

Submission:

Australian Law Reform Commission

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Equality, Capacity and Disability in Commonwealth Laws

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**Communication Rights
Australia**

Communication Rights Australia is an advocacy and information service for people with little or no speech. Their main function is to promote the interests and wellbeing of those with a disability through advocacy. Communication Rights Australia provides representation and referrals, as well as support that allows individuals to make their own choices about issues that affect their life



**Disability
Discrimination
Legal Service Inc**

The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with a disability, and to generally promote equality for those with a disability



**Villamanta Disability
Rights Legal Service Inc.**

Villamanta Disability Rights Legal Service ("Villamanta") is a community legal centre that specialises in disability related legal matters for people who have a disability. It has a priority constituency of people who have an intellectual disability and does most of its legal casework for them. Villamanta provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of Villamanta are to ensure that people who have a disability have the same rights and opportunities as other people and are equally included in the community, in particular that they know about the law and are enabled to use the law to help them get their legal rights.

INTRODUCTION

‘One of the most telling and challenging statistics is that Australia ranks 21st out of 29 OECD countries in employment participation rates for those with a disability. In addition, around 45% of those with a disability in Australia are living either near or below the poverty line. These facts alone show us that we need to change.’¹

Over the last two decades, Australia has seen numerous reports on various aspects of the lives of people with disabilities. Whether people with disabilities have benefited from any of these reports, is questionable.

The above Price Waterhouse Cooper report relevantly tells us that as at 2011, the quality of life for people with disabilities remains substandard, and the various and many barriers to a rich and fulfilling life remain.

A system whereby people with disabilities are required to struggle, often on their own, to achieve equality, either at law or in life, is ineffective and unworkable.

Every right a person with a disability has must be fought for, often at great financial and emotional cost. The international conventions that ostensibly offer protection, cannot be accessed without an individual putting themselves at great risk of costs by virtue of the requirement to exhaust all domestic remedies in their own country. This risk is one that many people with disabilities, understandably, choose not to take.

It is for this reason that it is vital the State ensure the provision of effective, low-cost and equal access to justice and the relevant laws.

All research, reporting and direct feedback from people with disabilities indicate that they do not have this access.

The wide ranging scope of this inquiry requires a significant period of time to competently respond.

The issues set out below are only some that are relevant to this inquiry. We urge the Commission to seek further comprehensive input on this very important topic.

ANTIDISCRIMINATION LAW

The Disability Discrimination Act [“DDA”] has recently suffered from a lack of progressive decisions, and rather has been characterised by narrow and rigid legislative interpretations. The consequence is that the law is not always offering the protection that parliament intended to people with disabilities.

¹ Price Waterhouse Cooper “*Disability Expectations Investing in a Better Life a stronger Australia*” 2011

Disability Standards for Education 2005 (“Standards”)

A review of the Standards was held by the Department Of Education Employment and Workplace Relations in 2011. Implementation of any recommendations in response to this review was held over due to the proposed consolidation of federal antidiscrimination legislation. As a consequence, no action has been taken in relation to addressing the inadequacies of the Standards.

In relation to the proposed consolidation of antidiscrimination legislation, many individuals and organisations took the opportunity to set out proposed changes to address the perceived ineffectiveness of the DDA. This project has also been held over, however it contains important feedback on the DDA that should be taken into consideration by the Commission.

In addition to the Commission availing itself of the results of the Standards review in order to inform itself, further issues have arisen in the interpretation of the Standards, issues which threaten the usability of the Standards themselves, and the DDA in relation to complaints of discrimination in the area of education.

The difficulties lie in Parts 4.2 [3], 5.2 [2], 6.2 [2] and 7.2 [5] and [6]. These sections set out the process by which reasonable adjustments for students with disabilities are decided upon. An example of the manner in which the sections are being interpreted is set out below.

Walker v State of Victoria (2011) 297 ALR 284

[284]. Some features, which are common to both ss 5.2(2) and 6.2(2) should be noted. The first is that both provisions require a school to consult a student or his or her parents about prescribed matters. **They do not, however, require that such consultation take any particular form or occur at any particular time.** Those involved may meet formally or informally. Discussions can be instigated by either the school or the parents. Consultation may occur in face-to-face meetings, in the course of telephone conversations or in exchanges of correspondence. Once consultation has occurred **it is for the school to determine** whether any adjustment is necessary in order to ensure that the student is able, in a meaningful way, to participate in the programmes offered by the school. The school is not bound, in making these decisions, by **the opinions or wishes of professional advisers or parents.**

Similar interpretations have been made in *Abela v State of Victoria* [2013] FCA 832 and *Sievwright v State of Victoria* [2012] FCA 118.

As is made clear, the courts are interpreting the Standards in a manner consistent with the decision-making process in relation to reasonable adjustments for students with disabilities resting completely in the hands of educational staff. Students with disabilities, their parents and practitioners have no rights or influence as to what

these decisions may be. Considering the conflict of interest that schools have in relation to the provision of reasonable adjustments, namely expenditure, to have discrimination legislation which allows school staff to make decisions about adjustments, regardless of how brief their consultation may be, and how ignorant those staff may be about disability issues, is a failure of legal drafting.

The quality of education for children with disabilities has been highlighted in Victoria through countless reports by the Victorian Auditor General's Office over the last 10 years, and the Victorian Equal Opportunity and Human Rights Commission Report "*Held Back-the experience of students with disabilities in Victorian schools*" 2012. The role that education plays in the lives of people with disabilities was also referred to in the Price Waterhouse Cooper Report "*Disability Expectations Investing in a Better Life a Stronger Australia*" which cites barriers to education throughout the document.

Given that s 34 of the *Disability Discrimination Act* provides a defence for educational institutions who can prove that they have acted in accordance with the Standards, the risk is that the drafting of the Standards has jeopardised access to the Act in this area.

ACCESS TO JUSTICE AND LEGAL ASSISTANCE PROGRAMS

Equal access for people with disabilities to discrimination legislation is compromised by the lack of funds available to provide them with the same supports that respondents can afford throughout a trial or hearing. Research on the socioeconomic status of people with disabilities is widely accepted, supported by the Price Waterhouse Cooper report above which on page 3 states that "*around 45% of those with a disability in Australia are either living near or below the poverty line.*"

Transcript

The ability of respondents to pay for transcript in the absence of people with disabilities having the funds to do so, puts them at a significant advantage.

Video Evidence

Fees apply for video linkups which may be required by a person with a disability, or an expert witness from another state or country.

Expert Witnesses

Most expert witnesses require payments for reports and attendance.

Legal Assistance

As is made clear in the report *Legal Australia-Wide Survey of Legal Need in Australia 2012* (Law and Justice Foundation of New South Wales), access to legal

assistance is a significant impediment for the general population, but clearly more so for individuals who cannot afford to pay for private representation.

