



COMMISSION FOR CHILDREN  
AND YOUNG PEOPLE

# Submission to the Department of Education and Training

Review of the restraint and seclusion policy,  
guidelines and principles (2018)

CCYPD/18/18793

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## Introduction

The Commission for Children and Young People (Commission) welcomes the opportunity to contribute to the review of the following documents developed by the Department of Education and Training (DET)<sup>1</sup>:

- school policy and advisory guide (SPAG) policy: restraint of students
- policy guidelines, procedures and resources
- the principles for reduction and elimination of restraint and seclusion in Victorian Government schools.

### The Commission

The Commission is an independent statutory body that promotes improvement in policies and practice affecting the safety and wellbeing of Victorian children and young people, with a particular focus on vulnerable children and young people.<sup>2</sup> This Commission performs a broad range of functions, which include:

- independent oversight and scrutiny of services for children and young people
- advocating and promoting the rights, safety and wellbeing of children and young people
- supporting and regulating organisations that provide services or facilities to children and young people through the Child Safe Standards and Reportable Conduct Scheme.

In delivering these functions, the Commission aims to:

- provide advice and advocacy strongly grounded in evidence, on behalf of children and young people
- hear and highlight the views and experiences of children and young people to ensure these are central to planning and decision making
- apply a rights based approach to our work drawing on the Victorian Charter of Human Rights and Responsibilities (2006) (the Charter)
- focus on the rights, safety and wellbeing of vulnerable children and young people and Aboriginal children and young people
- work in a way that is inclusive, culturally sensitive and respectful of the diversity of children and young people.

### The review process

The Commission's review of the restraint and seclusion policy, guidelines and principles are largely informed by:

- analysis contained in the two reports, *Held back: the experiences of children with disabilities in Victorian schools*<sup>3</sup> and *Held back: the experiences of children with disabilities in Victorian schools, Analysis paper*<sup>4</sup>
- a desktop review of research into the use and impacts of restrictive practices on children and young people in schools

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<sup>1</sup> The Commission understands that these documents were developed in 2016 and that at that time, DET undertook to review the documents in consultation with stakeholders by December 2018.

<sup>2</sup> Vulnerable children and young people are defined under section 5 of the Commission for Children and Young People Act (2012).

<sup>3</sup> Victorian and Equal Opportunity and Human Rights Commission (VEOHRC) *Held back: the experiences of students with disabilities in Victorian schools* (September, 2012)

<sup>4</sup> Victorian and Equal Opportunity and Human Rights Commission (VEOHRC) *Held back: the experiences of students with disabilities in Victorian schools: Analysis paper* (August, 2017)

- our knowledge and expertise in matters related to children and young people, particularly vulnerable and Aboriginal children and young people, gained via performance of our statutory functions
- experience gained via our role as regulator of the Reportable Conduct Scheme and Child Safe Standards.

### **The submission**

This submission examines the background to the development of DET's restraint and seclusion policy, guidelines and principles and provides a summary of the findings and recommendations made in Held Back and the subsequent analysis paper.

In reviewing these materials, the Commission has identified a range of issues that are summarised into the following themes:

- the need for regulation of restrictive interventions via legislative reform
- the importance of monitoring progress towards elimination via independent oversight
- ensuring accountability via release of data
- acknowledging and educating about the impact of restraint and seclusion on children and young people, particularly vulnerable and Aboriginal children and young people
- improved focus on the unique needs of Aboriginal children and young people
- restraint and seclusion and the Reportable Conduct Scheme
- restraint and seclusion and Child Safe Standards.

This submission makes 14 recommendations that correspond with these themes.

