

YOUR SAY



ACT
Government



Purple Orange

Consultation on the Review of the *Senior Practitioner Act 2018* (ACT)

Listening Report

April 2024

Who We Are

JFA Purple Orange is an independent, social-profit organisation that undertakes systemic policy analysis and advocacy across a range of issues affecting people living with disability and their families.

Our work is characterised by co-design and co-production, and includes hosting a number of user-led initiatives.

Much of our work involves connecting people living with disability to good information and to each other. We also work extensively in multi-stakeholder consultation and collaboration, especially around policy and practice that helps ensure people living with disability are welcomed as valued members of the mainstream community.

Our work is informed by a model called *Citizenhood*.

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- Jennifer Nixon - Acting Chief Executive Officer, ACT Mental Health Consumer Network Inc.
- Veronica Plunkett - Integrated Service Response Program, Office for Disability

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1.0 Background

In 2018, the ACT Parliament passed the *Senior Practitioner Act 2018* (SP Act), which commenced on 1 September 2018. The SP Act established the ACT Senior Practitioner (SP) role, and its powers and functions, and provided a formal framework for the reduction and elimination of restrictive practices across sectors where restrictive practices may be identified as an issue – primarily for services provided in the areas of education (including education and care), disability, and the care and protection of children.

Section 54 of the SP Act requires the Minister to review its operation and present a report of the review to the ACT Legislative Assembly as soon as practicable after the end of its 5th year of operation, i.e., from 1 September 2023.

The report must be presented before section 54 expires on 1 September 2024. JFA Purple Orange was engaged to consult with a range of ACT stakeholders regarding implementation of the SP Act.

2.0 Review Focus Areas

Our engagement focused on topics such as:

- the objects and principles of the *Senior Practitioner Act 2018* (ACT) (SP Act);
- whether the intent of the SP Act to provide a framework for the reduction and elimination of restrictive practices in the ACT is being met;
- whether the SP Act is operating effectively and supporting the Senior Practitioner's functions and powers;
- whether the SP Act presents any legislative barriers to the exercise of the Senior Practitioner's functions and powers;
- whether the SP Act provides an effective reporting structure for the Senior Practitioner;
- whether the SP Act enables the ACT to meet its commitments under the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Sector and the NDIS Quality and Safeguarding Framework;

- the interaction of the role of the Senior Practitioner with other agencies and the interaction of the SP Act with other ACT legislation; and
- stakeholder perspectives on:
 - the implementation guideline for disability support providers;
 - guidelines on positive behaviour support panels and positive behaviour support plans; and
 - delegation of the Senior Practitioner's functions.

3.0 Consultation and Engagement Plan

The methodology for our Consultation and Engagement Plan included the use of co-design, where a small group of stakeholders, comprising government and community agencies as well as people with lived experience, was assembled to assist JFA Purple Orange design a consultation process best placed to bring helpful and comprehensive input from stakeholders in the timeframe available, and with due regard for stakeholders' wellbeing.

The Co-Design Working Group and the ACT Government advised JFA Purple Orange on community stakeholders who would be suitable to approach for the consultation.

People could contribute by meeting or talking with personnel from JFA Purple Orange, or by visiting the Senior Practitioner Act YourSay webpage.

Contributors were asked to only contribute as much as they were comfortable with, and were assured that the report would be written in a way that minimises any risk of a person being identifiable from a comment they made. For contributors with lived experience of restrictive practices and where there was a risk the conversation may inadvertently trigger remembered trauma, counselling support was made available.

4.0 Who was consulted?

At the commencement of our engagement, the Community Services Directorate advised more than 550 identified stakeholders about the consultation and invited them to express interest via JFA Purple Orange. Stakeholders identified by the Co-Design Working Group were contacted by JFA Purple Orange.