Community Legal Centres, due to their size, are often unable to assist at a hearing or trial due to resource limitations. Individuals will often have to rely on pro bono assistance from counsel. This is not always available.

A failure by the State to facilitate legal assistance for people with disabilities has a consequence that the laws designed to assist them are inaccessible.

Costs

The *Disability Discrimination Act* requires for enforcement a trial at the Federal Court of Australia. This presents a substantial barrier to people with disabilities due to the imposition of a cost order against them if they are unsuccessful. For employment and education cases which could require trials between two and five weeks, such an order could be hundreds of thousands of dollars.

Currently, people with disabilities have the option of using state discrimination laws, which lead them to an administrative tribunal which is generally [but not always] no cost, or federal discrimination laws which put them at risk of costs. The impediments to Community Legal Centres of running trials are set out above. As an example, the Disability Discrimination Legal Service has a base staff of 2.6 EFT to service the state of Victoria.

Due to tribunals being no costs jurisdictions, private law firms, who may offer to assist clients on a “no win no fee” basis will not do so as it is fairly certain that even if they are successful, no costs will be awarded. This reduces assistance to people with disabilities who then have to rely on pro bono firms. Such assistance is difficult to obtain, particularly in the face of long hearings.

On the other hand, “no win no fee” firms are more motivated to work in the Federal Court due to the certainty of costs if successful, however this requires the client to put themselves at risk of costs.

An overview of both jurisdictions therefore presents a choice of two unsatisfactory systems for people with disabilities who wish to use antidiscrimination legislation.

Any decision to alter the hearing of complaints under the *Disability Discrimination Act* in order to implement a no cost system at the Federal Court, would simply re-create the same set of impediments currently present at the tribunal level.

The DDLS supports the notion of those choosing to go to the Federal Court not being at risk of costs, however respondents paying costs if they can afford to do so upon unsuccessfully defending a case.

Not only would this encourage more respondents to enter into alternative dispute resolution with a greater incentive, it would continue to encourage “no win no fee” law firms to provide legal assistance to people with disabilities using the Act.

Given the restricted availability of legal assistance to people with disabilities, the greater the number of legal alternatives available to those people, the more accessible the legislation itself is.

EMPANELMENT OF JURORS WITH DISABILITIES

In summary, the DDLs is of the view that current national and state jury laws should be reformed to avoid exclusion of people with disabilities from participating in jury duty. The DDLs maintains that the law should allow potential jurors with disabilities to participate in jury duty where such disabilities can be reasonably accommodated. This should replace the current legal position where prospective jurors with auditory and visual disabilities are readily challenged or stood down from a panel.

There are several compelling reasons with accompanying authorities which strengthen our submission, namely:

- The availability of resources enabling such jurors to perform in accordance with their duty to assess the evidence and arrive at a final, truthful verdict. There have not been issues in other jurisdictions regarding the availability of resources such as interpreters and newer and better technologies to assist jurors with disabilities. There is no reason why this should be any different in Victoria.
- The idea of a representative jury necessitates that people with disability be included in the jury process as they form an important part of the community.
- The enhancement of procedural fairness by including such jurors as they possess added perception in some issues during trials given the circumstances of their disability.
- Inclusion of jurors with disabilities would create consistency with other court rules and procedures.
- The possible beneficial effects on other members of the jury to have professional and positive exposure to people with disabilities.

Our system of jury duty effectively prevents people who are blind or deaf from participating as jurors. Schedule 2 of the *Juries Act 2000* (Vic) disqualifies people who are not able to 'communicate in and understand' English² and people with a physical disability who are not 'capable of discharging' their duty as a juror.³ Whilst this is not an express exclusion of persons with sensory disabilities, we are not aware of any instances of blind or deaf jurors in the history of the Victorian justice system.

² Schedule 2, s 3(f).

³ Schedule 2 s 3(a).

In the High Court in *John Fairfax Publications Pty Ltd v Rivkin*,⁴ Callinan J took the opportunity in a civil defamation case to emphasise the deference that juries are accorded in our justice system. He observed that

‘both as a practical and legal matter, a jury’s decision on a factual question, although [not] impregnable, does have an authority over and above that of a [tribunal of fact constituted by a single trial judge] ... The jury is representative of the community.’⁵

At present, all States and Territories tend to exclude in practice blind or deaf candidates from jury service. In all jury statutes such exclusion may be supported by an express exclusion of people with disabilities and/or a requirement that candidates be either able to read English or are allegedly incapable of performing the duties of jury service without proper articulation as to why. Some international jury law is also in line with Australian jury law.⁶

Some overseas jurisdictions provide contrast. Texan jury law provides for reasonable accommodation of a deaf or hard of hearing person serving as a juror.⁷ An interpreter shall be present at all times during the case⁸ and shall be allowed in jury deliberations.⁹ In addition, the New York Court of Appeals has indicated that the presence of an interpreter in the jury room will not give rise to breaches of confidentiality and illegal interference.¹⁰ Furthermore, s 504 of the Illinois *Rehabilitation Act 1973*¹¹ appears to provide that automatic exclusion on grounds of disability is a violation of the law, even for blind or deaf candidates.¹² Meanwhile, according to a detailed article in the St. Petersburg Times,¹³ one deaf woman who relied on interpreters was elected forewoman of a jury in a civil proceeding.

⁴ *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50 (10 September 2003) (‘Rivkin’).

⁵ Callinan J, *Rivkin* at 184.

⁶ See, eg, Section 4(m), Jury Act (NEWFOUNDLAND, CANADA); Section 4(a), Jury Ordinance (HONG KONG).

⁷ Section 62.1041(a) Government Code (Tx), as amended by the Seventy-fourth Legislature. Cited in Opinion, Texas Attorney General, May 14 1996, <http://www.oag.state.tx.us/opinions/op48morales/dm-392.htm>.

⁸ *Ibid.*

⁹ Section 21.009 of the Civil Practice and Remedies Code (Tx). Cited in Opinion, Texas Attorney General, May 14 1996, <http://www.oag.state.tx.us/opinions/op48morales/dm-392.htm>

¹⁰ *New York v. Guzman*, 555 N.E.2d 259 (N.Y. 1990). Cited in Opinion, Texas Attorney General, May 14 1996, <http://www.oag.state.tx.us/opinions/op48morales/dm-392.htm>.

¹¹ 29 USC 794

¹² Illinois Legal Aid.

http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_Content&CONTENTID=212&suppressAll=true. Last update 17 November 2002.

¹³ Anita Kumar, ‘Deafness is no obstacle for jury duty in bay area’, St. Petersburg Times 5 June 2000 <http://www.sptimes.com/News/060500/TampaBay/Deafness_is_no_obstac.shtml> at 7 September 2004.

