Education and Training Reform Regulations 2017 (Draft)

Submission to Department of Education and Training Consultation
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The Castan Centre for Human Rights Law (Castan Centre) thanks the Department of Education and Training (DET) for the opportunity to comment on the draft Education and Training Reform Regulations 2017.

Our principal concern with these proposed regulations is the retention of regulation 15 in the form of draft regulation 25. This regulation has the potential to result in outcomes which breach human rights.

**Draft Regulation 25**

*Potentially Illegal Outcomes from Authorising Restraint and Seclusion*

It has come to our attention that current regulation 15, which is proposed to be retained as regulation 25, has led to outcomes which may constitute breaches of human rights.

The Senate Community Affairs References Committee heard in 2015 about multiple cases of inappropriate restraint and seclusion Victorian schools.¹ The Committee noted that DET had announced a new ‘Restraint of Student’ policy which reflected regulation 15. However, it characterised this policy and the appointment of the Principal Practice Leader (Education) as ‘first steps towards reform,’ noting ‘a number of concerns with the initial approach taken. Ostensibly, restrictive practices are ruled out, however, it is not clear what type of strategies – funding and support – will be provided in its stead.’²

In the 2012 Victorian Equal Opportunity and Human Rights Commission (VEOHRC) report *Held Back*, it was noted that there is no obligation to record or report incidences of restraint or seclusion, nor is there any independent oversight or monitoring of these practices. VEOHRC’s interviews with parents and educators found many (numbering in the hundreds) reported that disabled children had been restrained or secluded at school.³ Coercive powers such as those effectively conferred by regulation 15 should always be accompanied by mandatory reporting and oversight measures.⁴ Having said that, it is the Castan Centre’s position that the better course would be to remove the power from the regulations altogether, as explained further below.

Restraint and seclusion of students risks breaching s 10 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The level of severity of treatment required to constitute a breach cannot be determined in the abstract, but the vulnerability of disabled students⁵ means that their physical restraint or confinement, even if it does not involve excessive force or lead to apparent

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¹ See Community Affairs References Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, November 2015, 103-108.

² Ibid, 108.


lasting harm,⁶ may amount to cruel or inhuman treatment contrary to s 10(b). VEOHRC has also noted that such treatment in front of peers ‘may be a degrading experience for the child’ and may additionally engage rights to freedom of movement and personal liberty.⁷

Restraint and seclusion also risk breaching the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). The ICCPR prohibits cruel, inhuman or degrading treatment or punishment,⁸ and the UNCAT requires States (including all jurisdictions within federal States) to ‘undertake to prevent’ such treatment.⁹ The CRC requires special measures of protection and care for children over and above those required for adults.¹⁰ The UN Treaty Bodies and Special Procedures have emphasised that physical restraint in general, and especially treatment which may be characterised as corporal punishment, is inconsistent with these obligations.¹¹

Finally, restraint and seclusion of students may breach the common law and the Wrongs Act 1958 (Vic). Specifically, physical restraint of a student would almost certainly fulfil the elements of the tort of battery if done outside the school context, and seclusion would satisfy the elements of the tort of false imprisonment. In addition, the DET’s duty of care to both its students and staff is at risk of breach if physical interventions are effectively sanctioned by regulation. With the reports of student mistreatment from multiple sources, including parents, VEOHRC and disability advocates, there can be little question that further harm is reasonably foreseeable – the threshold for an actionable claim.

If draft regulation 25 were to be omitted, DET employees would still be protected by defences and exceptions in the common law and relevant statutes. For example, policy considerations are taken into account in both tort and criminal cases. Such rules and exceptions have been developed over the years to meet the needs of the broader community, and there is no compelling reason why they should not apply to school communities as well.

**Discrimination**

Disabled students are more likely to be subjected to restraint and/or seclusion under draft regulation 25, which means it may be indirectly discriminatory under the Equal Opportunity Act 2010 (Vic) and/or the Disability Discrimination Act 1992 (Cth).¹² The number of complaints reported by disability advocates relating to restraint and seclusion indicate that this regulation unreasonably disadvantages disabled students – particularly those who need, but cannot obtain, a Behaviour Plan to manage their behaviour.

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⁶ US studies have shown that restraint and seclusion of children can lead to significant psychological harm – see eg Weissbrodt et al, ‘Applying International Human Rights Standards to the Restraint and Seclusion of Students with Disabilities’ (2012) 30(2) Law and Inequality: A Journal of Theory and Practice 287.