On 28 February 2024, the Senior Practitioner Act YourSay webpage went live. The YourSay page provided the option to respond to a survey or upload a written submission and included a document library with a discussion paper in 3 formats (full length, a plain English 1-page summary, and an Easy English version). JFA Purple Orange's sessions for people living with intellectual disability, lived experience of restrictive practices, and frontline workers were advertised on the YourSay page. YourSay consultation closed on 10 April 2024. Because of the heavier demands often made of First Nations community leaders and stakeholders in public consultation, this consultation methodology was supplemented by drawing on a recent ACT report¹ involving First Nations views on comparable matters.

We conducted a total of 17 consultation sessions with 56 contributors. Consultation sessions were held with:

- the Executive Branch Manager, Regulation, Assurance and Quality;
- the Office for Disability;
- the Director of Guardianship;
- the Public Advocate and Children and Young People Commissioner;
- the Children, Youth and Families Division;
- the Education Directorate;
- senior service provider representatives;
- Catholic Education, Archdiocese of Canberra & Goulburn;
- school principals;
- the lived experience community;
- education unions;

¹ 'Towards A 10-Year ACT Disability Strategy' Listening Report 2022.

- frontline workers;
- the Senior Practitioner and staff; and
- peak advocacy organisations.

5.0 What people said about whether the Senior Practitioner Act is fulfilling its intention of reducing restrictive practices

From the range of conversations conducted, these are the main things the authors heard:

- Some contributors believed the legislation had increased clarity regarding the definition of restrictive practices and this had helped reduce restrictive practices. Similarly, some contributors felt the SP Act is providing a framework within which to operate, train staff and improve support delivery for participants with complex needs. Some contributors said awareness was beginning to build within the service provider sectors regarding restrictive practices and positive behaviour support plans, notwithstanding the challenges posed by staff movements across sectors. Examples were cited regarding increases in reporting following awareness-building activities.
- In contrast, some feedback raised the view that the legislative powers established under the SP Act should be more heavily resourced and have not been effective in supporting providers to reduce and eliminate the use of restrictive practices.
- Some contributors felt that the regulatory agencies such as the Human Rights Commission, the Ombudsman and the Office of the Senior Practitioner interacted well with each other, providing “*an umbrella of protection*”.
- Anecdotal evidence was cited by some contributors regarding reductions in restrictive practices following interventions by high-quality positive behaviour support practitioners. They stated that the quality of positive behaviour support plans was improving following the wider usage of the Behaviour Support Plan Quality Evaluation Tool II (BSP-QEII). Some contributors also offered anecdotal positive experiences regarding positive behaviour support panels.

6.0 What people said about the drawbacks of the current legislation

From the range of conversations conducted, these are the main things the authors heard:

- **Scope of legislation:** Some contributors felt the legislation was too broad, and that the diversity of needs of service providers did not align with a one-size-fits-all approach, particularly in education. Alternatively, other government representatives, as well as people with lived experience, thought the scope of the legislation was too narrow, and sectors such as aged care, mental health and general health sectors should be included. There were differing perspectives on the inclusion of educational settings in the scope of the SP Act. These ranged from the view that the ACT should remove educational settings from the SP Act's scope (in line with other Australian jurisdictions) to the view that including education and the care and protection of children is a strength of the legislation. There was also the view that a consistent approach across multiple sectors helps to drive community understanding about restrictive practices.
- **Language of legislation:** There was a strong view expressed by a number of contributors that the language used in the legislation needed to be amended. Suggestions for amendment were:
 - emphasising capacity-building over compliance;
 - aligning with the ACT's Disability Strategy, normalising inclusion; and
 - anchoring human rights and dignity in language.
- **Refinement of definition of a restrictive practice:** A strong view was expressed by multiple contributors that ambiguity regarding the existing definition may be contributing to:
 - anxiety among families and service providers, with this leading to the failure to act in appropriate circumstances;
 - differing interpretations and applications by the Office of the Senior Practitioner; and
 - risk to service provider staff, such as teachers.