In the absence of practical difficulties posed by blind or deaf jurors, the selection of such persons should not compromise but only add to the perceived fairness of a trial. The New South Wales Law Reform commissioner remarked in April 2004 that trial lawyers believe that blind or deaf jurors will compromise the fairness of the trial because such people are unlikely to fully 'comprehend or deliberate on the evidence'.¹⁴ But the selection of blind or deaf jurors will only add to the special authority of a jury, a tribunal of fact, in that it will be representative to an unusual degree of the wider community.

In matters that involve defendants, plaintiffs, and third parties with disabilities, blind or deaf jurors could also enhance the authority and fairness of a jury as a tribunal of fact in such matters. One such case came before Justice Teague of the Victorian Supreme Court in 2001 in *R v Masters*.¹⁵ Four people, three of whom were profoundly deaf, pleaded guilty to manslaughter of another profoundly deaf man. In the course of his sentencing reasons, Teague J observed that 'a substantial degree of [naiveté] typically affects people suffering from a profound hearing loss since birth'¹⁶ and that the deaf offenders' naiveté and gullibility were 'traits ... linked to the disability'.¹⁷ His Honour's observations were offered in a case where by pleading guilty, no evidence was called or judicial notice taken of facts in support of those observations. It may be that a juror with a disability could have taken a different view about traits linked to profound deafness than a judge without a disability, concerned to take into account disability in sentencing. Indeed, the special insight of a juror with a disability in such matters would appear to add more weight to the authority and fairness of a jury as a tribunal of fact.

The present effective exclusion of blind and/or deaf people from jury duty also seems inconsistent with other court processes. For example, in most jurisdictions, jurors have to swear an oath or make an affirmation that they will 'give a true verdict according to the evidence.'¹⁸ This is the same sort of commitment that must be made by witnesses in most jurisdictions, substituting 'account' for 'verdict according to the evidence'.¹⁹ Without that commitment, witnesses are not competent to give sworn evidence, although they may still give unsworn evidence. As a result, witnesses need only show capacity to understand and honour the obligation of truthfulness to

¹⁴ Michael Tilbury, *The World Today* on ABC, April 6 2004, <<http://www.abc.net.au/worldtoday/content/2004/s1082248.htm>>.

¹⁵ *R v Masters & Ors* [2001] VSC 111 (10 April 2001).

¹⁶ *Ibid* at [10].

¹⁷ *Ibid* at [26-27]

¹⁸ *Juries Act 1967* (ACT), s 45; *Jury Act 1977* (NSW), s 72A; *Juries Act 1980* (NT), s 58; *Juries Act 1927* (SA), s 33; *Jury Act 1899* (Tas), Sch 2 Form VII; *Juries Act 2000* (Vic), Sch 3. Cited at [64] in *The Laws of Australia* as at July 2004.

For ¹⁹ Section 13(1) *Evidence Act 1995* (Cth) (regarded as basis for uniform evidence legislation in ACT, NSW, and Tas); s 9B(2) *Evidence Act 1977* (Qld); s 9(1) *Evidence Act 1929* (SA); s 100A *Evidence Act 1906* (WA). Cited in Gans, J, and A Palmer, *Australian Principles of Evidence*, 2nd Edition 2004, pp 49-50.

be eligible to give sworn evidence – whether they are blind or deaf. In the same way, capacity to understand and honour the obligation of truthfulness perhaps should be more important to eligibility of a potential juror in a trial, as opposed to the fact of their blindness or deafness.

Moreover, it is not a ground of appeal that a juror had been asleep during part of the trial.²⁰ In other words, jurors appointed under current law must be physically present yet are not expected to be consciously attentive for the duration of their empanelment. Our justice system, therefore, connives at a juror receiving no auditory and visual input for an indefinite period at trial, yet excludes a blind or deaf juror who may compensate for limited ordinary auditory and visual input through alternative, equally reliable types of input about the credibility of a witness. As Illinois Legal Aid has observed, a blind juror - currently excluded by Australian jury law – ‘can hear the clearing of the throat or pausing to swallow, voice quavering or inaudibility due to stress ... [that is,] things permit[ting] a blind juror to make credibility assessments of witnesses just as well as sighted jurors.’ As a result, it is not clear why a trial is fair when a juror falls asleep and yet unfair when a juror is permanently blind and/or deaf. Moreover, people with such disabilities are accustomed to long periods of higher concentration than other people because of the nature of their disabilities. Such people may be less likely to suffer a lapse in conscious attention during a jury service in a trial.

Another group of people with disabilities for whom judgments are made about their suitability for jury duty are people with complex communication needs who require communication devices or communication support workers to expressively communicate.

With today’s technology and continuing product development that addresses or alleviates sensory limitations, it is neither reasonable nor necessary to permit arbitrary exclusion from jury service on grounds of disability, English incapacity, or an imputed inability to discharge their duties as a juror, or satisfaction of the Sheriff (See Appendix B for a discussion of the present position taken by the NSW Sheriff’s Office to potential jurors with disabilities). Rather, that approach should now be discarded in favour of a more reasonable, inclusive approach to jury service candidacy of people with disabilities.

²⁰ R v Grant [1964] SASR 331.

RESTRICTIVE PRACTICES

The continued use of restrictive practices against people with disabilities puts Australia in conflict with international human rights legislation.

The Department of Human Services [State of Victoria] has in the last few years made significant steps in regulating restrictive practices in its services. While accepting that changes “on the ground” may lag behind policy and procedure, the Department of Human Services’ aim to cease restrictive practices completely is admirable and proper.

Unfortunately, restrictive practices in schools against children with disabilities remain a systemic problem which has shown no signs of change, despite the urging for regulation by statutory authorities. We refer to the joint submission to the Department of Families, Housing, Community Services and Indigenous Affairs by the Federation of Community Legal Centres which should be read as part of this submission, and which is attached.

The continued failure by the Department Of Education and Early Childhood Development to regulate restraint and seclusion puts children with disabilities at risk of injury or death. Attempts by advocacy organisations, parents and peak bodies to have this issue addressed have failed. This includes approaches to the relevant Federal Government Ministers of the day. If the State cannot demonstrate interest in protecting one of the most vulnerable groups in our society from physical and psychological harm, it is hard to envisage how the finer points of protecting the rights of people with disabilities will be competently addressed.

SUMMARY

The short timeframe required to respond to this inquiry has limited our response. We urge the Commission to make use of the reports and research documents of the last 10 years that address in part, many of the terms of reference. It is the opinion of the authors of this report that Australia does not meet its obligations to people with disabilities as set out in the UN *Convention on the Rights of Persons with a Disability*.

While the road to meeting its obligations is not always clear, we believe there have been sufficient advisory reports to guide the State in going some way towards achieving significantly better outcomes for people with disabilities living in Australia. If we can be of more assistance to the Commission, we would welcome any opportunity to do so.

Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VICTORIA) INC, IN CONSULTATION WITH MEMBER CENTRES

June 2013

Submission on the Draft Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector

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About the Federation of Community Legal Centres (Victoria) Inc

The Federation is the peak body for 51 community legal centres across Victoria. A full list of our members is available at <http://www.communitylaw.org.au>.

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria. Specialist community legal centres focus on groups of people with special needs or particular

areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

About Disability Discrimination Legal Service Inc

The Disability Discrimination Legal Service ('DDLS') is an independent, community organisation that supports individuals in disability discrimination matters. It is a not-for-profit association that provides free support to persons with disabilities. The DDLS also provides community legal education and undertakes law and policy reform projects in the areas of disability discrimination.

A Committee of volunteers manages the DDLS. The majority of the DDLS Management Committee is comprised of persons with disabilities. In addition to this, the DDLS's work is supported by the efforts of volunteers, some of whom also have disabilities.

The DDLS is an active member of the community legal sector, particularly in respect of matters concerning people with disabilities. It is a member of the Federation of Community Legal Centres, and is primarily funded by the Federal Attorney General's office.

We are a Victorian-based organisation and therefore provide the submission from that perspective.

Endorsed by

Communication Rights Australia



Communication Rights Australia

**Villamanta Disability Rights Legal
Service Inc**



**Villamanta Disability
Rights Legal Service Inc.**

**Youth Disability Advocacy Service,
Youth Affairs Council Victoria**



Introduction

The Department of Families, Housing, Community Services and Indigenous Affairs are to be commended for highlighting the importance of regulating restrictive practices in the disability service sector. As highlighted already, domestic and international legislation support the protection of people with disabilities, and their right to be free from cruel, inhumane and degrading treatment.

Unfortunately, those protections have not yet translated into best practice in a range of sectors within Australia and we welcome the opportunity to contribute to this important topic.

Applicability

Currently, the definition of 'Disability Service Sector' is unclear. The inference to be drawn is that this phrase may refer to services providing support and assistance to adults with disabilities.

In our view, it is imperative that any framework needs to cover children with disabilities in schools, for the following reasons:

- The failure to ensure that children with disabilities are treated with dignity, respect, and receive evidence based interventions to address challenging behaviours, can greatly influence their development as individuals. Challenging behaviours can be reinforced and/or worsened by inappropriate treatment.

It is unhelpful developing policy and practice that is applicable to a group of people, affording protection only after a certain age is reached. It is also unhelpful having a sector which is unregulated (education) and consequently exposing children with disabilities to harm, and then regulating after that time in order to mitigate that same harm.

- In Victoria, guidelines and regulations around restrictive practices in the child sector (education) and the adult sector (general services) are completely incompatible.

a) For example, the Department of Education and Early Childhood Development ('DEECD') do not have a policy on seclusion, ostensibly because it is forbidden (although that is not clear to any of their employees due to the lack of that policy). All the evidence is that seclusion is used frequently. The recent *Held Back* Report by the Victorian Equal Opportunity and Human Rights Commission¹ details in Chapter 10 the use of restrictive practices in the education sector. In addition, Children with Disability Australia's Issues Paper 'Enabling and Protecting' sets out the further instances of the abuse and neglect of children and young people with disability.²

It is also clear by reading the Position Paper on 'Positive Management Strategies' developed by the Principals Association of Specialist Schools³ that students are at times placed in rooms with the doors shut, and the advice from the DEECD Legal Department is that this could constitute 'illegal imprisonment'.

In this Paper, one of the recommendations is 'that the DEECD implements procedures to endorse individual school policies re the use of **time away** so that teachers and other staff in specialist schools can work with confidence' (p4, emphasis added).

¹ Victorian Equal Opportunity and Human Rights Commission, *Held Back-the Experiences of students with disabilities in Victorian schools* (2012).

² 'Enabling and Protecting- proactive approaches to addressing the abuse and neglect of children and young people with disability', Children with Disability Australia (2012).

³ PASS Position Paper on Positive Management Strategies (June 2011), p3.

Clearly, not only are Specialist Schools requesting permission for each of them to be able to decide themselves as to their own policies regarding 'time away', but seclusion is clearly occurring and there is no move by the DEECD to define seclusion, control its use or prohibit it.

b) The recent DEECD Restraint Policy dated 2012 can be compared to the Office of the Senior Practitioner May 2011 guidelines on restrictive practices.

The DEECD policy:

- i. Allows restraint to prevent the student from 'inflicting harm' on themselves or others. Such a phrase, not identifying the seriousness of that harm, allows a teacher to restrain in the event of a child simply hitting another child. There is no attempt to define 'harm', and therefore each staff person is able to interpret the phrase individually.
- ii. Allows restraint when there is 'no reasonable alternative' that can be taken to avoid the danger. There is no guidance to staff on what 'reasonable alternatives' may be, and there is no definition of 'danger'.
- iii. Disallows restraint unless 'alternative measures to avoid the danger have been exhausted'. There is no attempt to give guidance on what may be 'alternative measures'.
- iv. Gives no guidance on which restraint holds are acceptable and which are not. There is no warning that restraints have been known to cause death and injury, or which restraints are most likely to do so.
- v. States that it is 'advisable' that staff using restraint should be trained. It gives no guidance on that training, and in fact the DEECD openly admits to using martial arts instructors as trainers.
- vi. Asks staff to 'consider' a number of factors such as 'medical conditions' and so on but gives no guidance as to how they should consider such factors, and how those factors will be impacted upon by the use of restraint.
- vii. Does not require permission for restraint from any person within or outside the organisation that may have expertise in this area.

There is no mention of Positive Behaviour Support, Functional Behaviour Assessment and Analysis, or the role of psychologists in the mitigation of challenging behaviours.

In our view, the serious inadequacy of the current policies presents danger to children with disabilities.

c) The DEECD have been approached by numerous organisations requesting that their restrictive practices policies be addressed, without success. Most importantly:

- i. The *Held Back* report⁴ makes a recommendation that the regulation of restrictive interventions in Victorian schools (including Catholic and Independent schools) be transferred to the jurisdiction of the Office of the Senior Practitioner, Department of Human Services.

⁴ Victorian Equal Opportunity and Human Rights Commission, *Held Back-the Experiences of students with disabilities in Victorian schools* (2012).

- ii. The Office of the Public Advocate has also called for the regulation of restrictive practices in Victorian schools to be transferred to the Office of the Sector Practitioner.⁵

The above attempts to gain protection for children with disabilities in Victoria have failed, and consequently children with disabilities have little if any protection from inappropriately applied restrictive practices.

Recommendation 1

That the National Framework apply to children in schools.

General

The antidote to the inappropriate use of restrictive practices is psychology and evidence based positive behaviour supports. While individuals with disabilities, their parents, guardians and carers may all have important views in relation to restrictive practices, the experts in how to significantly reduce or eliminate challenging behaviours are professionals, such as Psychologists and Board Certified Behaviour Analysts.

