

# PROTECTING CHILDREN IN AUSTRALIAN SCHOOLS: TEACHER USE OF FORCE AND RESTRAINT AND LEGAL CHALLENGES

J. JOY CUMMING<sup>1</sup>

AUSTRALIAN CATHOLIC UNIVERSITY, BRISBANE, AUSTRALIA

RALPH D. MAWDSLEY

CLEVELAND STATE UNIVERSITY, USA

*In a companion article, we examined the burden plaintiffs in the United States of America (US) face in mounting legal challenges for what appears to be abusive dealings by school staff in restraining students, especially students with disability. While the US cases highlighted practices in schools recognised in some instances as harmful to students, teachers' practices were generally found by courts to be within acceptable interpretations of policy, or cases failed to be made on statutory or constitutional grounds. This article examines inappropriate restraint, seclusion and use of force with Australian students, including students with disability, and national, state and sector policy on restrictive practices with students. Possible grounds for legal challenge in Australia are considered and available case studies of teachers who have breached expected boundaries are discussed. As in the companion article, recommendations are provided to enhance safe practices in student restraint beyond the rhetoric of policy.*

## I INTRODUCTION: CHILD SAFETY IN AUSTRALIA

Children's safety in schools is taken seriously in Australia, as in many other nations. One major focus is bullying and harassment of children, especially cyberbullying.<sup>1</sup> Keeping children safe from adult sexual predators, from other children, building student resilience to handle bullying, and providing strategies for avoiding potentially dangerous situations are all identified as important for student safety. Schools and teachers are seen as having an important role in the protection of students, with reporting suspected abuse of students, whether within or outside school, mandatory for teachers and schools in all Australian states and territories.<sup>2</sup>

Our companion article<sup>3</sup> focused on a different parameter in child safety—US teachers alleged to commit violence against children, especially children with disabilities, and the resulting court challenges, grounds for the challenges, and outcomes. Most challenges centred on procedural rights guaranteed to children under the US Constitution<sup>4</sup> and under statutory rights.<sup>5</sup> Rights for children in Australia differ in two key areas from those of children in the US. First, our constitution does not afford protection for the personal safety of individuals,<sup>6</sup> established instead through statute law. Specifically, children's safety and need for a safe environment are provided through various Australian state and territory child protection acts:<sup>7</sup>

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<sup>1</sup>Address for correspondence: Professor J. Joy Cumming PhD JD, Learning Sciences Institute Australia & Faculty of Education & Arts, Australian Catholic University, PO Box 456, Virginia, Queensland 4014, Australia. Email: joy.cumming@acu.edu.au

- (a) providing for and promoting the wellbeing care and protection of children and young people in a way that —
  - (i) recognises their right to grow in a safe and stable environment and
  - (ii) takes into account the responsibilities of parents families the community and the whole of government for them and
- (b) ensuring that children and young people are provided with a safe and nurturing environment by organisations and people who directly or indirectly provide for their wellbeing care and protection <sup>8</sup>

While the global aims of these acts are to ‘ensure that all children are safe from harm’ and ‘to promote caring attitudes and responses towards children among all sections of the community’—which may be presumed to encompass educational settings—their predominant focus is institutional care of children including care away from home determining when children need to be removed from their family for safety, and juvenile detention settings ‘Restraint’, the topic of this article, is considered only in child safety acts that extend to juvenile detention or for prevention of harm to the child or by the child to others Use of restraint<sup>9</sup> or ‘reasonable’ force<sup>10</sup> in these contexts is expected to be used only under conditions similar to those established in US case law restraint must be a last resource, its use must be proportionate to the circumstances including serious need, an appropriate type of restraint is to be used according to the size and capacity (physical and developmental capacity) of the child, and, it must be used appropriately When such restraint occurs in accord with policy, individuals with delegated authority to institute restraint are immune from criminal or civil liability, although the state or territory may still be held liable <sup>11</sup>

The child protection acts reflect a second distinguishing feature of Australian legislation and policy from those of the US, the best interests of the child are identified as the paramount concern in all decisions affecting children, reflecting Australia’s ratification<sup>1</sup> of the UN *Convention on the Rights of the Child* (CRC) <sup>13</sup> Consequences of the CRC for education and child safety are discussed in the following section

The CRC provides the right to education,<sup>14</sup> with primary education to be compulsory and free, intended to ensure children are not exploited in employment and to enhance future life opportunities Children are also to be protected by the state from physical or mental violence

States Parties shall 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 including sexual abuse while in the care of parent(s) legal guardian(s) or any other person who has the care of the child <sup>1</sup>

Children in Australia have the ‘right’ to a free education, established through legislation in each state and territory <sup>16</sup> The nature of compulsory education has changed over the last century, however, beyond the minimum primary education expected in the CRC<sup>17</sup> to compulsory participation in education (or further training or employment) until 17 years of age <sup>15</sup> School has become the primary institution of care for children under the age of 18 years of age This article examines how safety of Australian school students is protected in actions within school policy—student restraint Is there evidence of inappropriate use of restraint in Australian schools? The consequential question is the legal implications of such actions for students, parents teachers and schools

## II CHILD SAFETY IN AUSTRALIAN SCHOOLS: REPORTS OF CURRENT STATUS OF USE OF RESTRAINT AND REASONABLE FORCE

At the time of writing, a Royal Commission into Institutional Responses to Child Sexual Abuse is being conducted in Australia, examining child protection in any form of institution, including schools.<sup>19</sup> Such a Commission has large powers to obtain evidence and to make recommendations to deal with reported cases of abuse. The hope is that this Commission will set a path for the future for Australian institutions to ensure greater attention to, and responsibility for, monitoring the care of children occurs in the future.<sup>20</sup> Evidence already revealed demonstrates this has not occurred in the past.