Recommendations for amendment of the definition of a restrictive practice included:

- further clarity regarding what constitutes reasonable protection from harm, including whether this extends to non-physical harm;
- when restrictive practices can be applied in health settings, such as during vaccinations;
- what constitutes a non-physical restrictive practice, particularly in the school setting; and
- greater clarity around the meaning of ‘reasonable’ and ‘imminent’.
- **Need for greater clarity regarding chemical restraints:** Concern was expressed strongly across almost all stakeholder groups regarding the effectiveness of the existing regulation of chemical restraints. Concerns included:
 - a lack of understanding in disability and aged care sectors;
 - the long-term use of medication that subdues the person, without adequate opportunities for medical review;
 - the administrative burden placed on families to report the use of medication;
 - ambiguity regarding whether a medication is for a diagnosed condition or for behaviour modification;
 - perceived lack of training of General Practitioners in restrictive practices;
 - the use of Medical Purpose Forms by some service providers to circumvent reporting requirements; and
 - the inconsistency between the SP Act, the *Mental Health Act 2015* (ACT) and NDIS legislation.
- **Extent the current legislative requirements support the collection and use of data to quantify effectiveness of the legislation:** There was broad acceptance across most contributors that there was a need for more clarity regarding the purposes served by reporting. Concern was also expressed regarding the perceived limited availability and usage of data obtained from reporting to quantify whether a reduction is occurring, and to “close the feedback loop” by using the data to further reduce and ultimately eliminate restrictive practices. Some contributors felt a lack of feedback on reports contributes to low levels of confidence in the ability of the SP Act to achieve its aims. Similarly, a lack of publicly available data (especially trend data over time) was felt to inhibit a meaningful evaluation of the SP Act’s effectiveness. Challenges

identified regarding the collection of data for quantifying whether there has been a reduction in use of restrictive practices included:

- the legislation's scope is so broad;
 - the limits on resources devoted to Senior Practitioner educative and implementation functions;
 - the difficulties posed by spikes in (late) reporting following Senior Practitioner awareness-raising activities;
 - a gap in the collection of data regarding why a cessation of reporting has occurred; and
 - the need for more streamlined interaction between the SP Act and other reporting structures, aided by simplified guides for service providers, people who may experience restrictive practices, and their families and carers.
- **Office of the Senior Practitioner's mandate is too broad:** Concern was expressed by various contributors regarding the Office's capacity to simultaneously perform multiple functions, which some argued were conflicting. Issues raised included:
 - a lack of focus in the legislation regarding which function is to take priority;
 - the need to strengthen resources to perform functions across all delegated functions of the Senior Practitioner;
 - varying levels of engagement with, and oversight of, each of the different sectors covered by the scope of the SP Act;
 - the capacity to maintain relationships while being both educator and enforcer;
 - less punitive approaches, such as the Human Rights Commission's conciliation unit were perceived to be more successful in maintaining relationships; and
 - the Office's perceived role as authoriser of restrictive practices was viewed as presenting a challenge to their effective delivery of key messages regarding the need for the reduction and elimination of restrictive practices.
 - **Difficulty imposing sanctions:** Various contributors expressed concerns regarding the capacity to enforce sanctions under the existing legislation. These concerns included:
 - the evidentiary and procedural challenges involved in the Director of Public Prosecutions accepting a brief or to ensure a conviction;

- limitations imposed regarding the issuing of directions under sections 26 (h) and 39 of the SP Act to instances where the Senior Practitioner has registered a plan or investigated;
 - a lack of clarity regarding the length of investigation required under section 31 of the SP Act;
 - the use of ‘may’ rather than ‘must’ in sections 13 and 22 of the SP Act regarding service provider positive behaviour support plan obligations; and
 - a lack of clarity regarding the Senior Practitioner’s exercise of discretion under section 22 of the SP Act.
- **Interaction with health systems:** There were various views expressed regarding challenges in the arrangements for the SP Act’s interaction with the ACT’s health systems, including:
 - consistent regulation of chemical restraints when a person moves across systems;
 - the need for the SP Act to align with the ACT Health Strategy; and
 - the need to expand the Senior Practitioner’s powers to access sensitive information from adult forensic health facilities.
 - **Interaction between the SP Act and other legislation:** Contributors identified various interactions between the existing SP Act and other ACT legislation that could be clarified, including:
 - the relationship between restrictive practices, the Reportable Conduct Scheme, Codes of Conduct, and Disability Standards for Education in education settings, which creates a culture of uncertainty for workers;
 - the implications of restrictive practices used in education contexts on rights granted to students by the Commonwealth’s *Disability Discrimination Act 1992* and the ACT’s *Education Act 2004*, with particular concern regarding the right to learn in-person. In prior consultations with the ACT Government, First Nations communities identified cultural and physical safety and being safe from bullying in school as important considerations²;