Research has been plentiful over the decades in regard to Positive Behaviour Support and Behaviour Analysis. It is imperative that guidelines regarding restrictive practices are informed by science.

We strongly encourage the Department of Families, Housing, Community Services and Indigenous Affairs to work closely with the Australian Psychological Society and make good use of its publications and its endorsed publications. The Office of the Senior Practitioner, Department of Human Services, also has very relevant resources and experience, given their role in overseeing restrictive practices for people receiving disability services in Victoria.

Recommendation 2

That the Australian Psychological Society are recognised as the primary body of expertise in relation to developing a framework on restrictive practices.

Binding nature of the Framework

We suggest that assuming an acceptable Framework proceeds, informed by the relevant psychological agencies and evidence-based positive behaviour interventions, that it be binding on organisations that receive Federal funding.

It will be insufficient to simply have a Framework and hope that the relevant organisations will abide by its 'guidelines'. The issue of restrictive practices is sufficiently crucial to require assurance that disability organisations adopt the Framework as part of their practice.

Recommendation 3

That the Framework be binding on organisations that receive Federal funding, via inclusion in service agreements.

Timelines

There are already examples of best practice guidelines in relation to restrictive practices; for example, the Victorian Office of the Senior Practitioner May 2011 Guidelines. The research on behaviour analysis and Positive Behaviour Support has been in existence for decades, as has much research in relation to the dangers of restrictive practices. In our view, the Framework should be put in place by

⁵ Office of the Public Advocate, Position Statement 'Restrictive interventions in educational settings' (March 2013).

the end of 2013, adopting the goal of eventual elimination of restrictive practices in the sector as one of its tenets.

Recommendation 4

That the Framework be published and distributed by the end of 2013.



Position statement

Restrictive interventions in educational settings

March 2013

Introduction

A restrictive intervention is any intervention which effectively restricts a person's freedom of movement. Restrictive interventions can include mechanical, chemical (drugs), physical restraint and seclusion - the confinement of a person in a room or place where they are unable to leave or interact with other people. In institutional or residential settings providing for people with disabilities, restrictive interventions can be used as tools to manage 'challenging behaviours.'¹

Restrictive interventions constitute a significant incursion on a person's liberty and engage a number of human rights articulated in the Victorian *Charter of Human Rights and Responsibilities Act 2006*, including, rights of 'recognition and equality before the law' (s8); 'protection from torture and cruel, inhuman or degrading treatment' (s10) and 'freedom of movement' (s12). Under the Victorian Charter, government schools have an obligation to consider, promote and protect human rights when they deliver services. Australia also has an obligation to protect human rights under international treaties.

International treaties Australia has adopted include the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the United Nations *Convention on the Rights of Persons with Disabilities* and the United Nations *Convention on the Rights of the Child*. As signatory to the *Convention on the Rights of the Child*, Australia must 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.'²

¹ Where the behaviour of a person with a cognitive impairment or a mental illness in residential care poses a threat to their own or other people's safety, the person may be described as having 'challenging behaviours' or 'behaviours of concern'.

² United Nations *Convention on the Rights of the Child*, entered into force 2 September 1990, Article 19.

In Victoria, the use of restrictive interventions in disability residential settings is regulated through the *Disability Act 2006*. There are limits on how and when³ restrictive interventions can be used, there are reporting requirements, procedural safeguards and an independent body, the Office of the Senior Practitioner, which monitors the use of restrictive interventions.⁴ But in Victorian educational settings, there is a lack of legislative or policy guidance around the use of restrictive interventions. There is no independent oversight or monitoring of the use of seclusion and restraint and there is no legal requirement for a teacher or school in Victoria to report the use of restrictive interventions, other than in the case of the use of ‘physical force’.

This discrepancy needs to be corrected to protect the rights, interests, freedom and dignity of children with disabilities in schools.

Policy context for the use of restrictive interventions in schools

The Victorian Department of Education and Early Childhood Development (DEECD) has a policy directive on the use of ‘physical restraint’ in emergencies. Drawing on regulation 15 of the *Education and Training Reform Regulations 2007*, which address ‘restraint from danger’, the policy states that ‘a member of the staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student or any other person’.⁵ Restraint is defined as ‘physical force’ and is only able to be used when ‘the situation is an emergency and the danger of harm to the student and/or others is imminent’.⁶ Restraint should not be used to maintain good order or to respond to disruption. Mechanical and

³ Where the behaviour of a person with a disability poses a threat to their own or other people’s safety, under the *Disability Act 2006*, disability service providers may propose the use of restrictive interventions as part of that person’s behaviour support plan.

⁴ Under the *Disability Act 2006*, restraint or seclusion can only be used if their use is necessary to ‘prevent the person from causing physical harm to themselves or any other person’ (s.140 (a)(i)) or ‘to prevent the person from destroying property where to do so could involve the risk of harm to themselves or any other person’ (s.140(a)(ii)). They must be the least restrictive of the person as is possible in the circumstances (s.140(b)). The Disability Act prescribes a range of procedural safeguards relating to the use of restraint and seclusion in disability services. A disability service provider who proposes to use restrictive interventions must apply to the Secretary for approval (s.135(1)); the Authorised Program Officer for the disability provider must ensure that any restrictive intervention is used in accordance with the Act (139(1)); any proposed use of restraint and seclusion must be outlined in a behaviour support plan (s.141).

⁵ DEECD <http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx>, p1

⁶ DEECD <http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx>, p2

other forms of restraint including seclusion, are not endorsed by the DEECD (and not covered by the policy).⁷

The Australian (National) *Disability Standards for Education 2005* include standards for harassment and victimisation.⁸ The Standards require educators to take steps to prevent, respond and enable complaints about harassment and victimisation. A 2012 review of the Standards found that ‘in spite of the intent of the Standards, some reported that ongoing discrimination and a lack of awareness across all areas on (sic) education continues to be an extremely significant area of concern for students with a disability and their families. Many families reported that, through their education experiences, their children are subjected to: limited opportunities; low expectations; exclusion; bullying; discrimination; assault and violation of human rights.’⁹

The 2012 Standards review identifies the use of restrictive practices as a key area for attention. The review reported that ‘teachers are not well equipped to deal with the challenges associated with children who have complex needs ... this is increasingly leading to the use of restrictive practices such as the unplanned use of medications, physical, mechanical and special restraints’.¹⁰ Children with Disability Australia (CDA), a peak national body for children with disabilities agree, saying that ‘there is a clear need for further research and policy attention to the experience of children and young people in inclusive and special schools, home schools and other educational settings’¹¹, particularly as there is no data on how frequently restraint and seclusion practices occur.