### **Summary of key points**

In reviewing the restraint and seclusion policy, guidelines and principles, the Commission welcomes:

- all efforts to eliminate the use of restraint and seclusion in schools
- the inclusion of references in the Principles and policy guidance to a range of human rights obligations, including those provided by the Charter, equal opportunity and disability discrimination laws
- reference to the requirement that any 'behavioural intervention' must be consistent with the Charter and the student's rights to be treated with dignity and to live free from abuse (Principle 5)
- reference to the requirements of disability discrimination laws that reasonable adjustments must be made for students with a disability and that failure to provide necessary adjustments amount to potential discrimination
- the inclusion of reporting requirements, including notification of parents following each instance in which physical restraint or seclusion (Principle 13)
- the commitment to regularly review and update, as appropriate, policy regarding use of restraint and seclusion (Principle 14)
- the general promotion of data collection and review of data informing future review of policies (Principle 15)
- articulation within the Principle preamble that there is no evidence that using restraint or seclusion is effective in reducing the occurrence of problem behaviours and that its use can have serious consequences including injury or death.

The Commission has concerns about:

- the status and enforceability of the documents, in the absence of legislative and regulatory reform
- the key points relating to the use of restraint and seclusion failing to reference a commitment to the elimination of restraint and seclusion in Victorian government schools
- the definition and treatment of seclusion and its inclusion as a lawful exercise of restrictive intervention
- current uncertainty concerning the future status of the Principal Practitioner Leader (Education) (PPL(Education)) and the critical need to retain this position, preferably via legislative reform
- the aspirational nature of the documents not being matched by corresponding investment in supporting schools to utilise positive behaviour support strategies
- the collection of information by schools following an incident of restraint or seclusion fails to include information specific to the individual child or young person, for example their age, gender, disability, cultural background, Aboriginal status, whether they are the subject of a Child Protection order, in out of home care and the location of school
- a lack of clarity concerning the role of the internal DET Security Service Unit with respect to their collection of information regarding the use of restraint and seclusion
- inadequate reference in the materials to the potential impact of restraint and seclusion on children and young people, particularly vulnerable and Aboriginal children and young people
- lack of reference within the documents to the specific needs of Aboriginal children and young people
- lack of reference to the potential interaction between the use of restraint and seclusion and Victoria's Reportable Conduct Scheme
- lack of reference to the potential interaction between the management of policies and processes around restraint and seclusion at a local level and the Child Safe Standards
- the intersection of the policies, guidelines and principles developed by DET and their compliance with the Child Safe Standards.

## Recommendations

The Commission recommends that:

1. As a priority, the Victorian Government give consideration to law reform and corresponding regulation that would embed the principles of elimination of restraint and seclusion in a form that is precise, accountable and enforceable.
2. The PPL (Education) or equivalent role be maintained, preferably via legislative amendment, to ensure ongoing oversight of the use of restraint and seclusion in schools.
3. DET confirm whether it is intended that the Security Services Unit monitor and review information received by the Unit with respect to incidents of restraint and seclusion.
4. DET set a timeline for further review of documents, including reconsideration of legislative amendment within 24 months from completion of the current review process in December 2018.

5. Any future reviews of policies, guidelines and principles relating to the use of restraint and seclusion must involve the active participation of children and young people with disability, so that their views may be heard on issues affecting them.
6. The collection of data by schools following an incident of restraint or seclusion be improved, to include the individual characteristics of the child or young person, for example, their age, gender, disability, cultural background, Aboriginal status, whether they are the subject of a Child Protection order or in out of home care and the location of school.
7. DET releases data currently held on the use of restraint and seclusion in Victorian government schools and commit to releasing this data publicly, on an annual basis.
8. All training delivered to schools around the use of restraint and seclusion incorporates information around human rights implications, legal obligations arising under discrimination laws and how the use of restraint and seclusion impacts children and young people, including vulnerable and Aboriginal children and young people.
9. DET work with existing bodies and other relevant parties to improve the policies around restraint and seclusion of Aboriginal children and young people and work towards the development of Aboriginal specific strategies, including:
  - the DET Koori Outcomes Unit
  - the Marrung Central Governance Committee
  - the Victorian Aboriginal Education Association Incorporated (VAEAI), the state's peak Aboriginal community organisation for education and training
  - the Aboriginal Children's Forum
  - Koori Engagement Support Officers
  - Aboriginal children and young people.
10. DET report on a quarterly basis to the Commissioner for Aboriginal Children and Young People on the numbers of Aboriginal children and young people who have been the subject of a restraint and/or seclusion in schools.
11. Relevant documents be amended to include reference to the Reportable Conduct Scheme and guidance as when to report an allegation of reportable conduct in the context of the use of restraint or seclusion. The Commission would be pleased to work with DET to develop these materials.
12. DET share available data on incidents of restraint and seclusion with the Commission so that a comparative analysis may be undertaken against the Commission's records of reportable conduct allegations involving restraint and/or seclusion in government schools.
13. Relevant documents be amended to provide clarification about the intersection between the local management of restraint and seclusion procedures and processes and DET's obligations arising under the Child Safe Standards. The Commission would be pleased to work with DET to develop these materials.
14. DET consider how its guidance around the use of restraint and seclusion supports is compliant with Child Safe Standards. The Commission would be pleased to work with DET to ensure its compliance.