⁷ See Held Back, above n 3, 108.

⁸ See ICCPR, article 7.

⁹ See UNCAT, article 16.

¹⁰ See CRC, articles 3 and 19.

¹¹ See eg Human Rights Committee, General Comment 20 (UN Doc CCPR/GEC/6621/E, 1992), para 5; also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/10/44, 14 Jan 2009, paras 37 and 55-56.

¹² See further Held Back, above n 3, 108.
Unjustified differential treatment also risks breaching the UN Convention on the Rights of Persons with Disabilities (CRPD), which requires that disabled students have the same rights to health and education as other students.\textsuperscript{13} The CRPD also requires that disabled students be able to enjoy the other rights mentioned above (protection from mistreatment and personal liberty) on an equal basis with others.\textsuperscript{14}

In addition, physical restraint appears to be more tightly regulated in the disability services arena than in schools, which is an undesirable inconsistency in treatment of different groups of disabled people.\textsuperscript{15}

**Prevention is Preferable**

A preventive approach to behaviour management should be put in place to render draft regulation 25 unnecessary. Behaviour Plans, written by qualified practitioners according to a set template,\textsuperscript{16} should be made mandatory. VEOHRC reported in 2012 that ‘as training on positive behaviour has been rolled out across the disability services workforce, the use of restraint has declined,’ and that ‘[a] recent Victorian study of 198 behaviour support plans in disability services showed that individuals with high-quality plans were found to be subjected to less restrictive interventions over time, while those with low-quality plans were subjected to more restrictive interventions.’\textsuperscript{17}

Training should be in disability awareness and de-escalation techniques, provided by properly qualified practitioners. VEOHRC notes: ‘understanding the function of the behaviour the student is displaying is central to developing behaviour plans that will work in practice and to minimising the use of restrictive practices.’

Additionally, reporting of concerning behaviours should be mandatory, to provide the evidence base for allocation of extra support to schools which require it.\textsuperscript{18}

**Explanatory Material, Inconsistency**

The Regulation Impact Statement (RIS) for these draft regulations makes some rights-related claims for the regulations, including that they ‘provide for the care, safety and wellbeing of students, particularly relating to student behaviour and responses to dangerous behaviour. Further, the proposed regulations establish minimum standards for school registration that would help protect students from poor education.’\textsuperscript{19}

\textsuperscript{13} See CRPD, articles 24 and 25.
\textsuperscript{14} See CRPD, articles 15-18.
\textsuperscript{15} See Held Back, above n 3, 121.
\textsuperscript{16} Such a template already exists for use in the disability services sector – see OSP, *Practice Guide: Behaviour Support Plan*:  
\textsuperscript{17} See Held Back, above n 3, 119 and 123.
\textsuperscript{18} See further Held Back, above n 3, 121.
\textsuperscript{19} RIS, 15.
However, concern for students’ wellbeing in situations of confrontation does not appear to be reflected in draft regulation 25, which sits ill with the registration requirement in regulation 60 that schools commit to ‘equal rights for all before the law’ and ‘must ensure that...the care, safety and welfare of all students attending the school is in accordance with any applicable State or Commonwealth laws’. The applicable set of laws presumably includes the Charter and the Disability Discrimination Act 1992 (Cth) with which, as outlined above, draft regulation 25 is unlikely to be compatible.

The Victorian Government should consider making Statements of Compatibility, as required for Bills under s 28 of the Charter, for regulations with human rights implications as well. This could be done on a voluntary basis, without the need to amend the Charter. We note that the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) requires delegated legislation to be accompanied by Statements of Compatibility. A Statement of Compatibility for the present draft regulations would be a more appropriate vehicle for rights-related claims than the RIS, and could set out how/whether the DET believes the regulations are consistent with human rights.

With the above considerations in mind, the Castan Centre recommends that the DET:

1. Omit draft regulation 25 from the final Education and Training Reform Regulations 2017
2. Make appropriate disability training mandatory for all educators dealing with disabled students
3. Mandate behaviour plans with an evidence-based template
4. Mandate reporting of behaviour-related incidents and allocated funding for preventive measures accordingly
5. Produce Statements of Compatibility with human rights for delegated legislation with human rights implications, such as the present regulations

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