Incidence of the use of restraint and seclusion in schools

Research undertaken by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in 2012 provides qualitative evidence on the use of restraint and seclusion in Victorian schools. Although there is no official data to corroborate the claims made in the research, the number of reports from parents, students and teachers interviewed and

⁷ Victorian Equal Opportunity and Human Rights Commission, 2012, *Held Back: the experiences of students with disabilities in Victorian schools*, p117

⁸ Harassment is defined as ‘an action taken in relation to the person’s disability that is reasonably likely, in all the circumstances, to humiliate, offend, intimidate or distress the person.’

⁹ Australian Government, Department of Education, Employment and Workplace Relations, *Report on the review of the Disability Standards for Education 2005*, 2012, cited by VEOHRC, p22

¹⁰ As cited above by VEOHRC, p107

¹¹ Children with Disability Australia, 2012, *Enabling and protecting: proactive approaches to addressing the abuse and neglect of children and young people with disability*, Issues Paper, p29

surveyed as part of the research, demonstrate that restrictive interventions are being used in Victorian schools. The research included interviews, surveys and focus groups with over 1800 teachers, students, parents and other key informants. Thirty-four parents reported the use of restraint on their child, 128 parents reported that their children had been placed in ‘special rooms’ and 514 educators reported having used restraint.¹²

This supports anecdotal evidence published by CDA Australia who write that ‘reports of aversive and abusive behaviour management practices (viewed by particular schools as appropriate for students with a disability) have been made over many years by students with disability, family members, advocacy groups and legal bodies.’¹³ According to CDA, these reports include:

- ‘The use of a martial arts instructor to train school staff in the ‘behaviour management’ of children with disability;
- The use of small rooms and small fenced areas as punishment for ‘bad’ behaviour;
- The use of chemical restraint – medication to influence behaviour – without accompanying positive behaviour support strategies.¹⁴

The CDA issues paper quotes from the shadow report to the United Nations from Australian non-government organisations that ‘children with disability continue to experience restrictive practices in both mainstream and *special* schools including being locked in isolation rooms, being physically restrained and penned in outside areas, and chemical restraint.’¹⁵

Recommendations for Victoria

The rights of students and teachers would be better protected by establishing a system of reporting and monitoring that ensures independent oversight.¹⁶ Accompanied by independent and transparent data and analysis, continuous quality improvement mechanisms could be put in place to support schools to manage challenging behaviour while protecting the rights and dignity of children in their care.

¹² VEOHRC, p105

¹³ CDA, p13

¹⁴ CDA, p13

¹⁵ CDA, p20

¹⁶ VEOHRC

OPA supports the recommendations outlined in the VEOHRC report:¹⁷

1. That the use of restrictive interventions in Victorian schools be regulated as a matter of priority.
2. That the *Education and Training Reform Act 2006* and the *Disability Act 2006* be amended to provide for transfer of the regulation of the use of restrictive interventions in schools to the Office of the Senior Practitioner (OSP).
3. That, until the oversight of responsibility has been transferred to the OSP, the Department of Education and Early Childhood Development's 'Restraint of Student Policy' be amended to prohibit the use of seclusion and to better regulate the use of restraint, including notification of parents, better planning, reporting and reviewing.
4. That the *Education and Training Reform Act 2006* be amended to provide that any student subject to a restrictive intervention have a positive behaviour support plan put in place that identifies ways to minimise the use of restrictive interventions.

¹⁷ See p124 of the VEOHRC report for full recommendations



Leading special education in Victoria

PASS POSITION PAPER ON POSITIVE MANAGEMENT STRATEGIES

JUNE 2011

The Principals' Association of Specialist Schools Victoria Inc. (PASS) is the professional body for the principals of the 81 specialist schools in the Victorian Department of Education and Early Childhood Development (DEECD).

The aims of PASS include:

- To promote the principles of special education and improved community awareness of the capacity for special education throughout the State of Victoria.
- To watch over and protect the interests, rights and privileges of its members and specialist schools.
- To act as a representative body of principals of specialist schools in the state of Victoria.
- To promote the effective administration of special education and the employment of appropriately qualified special education personnel in all areas.
- To consider and deal with all matters affecting the professional interest of its members.
- To promote the consideration and discussion of all questions affecting special education.

Victoria's specialist schools form a substantial part of the provision of education for the state's students with special education needs on the Program for Students with Disabilities (PSD) and outside the program. Presently 46% of the students on the PSD attend the 81 specialist schools. The categories of students under the PSD are mild to profound intellectual disabilities, a physical disability, a severe behaviour disorder, a hearing or visual impairment, a severe language disorder with critical education needs, are on the Autism Spectrum, or have a combination of these factors.

BACKGROUND

Under the *Occupational Health and Safety Act 2004* and the *Occupational Health and Safety Regulations 2007*, Victorian schools have an obligation to provide and maintain as far as practicable a work environment which is safe and which minimises the threat of occupational violence. The DEECD has a duty to protect its employees. One major means for this to occur would be for the DEECD to provide suitable, approved training to these people.

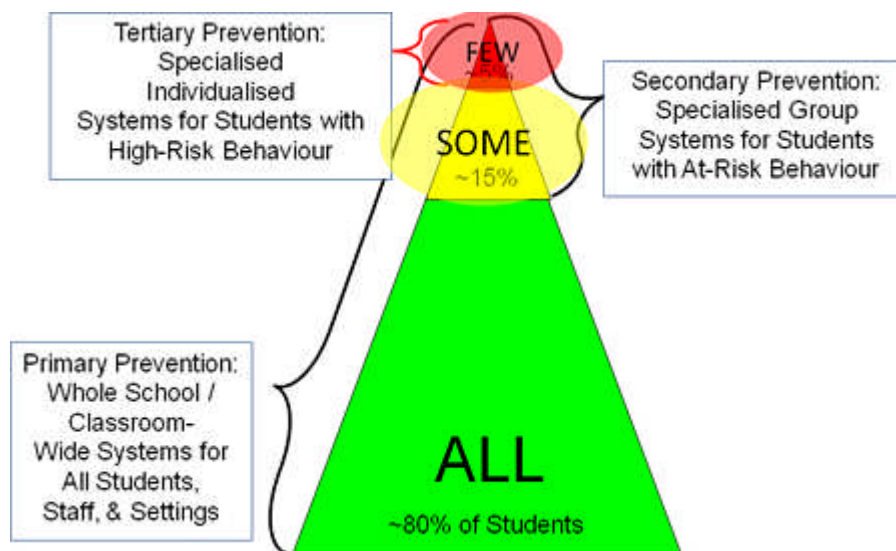
Schools also have a duty of care.

'The law imposes a legal duty on teachers and schools to take care of the safety and wellbeing of pupils in their care. This *duty of care* arises where a **teacher-pupil** relationship exists.