## Background to the restraint and seclusion policy, guidelines and principles

### **Held back: the experiences of students with disabilities in Victorian schools (2012)**

In 2012, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) published *Held back: the experiences of students with disabilities in Victorian schools* (Held Back), which examined the use of restraint and seclusion in schools. Held Back made a number of findings, which identified:

- there was no legal requirement for a teacher or school in Victoria to report the use of restraint or seclusion
- there was no independent oversight or monitoring of the use of restraint or seclusion
- 514 educators reported having used restraint on a student and over half of those educators said they felt they were inadequately trained to deal with the situation
- the uses of restraint and seclusion as described to VEOHRC during the course of Held Back frequently constituted a breach of human rights.

Held Back made five recommendations with respect to the use of restraint and seclusion, which principally involved the regulation of restrictive interventions via legislative amendment and policy amendment that ensures:

- seclusion is expressly stated as prohibited
- parents are notified of all uses of restrictive interventions
- student support groups are convened to review any incidence of restrictive intervention
- contemplation of the use of restrictive practices are included in individual learning plans
- restrictive interventions should be reported as a critical incident to the Emergency Management Unit, which must be passed on to Student Wellbeing Division for ongoing monitoring.

### **Held back: the experiences of students with disabilities in Victorian schools, Analysis paper (2017)**

In 2017, VEOHRC published *Held Back: the experiences of students with disabilities in Victorian schools, Analysis paper* (the analysis paper), which outlined major developments since the 2012 Held Back report, including:

- the establishment of the role of PPL (Education)
- mandatory reporting of restrictive interventions used by schools (from October 2015)
- a range of professional learning opportunities that accompanied the rollout of revised policy guidance in 2017.

The analysis paper made a number of observations, highlighting areas for concern, including the need for:

- sustained commitment to build on recent improvements in the management of restraint and seclusion
- the role of PPL (Education) or an equivalent independent role to be secured
- evaluation of training to determine its effectiveness
- significant effort and investment to ensure the aspirations of the Policy, Guidance and Procedures and Resources for the Reduction and Elimination of Restraint and Seclusion in Victorian government schools can be met.

The analysis paper referred to the policy, guidelines and principles currently under review and raised a number of concerns, including:

- the status and enforceability of the documents, which adopt a different tone to the language embedded within Regulation 25 of the Education and Training Regulations (2017)<sup>5</sup>
- how non-compliance with the policy guidance will be monitored and measured
- the definition and treatment of seclusion
- the aspirational nature of the document and the corresponding need for resources to support the changes required
- the future status of the PPL (Education) role.

The Commission maintains its support for the recommendations outlined in Held Back and shares the concerns expressed by VEOHRC in its subsequent analysis paper. A number of our recommendations align with those contained in Held Back and the analysis paper.

## Discussion of themes

### The need for regulation of restrictive interventions via legislative reform

The Commission submits that the regulation of restraint and seclusion in schools should be enshrined in legislation so as to ensure:

- there is a binding commitment to the elimination of restraint and seclusion, which embeds accountability and compliance
- oversight by the PPL (Education) or an equivalent independent role for all incidents of restraint and seclusion
- mandated reporting processes
- reporting of data related to incidents of restraint and seclusion.