² ACT Government, ‘Towards a 10-year ACT Disability Strategy Listening Report 2022’ ‘Section 2 Experiences of Aboriginal and Torres Strait Islander people with disability’, 30.

- ambiguity regarding division of responsibility to investigate between the Education Directorate, the Ombudsman and the Senior Practitioner;
- ambiguity regarding how to balance work health and safety obligations with the SP Act regulations; and
- aligning the SP Act with the *Carers Recognition Act 2021* (ACT) by changing the definition of ‘informal carers’ and requiring that carers be consulted in developing positive behaviour support plans.

6. Resource and implementation barriers to the achievement of the SP Act’s objectives

- **The Senior Practitioner’s educative function:** Contributors highlighted challenges limiting the effectiveness of the Senior Practitioner’s educative function and areas where further education was necessary, including:
 - the rate of staff turnover in the sector;
 - difficulty reaching non-NDIS registered disability service providers who “*don’t know what they don’t know*”;
 - a lack of understanding from aged care sector providers regarding obligations to residents living with disability;
 - difficulties shifting entrenched attitudes held by families and guardians;
 - the need for further education and resources tailored to the education sector;
 - the need for training and support for Learning Support Assistants (who are less likely to receive guidance on how to manage challenging behaviour, and may only receive instruction on what they must not do);
 - the need for education and guidance for informal carers and families;
 - the need for further awareness-raising and capacity-building on supported decision-making;
 - the need for continued efforts in building awareness of the full spectrum of possible restrictive practices, including restrictions on participation in areas such as finances, internet, dating websites, and mobile devices.

- more awareness-raising necessary within culturally and linguistically diverse (CALD) and First Nations communities;
- a lack of engagement with carer and lived experience communities;
- further education required in segregated settings, as *“a restrictive practice for one becomes a restrictive practice for all”*; and
- a shift in focus from education to compliance over recent years – a continued focus on education is critical to improve understanding of the SP Act and obligations for providers.

Various contributors suggested there was a need for greater integration of the SP Act’s obligations into course materials for workers who are likely to work in services/settings regulated by the Act.

- **Resource challenges:** While there was broad recognition across contributors regarding the merits of reducing restrictive practices and the ideals contained within the legislation, there was also concern expressed regarding the adequacy of resources devoted to ensuring the proper implementation, including:
 - perceived unfunded administrative reporting burden imposed on disability service providers, which means providers have had to redirect staffing resources into reporting activities;
 - delays in approval of new plans because of backlogs, leading to an increased need to report previously authorised restrictive practices;
 - a perceived reduction in the quality of positive behaviour support panels over time;
 - reluctance to use the Restrictive Intervention Data System (RIDS) due to lack of capacity and the accessibility and usability of the system;
 - understaffing and other resourcing issues in education, making implementation of rules difficult;
 - need for further training for school support workers, relief teachers and administrative staff;