'Duty of care can be defined as "an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others". Every teacher and school authority owes a duty of care to take reasonable care to ensure that their acts or omissions do not cause reasonably foreseeable injury to their pupils.' (Verma, R., 2010)

A number of students in Victorian specialist schools present at times with behaviours which could pose an imminent threat to themselves or others, such as kicking and biting. All specialist schools in Victoria have students who at times display these behaviours, students with social and emotional difficulties including those with ADHD, Acute Conduct Disorder and Oppositional Defiance Disorder.

All our member schools have comprehensive management strategies, many being modelled on the very well researched Positive Behaviour Strategies (PBS). “Unlike traditional management interventions that view the individual as the problem and strive to eliminate behaviours, PBS and functional behaviour assessment view systems, settings and the lack of skills as part of the problem and work to modify these factors to support the student.” (Walker, Shea, & Bauer, 2007, 94) PBS involves a school wide system with three levels of intervention. Primary prevention strategies focus on interventions used on a school-wide basis for all students. Secondary prevention strategies involve students who do not respond to primary prevention strategies and are at risk of academic failure or behaviour problems but are not in need of individual support. Tertiary strategies are for students who display persistent patterns of disciplinary problems and employ intensive or individualised interventions which are the most comprehensive and complex.



The triangle diagram above is used to demonstrate PBS. While the proportions given above for ‘All’, ‘Some’ and ‘Few’ are regarded as correct for most schools and classrooms, Victoria’s specialist schools generally have higher proportions of students in the ‘Some’ and ‘Few’ categories due to the nature of their student populations.

Although there are comprehensive behaviour management plans for most of these students, and training in Aggression Management for staff in many of the schools, situations can arise when it is deemed that a student needs to be withdrawn or restrained to minimise the chances of harm to themselves or to others. It must be emphasised that staff in Victoria’s specialist schools do not use restraint as a punishment or threat, but rather as one of a range of behaviour management techniques, in these cases to protect the safety of all parties involved.

In the DEECD *Schools Reference Guide* at 16.6 Legal liability and associated matters, Item 6.16.11.5 Restraint of students under regulation notes:

Regulation 15 of the Education and Training Reform Regulations 2007 states: “A member of the staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff or any other person.”

The regulation authorises *'reasonable'* action which is *'immediately'* required to *'restrain'* a student. In less serious cases, the reasonable action could involve a warning or instruction to the student not to proceed. In more serious cases where a person faces an imminent threat of injury due to the student, the reasonable action could involve the physical restraint of the student.

The object of the restraint is to avert the danger to some person. It should therefore be measured (i.e. reasonable in the circumstances) and removed once the danger has passed.

Our member schools are also governed by the *WorkSafe Guide to Challenging Behaviour Risk Prevention in Specialist Schools*. This lengthy document has sections on:

- 1 Purpose
- 2 Definitions
- 3 Consultation
- 4 Hazard identification
- 5 Risk assessment
- 6 Risk control
- 7 Incident management procedures and systems
- 8 Review and audit

Many of these sections have comprehensive checklists.

The first two sections are:

1 Purpose

This document is designed to assist WorkSafe inspectors in assessing whether a specialist school is controlling, so far as is practicable, the risks to employees from student initiated challenging behaviour. Many of the questions in this document help inspectors form an opinion on occupational health and safety (OHS) compliance. *[It should be noted here that this document is limited in its scope as its Purpose speaks only of 'risk to employees' and not of risks to other persons.]*

The document was developed in consultation with employers and employees to assist with understanding of their duties under OHS legislation.

2 Definitions

2.1. Student initiated **challenging behaviour** denotes any behaviour that:

- is a barrier to a person participating in, and contributing to their schools community
- undermines, directly and indirectly, a person's rights, dignity or quality of life and damages psychological health
- poses a risk to the health and safety of the student, staff, other students and visitors.

The document then notes that student -initiated challenging behaviour can cause muscular-skeletal disorders and/or psychological injuries to the student, other students and/or staff.

As well as these documents, there can be other policies operating in some specialist school workplaces which provide an integrated service with organisations such as those of CAHMS (Child and Adolescent Mental Health Services). These schools' policies are therefore in line with those of these organisations.

Interventions to moderate or change adverse student behaviours should form a continuum of interventions which has been agreed upon by the school.

PASS member schools need clarity and explicit advice regarding these procedures. At present legal advice to one of our member schools from a DEECD legal officer (Feb 15th 2011) indicates that if a student in time out is unable to remove him/herself of his/her own volition then time out with the door "closed" can be

construed as illegal imprisonment in terms of common law. He does qualify this by stating that in “extreme circumstances” as defined above, a teacher is able to “close” the door.

While it is preferable to have the door open, in “extreme circumstances” it is irresponsible to put the student and others at risk. It is preferable to have the door closed and to have the student contain him/herself, rather than having the door open which often necessitates the need to put a student into a hold; a more invasive strategy. It also needs to be understood that whilst being in Time Out, the student is supervised, supported and in sight of the teacher at all times.

The staff at the school felt secure having very clear guidelines which are well understood and practiced at a whole school level as evidenced in the school’s Policies. However, these teachers are now concerned regarding the advice from DEECD which infers that having the door “closed” contravenes the Human Rights Charter. Teachers feel that their management strategies are compromised and less effective if the choice to close the door is taken away. Clarity is required about circumstances which limit such rights when safety is the predominant issue.

PASS, on behalf of its member school, asks for clarity regarding holding. In isolated and severe cases, holds can last for an extended time if the student is out of control and the safety of the student or others is compromised.

RECOMMENDATIONS

PASS recommends:

- 1. that the Victorian DEECD clarifies more explicitly policies and procedures on the restraint of students**
- 2. that the DEECD implements procedures to endorse individual school policies re restraint of students so that teachers and other staff in specialist schools can work with confidence**
- 3. that the DEECD implements procedures to endorse individual school policies re the use of time away so that teachers and other staff in specialist schools can work with confidence**
- 4. that the DEECD provide funds for training school staff to undertake appropriate training in working with students with very challenging behaviour**
- 5. that a meeting be organised by DEECD between Conduct and Ethics, Legal, Student Wellbeing and PASS to discuss and finalise these issues.**

REFERENCES

Austin School. (2011). *Student Management Policy*. Author.

Council for Children with Behavioral Disorders. (2009). ‘CBCD’s Position Summary on Physical Restraint and Seclusion Procedures in School Settings’ *Beyond Behavior*, 19 (1), 40-41.

Verma, R. (2010). Duty of Care, *The Law Handbook*, Fitzroy Legal Service, 2010. Retrieved from <http://www.lawhandbook.org.au/handbook/ch06s03s02.php#>

Victorian Department of Education and Early Childhood Development. (2006). 16.6 Legal liability and associated matters, *DEECD Schools Reference Guide*. Retrieved from (http://www.education.vic.gov.au/management/governance/referenceguide/management/6_16.htm)

Victorian Government. (2007). *Occupational Health and Safety Regulations 2007*. Retrieved from [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt5.nsf/DDE300B846ED9C7CA257616000A3571/DDD3370D63546CB4CA257761003EC5C2/\\$FILE/07-54sr001.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt5.nsf/DDE300B846ED9C7CA257616000A3571/DDD3370D63546CB4CA257761003EC5C2/$FILE/07-54sr001.pdf)

Walker, J.E., Shea, T.M. & Bauer, A.M. (2007). *Behavior Management: A Practical Approach for Educators*. Upper Saddle River, NJ: Pearson.