The Commission shares the concerns expressed in the VEOHRC analysis paper that schools may give greater weight to the language of Regulation 25, which is more permissive in its scope and use of ambiguous language than the documents under review. It is also unclear from the documents as to the consequences of non-compliance with the documents by staff or schools and how this will be recorded or measured.

### Recommendations

1. As a priority, the Victorian Government give consideration to law reform and corresponding regulation that would embed the principles of elimination of restraint and seclusion in a form that is precise, accountable and enforceable.
2. The PPL (Education) or equivalent role be maintained, preferably via legislative amendment, to ensure ongoing oversight of the use of restraint and seclusion in schools.

<sup>5</sup> Regulation 25 provides: 'Restraint from danger: 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'.



## **The importance of monitoring progress towards elimination via independent oversight and further review**

A robust monitoring system is critical to ensure oversight of the use of restraint and seclusion in schools and to achieve tangible progress towards its elimination. Principle 15 identifies the value that DET places upon the collection of data to enhance staff understanding and inform future policy review. The Commission understands from the guidelines that every instance of restraint or seclusion must be reported to the Security Services Unit (DET). Other information gleaned from the DET website describes the Security Services Unit (SSU) as performing the following functions:

- provides security risk management advice
- develops state-wide security management policy
- provides security management services to schools including alarm installation and maintenance services
- co-ordinates support from specialist agencies such as Victoria Police Community Consultation and Crime Prevention Office, in relation to security.

The Commission seeks clarification from DET as to whether it is intended that SSU undertake the monitoring and review of incidents of restraint or seclusion. If so, the Commission would have concerns about the appropriateness of an internal unit, with an apparent security mandate, providing sufficiently independent and child-focussed oversight.

It was clearly envisaged in the recommendations of Held Back that independent oversight and monitoring of the use of restraint and seclusion (and its elimination) should be provided by a PPL (Education) or equivalent role.

Principle 14 provides that DET will regularly review and update, as appropriate, policy regarding the use of physical restraint or seclusion. Given that the principles are intended to 'set a course to reduce and eventually eliminate the use of restraint and seclusion in Victorian government schools'<sup>6</sup>, the Commission considers it appropriate that DET establish a timeframe for the review of progress made towards elimination of restraint and seclusion. The review should consider the effectiveness of the policy documents and identify, and address, any barriers to the elimination of restraint and seclusion.

The Commission recommends that any future review of restraint and seclusion facilitates the participation of children and young people, in order to ensure that their perspectives and lived experiences inform development of child-focussed policy.

### **Recommendations**

3. DET confirm whether it is intended that the Security Services Unit monitor and review information received by the Unit with respect to incidents of restraint and seclusion.
4. DET set a timeline for further review of documents, including reconsideration of legislative amendment within 24 months from completion of the current review process in December 2018.
5. Any future reviews of policies, guidelines and principles relating to the use of restraint and seclusion must involve the active participation of children and young people with disability, so that their views may be heard on issues affecting them.

<sup>6</sup> The Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools, Preamble (October 2018)

## Ensuring accountability via release of data

The Commission welcomes all efforts to eliminate the use of restraint and seclusion in schools. It is critical to measure all restraint and seclusion instances so that progress (or lack of progress) towards elimination is publicly tracked and measurable. The greater the level of detail around the uses of restraint and seclusion, the easier it will be to determine trends and direct appropriate resources, training and support as required.

In line with Principle 15, the Commission recommends that the scope of information collected by schools following an incident of restraint or seclusion, includes individual characteristics of the child or young person, for example, their age, gender, disability, cultural background, Aboriginal status, whether they are the subject of a Child Protection order, in out of home care and the location of school.

The Commission submits that the collection and release of this additional data will identify the use of restraint and seclusion across particular students and vulnerable cohorts, including Aboriginal children and young people, those in out of home care and children and young people with disability. This data would inevitably contribute to further understanding by staff and improvement of policies, as envisaged by Principle 15.

The Commission understands that in 2017, the Victorian Government undertook to release data held on the use of restraint and seclusion.<sup>7</sup> We encourage DET to release this data publicly and to continue to release publicly updated information on an annual basis so that assessments may be made as to progress towards elimination.