- need for more support provided to families, particularly parents living with disability, who face the risk of having children taken away as a *“drastic restrictive practice”*;
 - need for more resources devoted to tailoring Senior Practitioner guidelines, policies and procedures to each sector and for thorough, consistent engagement with stakeholders;
 - challenges faced by service providers in navigating the conflicting demands of the SP Act and families/care givers;
 - challenges posed by calendar day reporting requirements for the education sector, where staff do not work on weekends; and
 - the need for a balance between compliance and organisations’ capacity to implement actions to reduce and eliminate restrictive practices.
- **Interaction between the NDIS and the SP Act:** There were strongly negative sentiments expressed by most contributors regarding the interaction between the NDIS and the SP Act. Concerns included:
 - the administrative burden caused by the need to report to both tiers of government, due to the dual regulatory environment operating with the NDIS Quality and Safeguards Commission and the ACT Senior Practitioner;
 - the Commonwealth Government’s lack of sharing of information with the ACT Government;
 - lack of response following reports made to the NDIS Quality and Safeguards Commission;
 - inconsistent registration requirements for disability service providers;
 - inconsistent interpretations regarding what constitutes a restrictive practice leading to reduced faith in ACT legislative requirements, such as *“NDIS told us we don’t need to report this”*; and
 - inconsistent timelines for reporting between the two frameworks (NDIS and the Office of the Senior Practitioner).
 - **Implementation guideline for disability support providers:** There was not broad awareness of the content of the Implementation Guideline. Those contributors who did express views said:

- language could be more human rights-focused and further emphasise the need to reduce and eliminate restrictive practices;
 - legislative amendments regarding verbal and gestural restrictive practices need to be reflected in the Implementation Guideline;
 - the Guideline contains terms that are inconsistent with the legislation: behaviours of concern (instead of risk of harm) and emergency reporting (not mentioned in the SP Act); and
 - an additional Guideline tailored to the unique needs of the education sector would be useful.
- **Understanding of positive behaviour support plans:** Contributors said that while awareness of positive behaviour support plans was building, there was still a need for improvements, including:
 - greater understanding of long-term benefits of use;
 - greater recognition of how long it may take to support new behaviour;
 - greater understanding of interaction between plans, duty of care, dignity of risk and safeguards;
 - greater acknowledgment and resourcing for service providers to cope with support plan workload;
 - for positive behaviour support panels, a stronger emphasis on how well the strategies have been implemented, and to what extent each party is contributing to the reduction or elimination of restrictive practices (rather than a focus on whether the plan meets the requirements of the SP Act);
 - clarification of the roles of implementing providers and practitioners, so practitioners hold accountability for plans they develop; and
 - consideration of a risk-based approach to defining unauthorised restrictive practices (URP), to distinguish between a URP that was authorised in the person's most recent plan (lower risk) and a URP that has never/not recently been authorised for the person (higher risk).
- **Quality of positive behaviour support plans:** While, as mentioned above, there was an acknowledgment of some improvement in the quality of positive

behaviour support plans, contributors identified various factors hindering the quality of plans, including:

- shortage of suitably qualified behaviour support practitioners. Evidence suggests that this shortage is likely to be greater in First Nations communities due to a lack of culturally appropriate disability services;
- insufficient funding for the use of external providers to develop positive behaviour support plans, which can create a heavy cost burden to the provider;
- the use of copy and paste recipes or formulas rather than appropriately designed plans;
- the length and usability of existing templates;
- inconsistencies between discussions at positive behaviour support panels and the plans produced;
- the bureaucratic impost placed upon families and providers, particularly regarding ensuring that a plan meets criteria;
- the lack of proximity between support practitioners and the person;
- plans being written in language that is not child/family-focused, or is not culturally accessible;
- delays in approvals of plans, posing risks to service provider staff, especially when timing is determined by factors outside the service provider's control;
- inconsistency of timelines written on physical plans with those published on the online portal;
- the inconsistent application or suitability of plans across multiple service providers, particularly within schools, and the challenges of having several plans for an individual, rather than a single wraparound plan;
- the need to consider options such as the payment of positive behaviour support panel members and the enforcement of strict timelines for each stage of the panel process; and
- the need for greater separation between the Office of the Senior Practitioner and the positive behaviour support panel.

7.0 Next steps

JFA Purple Orange will shortly complete a final report on the consultation, to be delivered to the ACT Government in April 2024. These reports are intended to assist the ACT Government in its deliberations in relation to the review of the *Senior Practitioner Act 2018*.

End of report