enable regulations made under the *Senior Practitioner Act 2018* (the Act) to create offences and fix penalty units. The Committee seeks further information about why offences cannot be included in the Act as opposed to within a regulation.

While primary legislation is made by the Legislative Assembly and does not operate until the Assembly has passed it, subordinate legislation, such as a regulation, being made by the executive generally operates from the day after it is notified. I appreciate that this means that the Legislative Assembly has far greater capacity to amend primary legislation than subordinate legislation; and therefore, to have real control over its final form. Whilst the Legislative Assembly can disallow, and has limited capacity to amend, subordinate legislation, it is true that the Assembly's powers in relation to subordinate legislation are more limited.

Nevertheless, there are advantages to creating a Regulation over an Act including, most notably in this instance, the relative flexibility a regulation provides. This attribute is necessary to deal with a changing environment or unforeseen circumstances, particularly as they may relate to potential practices which may pose a threat to life.

ACT Legislative Assembly London Circuit, GPO Box 1020, Canberra ACT 2601

 +61 2 6205 1941

 davidson@act.gov.au

 @emmadavidsonACT

 emmadavidsonACT

 emmadavidson

Maintaining currency with changes to contemporary practice is supported by the ability to more easily and quickly amend subordinate legislation. This in turn enhances our ability to safeguard people subject to restrictive practices. There are, however, advantages to creating a regulation over an Act, including when flexibility is needed to deal with a changing environment or unforeseen circumstances.

It is difficult to have a complete list of practices that should be offences. An example is practices (like prone restraint) that have been used in the past to respond to behaviours of concern by individuals, that are known to have led to severe impacts on people including death. It is imperative that such a guideline can be updated quickly to include other practices in the future that have similar deleterious effects on people. Secondary to this is the outcome of reducing pressure on the business of the Legislative Assembly.

As noted in the Explanatory Statement, seeking to enable the creation of regulations which include offences and fix penalties is specifically intended to discourage actions and practices deemed a serious risk to vulnerable persons. The Community Services Directorate will begin consultation imminently about the development of a list of prohibited practices; broadly informed by the NDIS Quality and Safeguard Commission's practices proposed to be prohibited. Consultation will seek stakeholder views on whether these practices should be included in the Act or subordinate legislation (or another format) and whether offences and penalties should apply. The discussion paper is attached for your information. This is a pertinent example of potential legislation intended to protect vulnerable people but also likely to be subject to ongoing refinement through ACT and national policy development and evolution in terms of contemporary best practice.

Because the Act currently allows the Executive to make regulations for the Act, the Bill may be seen as an extension of this existing authority. As noted in the Explanatory Statement, the making of any regulation would be subject to stakeholder and community consultation and consideration of human rights implications; as is currently the case. As subordinate legislation, a regulation would still be presented in the Assembly for consideration and Scrutiny Committee review.

While acknowledging the reduced capacity of the Legislative Assembly to amend subordinate legislation, it is worth noting that should a regulation be made, this would also result in reduced burden on the Assembly in comparison to potentially frequent amendments to the Act required to maintain currency with contemporary best practice.

Thank you for your scrutiny of the Senior Practitioner Amendment Bill 2022. I trust that the explanation provided herein addresses committee concerns.

Yours sincerely

Emma Davidson MLA
Minister for Disability

Attachment: Discussion Paper – Prohibited Practices