### Recommendations

6. The collection of data by schools following an incident of restraint or seclusion be improved, to include the individual characteristics of the child or young person, for example, their age, gender, disability, cultural background, Aboriginal status, whether they are the subject of a Child Protection order or in out of home care and the location of school.
7. DET releases data currently held on the use of restraint and seclusion in Victorian government schools and commit to releasing this data publicly, on an annual basis.

### Acknowledging the potential impact of restraint and seclusion on children and young people, particularly vulnerable and Aboriginal children and young people

Principle 6 provides that physical restraint or seclusion must never be used as a punishment or discipline (for example, placing in seclusion for non-compliant behaviour); as a means of coercion or retaliation; or as a convenience.

Research illustrates that the use of restraint and seclusion in schools can cause significant harm to children, including physical and psychological injury, loss of dignity, serious harm and death.<sup>8</sup> The impacts can be particularly profound for vulnerable children, who may be more likely to display challenging or oppositional behaviours in a school setting.<sup>9</sup>

<sup>7</sup> <http://www.theage.com.au/national/victoria/secret-data-on-school-restraint-and-seclusion-to-be-exposed-20170609>

<sup>8</sup> See for example, evidence cited in School is not supposed to hurt: investigative report on abusive restraint and seclusion in schools, (2009) National Disability Rights Network DC at page 9, Suarez, Lanette: 'Restrains, seclusion, and the disabled student: the blurred lines between safety and physical punishment', University of Miami Law Review, Volume 71:859 at pages 796.

<sup>9</sup> Suarez at page 894.

Principle 9 provides that strategies to address behaviours that cause physical harm to self or others should address the underlying causes or purpose of behaviour. It is critical that schools are educated on how to identify and respond to behaviours by children and young people that may be a manifestation of disability, exposure to trauma (including intergenerational trauma) or abuse.

### **Recommendation**

8. All training delivered to schools around the use of restraint and seclusion incorporates information around human rights implications, legal obligations arising under discrimination laws and how the use of restraint and seclusion impacts children and young people, including vulnerable and Aboriginal children and young people.

### **Improved focus on Aboriginal children and young people**

The policy, guidelines and principles fail to address the specific needs of Aboriginal children and young people, despite:

- these children being more than twice as likely as non-Aboriginal children to have a disability (0-14 years)<sup>10</sup>
- Aboriginal boys (0-14 years) being almost three times as likely to have a disability than non-Aboriginal boys of the same age<sup>11</sup>
- being ten times as likely to be on a protection order and in out of home care than non-Aboriginal children and young people<sup>12</sup>
- Aboriginal children and young people being 16 times more likely to be both in the child protection system and under youth justice supervision than the non-Aboriginal population.<sup>13</sup>

The Commission submits that data relating to incidents of restraint and seclusion against Aboriginal children and young people should be shared with the Commissioner for Aboriginal Children and Young People to promote accountability and transparency. The Commissioner for Aboriginal Children and Young People would use the information to inform the development of strategies to keep Aboriginal children and young people engaged and achieving in school.

Aboriginal children and young people have unique needs and a right to culturally appropriate service responses. All policies attempting to address and eliminate the use of restraint and seclusion must incorporate strategies that are specific to Aboriginal children and young people.

<sup>10</sup> Australian Bureau of Statistics – Disability, Ageing and Carers, Australia: Summary of Findings, 2012

<sup>11</sup> Ibid, rate of disability in non-Aboriginal boys (7.3 per cent) compared with Aboriginal boys (21.1 per cent) of the same age range.

<sup>12</sup> Child protection Australia, 2016-17, Australian Institute of Health and Welfare

<sup>13</sup> Ibid.

## Recommendations

9. DET work with existing bodies and other relevant parties to improve the policies around restraint and seclusion of Aboriginal children and young people and work towards the development of Aboriginal specific strategies.
10. DET report on a quarterly basis to the Commissioner for Aboriginal Children and Young People on the numbers of Aboriginal children and young people who have been the subject of a restraint and/or seclusion in schools.