Worksafe Victoria. (2004). *Occupational Health and Safety Act 2004*. Retrieved from <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/home/laws+and+regulations/occupational+health+and+safety>

This position paper was endorsed by a PASS meeting on 23rd June 2011.

Restraint of Student

Purpose of this policy

To ensure schools are informed about the Department's policy about restraint including that restraint is only used when certain conditions are met and that appropriate standards and procedures are followed.

Definition – Restraint

In this policy, restraint means the use of physical force to prevent, restrict or subdue movement of a person's body or part of their body for the primary purpose of behavioural control.

Policy

Regulation 15 of the Education and Training Reform Regulations 2007 provides that:

“A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student, or any other person.”

When restraint may be used

School staff may only use restraint on a student when all of the following conditions are met:

- the situation is an emergency and the danger of harm to the student and/or others is imminent;
- the restraint is used to prevent the student from inflicting harm on him/herself and/or others;
- there is no reasonable alternative that can be taken to avoid the danger.

When restraint should not be used

Restraint should not be used unless alternative measures to avoid the danger of harm have been exhausted.

Restraint should never be used in the following circumstances:

- to intentionally provoke or punish a student
- cause harm or injury to the student.

Restraint should not be used on a student in any of the following circumstances:

- to maintain good order or respond to a class/school disruption
- to respond to:
 - a student's refusal to comply
 - verbal threats from a student
 - a student leaving the classroom /school without permission
 - property destruction caused by the student.

Restraint should not be used unless all of the following conditions are met:

- the situation is an emergency and the danger of harm to the student and/or others is imminent;
- the restraint is used to prevent the student from inflicting harm on him/herself and/or others;
- there is no reasonable alternative that can be taken to avoid the danger.

How to Restrain

If applying restraint, staff should only:

- use the minimum force required to avoid the danger of harm
- apply restraint for the minimum duration required and remove the restraint once the danger has passed.

It is also important for staff to consider the following factors:

- the age of the student
- the stature and weight of the student
- any impairment of the student e.g. physical, intellectual, neurological, behavioural, sensory (visual or hearing), or communication
- any mental or psychological conditions of the student
- any other medical conditions of the student
- the likely response of the student
- the environment in which the restraint is taking place.

Staff should talk to the student throughout the incident. Staff should make it clear to the student when and why the restraint is to be applied. Staff should also calmly explain that the restraint will stop once it is no longer necessary to protect the student and/or others.

It is also advisable that whenever possible:

- At least one other staff member is present to witness the restraint being used (this will lessen the opportunity for staff actions to be misconstrued).
- Only staff trained in using restraint should use restraint on a student.
- Parents/guardians are made aware of the Department’s restraint policy.

Actions after restraint has been used

This table explains the follow up actions that must be undertaken after a student has been restrained.

Action	Description
Reporting of the restraint	<p>The staff member(s) involved in the restraint must immediately notify the principal of the incident.</p> <p>A staff member should contact the student’s parents and provide them with details of the incident as soon as possible.</p> <p>The incident may need to be reported to:</p> <ul style="list-style-type: none"> • the Security Services Unit (previously known as the Emergency Management Unit), see: Reporting (emergency and incidents) • WorkSafe, see: WorkSafe Notification.
Providing supports for those involved	<p>Following the use of restraint on a student, appropriate supports must be offered to following people:</p> <ul style="list-style-type: none"> • The student who has been restrained and their parents/guardians. This may include participation in decisions involving the student’s behaviour management, student support group meetings, the development of a student behaviour management plan, and involvement of Student Support Services. For policy advice on the prevention of endangering behaviour and promoting positive

	<p>behaviours see: Effective Schools are Engaging Schools – Student Engagement Policy Guidelines.</p> <ul style="list-style-type: none"> • Other students and staff members who were involved in or witnessed the incident. This may include a debriefing in relation to the incident, and counselling support.
Maintain records of the incident	<p>A written record of the incident and the restraint used must be made by the principal as soon as practicable. This record should detail:</p> <ul style="list-style-type: none"> • the name of the student involved • date, time and location of the incident • names of witnesses (staff and other students) • the behaviour of concern that necessitated the action • any other strategies used or attempted • an outline of the physical restraint used • the student's response and the outcome • any injuries or damage to property • actions taken after the incident. <p>The principal should also arrange for all staff who were involved/present at the incident to prepare a statement / record of their involvement or observations of the incident.</p>

Related policies

- [Accident Recording and Reporting](#)
- [Duty of Care](#)
- [Personal Liability of School Employees](#)
- [Reporting \(emergency and incidents\)](#)
- [Risk Management](#)
- [Safety Management](#)
- [Student Engagement](#)
- [Suspensions](#)
- [WorkSafe Notification](#).

Related legislation and regulations

- *Charter of Human Rights and Responsibilities Act 2006*
- *Disability Discrimination Act 1992 (Cth)*
- *Education and Training Reform Regulations 2007*
- *Equal Opportunity Act 2010*
- *Occupational Health and Safety Act 2004*

Department resources

- [Effective Schools are Engaging Schools – Student Engagement Policy Guidelines](#)
- [Health Safety and Worksafe](#)
- [Program for Students with Disabilities](#)

Page Last Updated: June 22,2012

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77. [Faint text]	1	100.00	100.00
78. [Faint text]	1	100.00	100.00
79. [Faint text]	1	100.00	100.00
80. [Faint text]	1	100.00	100.00
81. [Faint text]	1	100.00	100.00
82. [Faint text]	1	100.00	100.00
83. [Faint text]	1	100.00	100.00
84. [Faint text]	1	100.00	100.00
85. [Faint text]	1	100.00	100.00
86. [Faint text]	1	100.00	100.00
87. [Faint text]	1	100.00	100.00
88. [Faint text]	1	100.00	100.00
89. [Faint text]	1	100.00	100.00
90. [Faint text]	1	100.00	100.00
91. [Faint text]	1	100.00	100.00
92. [Faint text]	1	100.00	100.00
93. [Faint text]	1	100.00	100.00
94. [Faint text]	1	100.00	100.00
95. [Faint text]	1	100.00	100.00
96. [Faint text]	1	100.00	100.00
97. [Faint text]	1	100.00	100.00
98. [Faint text]	1	100.00	100.00
99. [Faint text]	1	100.00	100.00
100. [Faint text]	1	100.00	100.00