## Restraint and seclusion and the Reportable Conduct Scheme

The Reportable Conduct Scheme (the scheme) commenced in July 2017. The Commission has a number of roles in relation to the scheme, including:

- to educate and provide advice to entities so they can identify reportable conduct and investigate outcomes
- to educate regulators and provide advice to promote compliance
- to oversee the investigation or reportable conduct allegations
- to investigate reportable conduct allegations in some circumstances.

The use of restraint or seclusion in schools may constitute reportable conduct.<sup>14</sup> Under Regulation 25, lawful physical contact includes physically restraining a child to stop them from hurting another person or themselves. Any force used by staff must be reasonable in all the circumstances and involve no more force than is necessary. If the use of force is unreasonable or involves more than is necessary, it could be considered physical violence under the scheme and should be reported to the Commission.

Despite this, the documents reviewed make no reference to the interaction between improper use of restraint and seclusion and the scheme. It is the strong view of the Commission that this is an oversight that should be addressed in the documents.

The Commission would welcome the provision of data on the use of restraint and seclusion for the purpose of comparative analysis with data captured by the scheme. This would provide valuable insight into the extent to which the scheme is capturing incidents of restraint or seclusion in government schools, which would in turn, inform the Commission's engagement and education activities to support compliance with the scheme.

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<sup>14</sup> At this stage, the Commission does not categorise reportable conduct reports and findings by seclusion or restraint. However, the Commission's data indicates that from July 2017 to September 2018 there have been 201 allegations of physical violence committed against a child in the educational sector. Of those allegations, 15 have been substantiated, several of which related to the use of force as part of a restraint. The substantiated claims include eight from Government schools.

## Recommendation

11. Relevant documents be amended to include reference to the Reportable Conduct Scheme and guidance as when to report an allegation of reportable conduct in the context of the use of restraint or seclusion. The Commission would be pleased to work with DET to develop these materials.
12. DET share available data on incidents of restraint and seclusion with the Commission so that a comparative analysis may be undertaken against the Commission's records of reportable conduct allegations involving restraint and/or seclusion in government schools.

## Restraint and seclusion and Child Safe Standards

All schools are required to comply with the Child Safe Standards (the standards). DET has implemented Ministerial Order 870 to support schools to meet their obligations under the standards.

The standards are referred to in the principles and the 'Restraint and seclusion: legal obligations' policy document. However, neither document provides information about the impact that use of restraint and seclusion may have on a school's ability to demonstrate compliance with the standards.

There is a broader question around whether DET's current approach to the use of restraint and seclusion undermines its own compliance with the standards.

The Commission recommends that DET consider the intersection between the restraint and seclusion policy, guidelines and principles with implementation of the standards, in particular:

- Standard 1 requires that organisations demonstrate that they have strategies to embed an organisational culture or child safety. Improper use of restraint or seclusion, especially where normalised by the school, would be inconsistent with this standard.
- Current guidance on the use of restraint and seclusion allows schools to exercise a level of discretion in their usage, making it difficult to assess compliance with the guidance. This could undermine DET's compliance with Standard 3, which requires organisations to have a Code of Conduct that establishes clear expectations of appropriate behaviour towards children and young people.
- Current policy on restraint and seclusion acknowledges that it is disempowering to children and young people, is an ineffective behavioural management method and likely to undermine a child or young person's engagement with the school system. This submission has described the potential negative impact the use of restraint and seclusion may have on the emotional wellbeing and safety of children and young people. The use of restraint and seclusion therefore may not support a school's compliance with Standard 7, which requires organisations to have strategies to promote the participation and empowerment of children and young people.

The Commission acknowledges that the application of Child Safe Standards in the context of the use of restraint and seclusion is complex and is open to working with DET on this important issue.

### **Recommendations**

13. Relevant documents be amended to provide clarification about the intersection between the local management of restraint and seclusion procedures and processes and DET's obligations arising under the Child Safe Standards. The Commission would be pleased to work with DET to develop these materials.
14. DET consider how its guidance around the use of restraint and seclusion supports is compliant with Child Safe Standards. The Commission would be pleased to work with DET to ensure its compliance.