Inappropriate use of restraints and physical force in schools in the US has frequently involved students with disabilities. The Royal Commission is receiving evidence of institutional abuse of people with disabilities. Overall, inappropriate restrictive practices including restraint, seclusion and use of force in Australian schools have already been identified in several reports, discussed below.<sup>21</sup>

First, nearly a decade ago, the Review of the Disability Standards identified use of restrictive practices as an area needing attention:

teachers are not well equipped to deal with the challenges associated with students who have complex needs. The review heard that this is increasingly leading to the use of restrictive practices such as the unplanned use of medications, physical, mechanical and social restraints. However, 'there are no clear Standards and guidelines about the use of restrictive practices – there is no clear statement about restrictive practices being ... the last option after all other proactive strategies and adaptations have been made'.<sup>22</sup>

Similarly, more recently, a report for advocacy organisation Children with Disability Australia (CDA), documenting proactive approaches to address the abuse of young people with disability,<sup>23</sup> provided reports from families that 'aversive and abusive behaviour management practices' have occurred with students with disability including 'use of small rooms and small fenced areas' as punishment, chemical restraint, and placement of a very young child in a storeroom so other students were not disrupted.<sup>24</sup> As noted by the CDA, a 2012 shadow report<sup>25</sup> to the United Nations on Australia's implementation of the Convention on the Rights of Persons with Disability (CRPD), citing numerous sources, identified that:

- [240] People with disability are routinely subjected to unregulated and under-regulated behaviour modification or restrictive practices that include chemical, mechanical, social and physical restraint, detention, seclusion and exclusionary time out. These practices can cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, alter thought and thought processes, and deprive persons of their property and access to their children.
- [241] Restrictive practices aim to manage behaviour that is 'challenging' or that is of danger to the person with disability or others. However, restrictive practices can constitute humiliation and punishment, and can be imposed as a means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support.
- [242] Restrictive practices are not limited to the disability and mental health service settings, such as institutions, group homes, boarding houses and mental health facilities. They also occur in *schools*, hospitals, residential aged care facilities and prisons (emphasis added).

[243] Research and available data on the use of restrictive practices and the impact of these practices on people with disability is very limited in Australia. Further, there is an absence of any definitive, regular and reliable national public reporting of rates of use of restrictive practices, and where reporting is required, there is an under-reporting of the number of people who endure these practices (citations omitted).<sup>76</sup>

Overall, no data on frequency of restraint and seclusion are recorded, not only in Victoria,<sup>77</sup> but also across the other Australian states and territories.

A recent and comprehensive research project by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) examined experiences of students with disability in schools.<sup>78</sup> Student restraint and seclusion were specific concerns of the responding participants for students attending government and non-government schools. While Victorian policy for government schools expected restraint to be reported, there was no *legal* requirement for teacher or schools to report restraint or seclusion, no official incident data were available on frequency or impact,<sup>79</sup> and no independent oversight of their use in Victorian schools.<sup>80</sup> Thirty-four parents reported use of restraint while 128 parents reported seclusion in 'special rooms'.<sup>81</sup> Five hundred and fourteen educators (60% of teacher survey respondents) reported using restraint,<sup>82</sup> with half of these teachers saying they had inadequate training to do so. Restraint and seclusion were more common in special education settings. In summary, VREOC considered that reported circumstances of these actions 'would constitute a breach of human rights'.<sup>83</sup>

Teachers responding in the VEOHRC project indicated that restraint was used mostly to protect students from self-harm or from harming others. Restraints used included physical (to subdue body movement), mechanical (harnesses or straps to restrict movement but not therapeutic), chemical (drugs but not those prescribed for treatment of a mental or physical illness), psychosocial (use of social or material sanctions or the threat of the same), consequence-driven (withdrawal of activities until behaviour is corrected), and/or environmental (lack of free access to environment).<sup>84</sup> Media stories of mistreatment of students with disability were noted by the VEOHRC,<sup>85</sup> including use of excessive force and seclusion in windowless rooms, and children screaming. Restraint included children being tied to chairs to prevent movement. One report was a teacher standing on a boy's feet to restrain him. Another parent reported

*Our child was locked in a pen/yard without protection from the weather or access to food or water for extended periods up to 5-6 hours a day. He would come home with large bruises which staff admitted to doing. Fingernails ripped off and covered in blood. We have written proof from teaching staff that they did this over an extended period of time, until we withdrew our child from the school.*<sup>86</sup>

Parents indicated they were not consulted on restraint of their children. Most respondents indicated a lack of protocols for restraint and training for staff.

A general review of provision for students with special learning needs undertaken by the Victorian Auditor-General noted that more information was needed on the usefulness of policy and guidance material on restraint and seclusion practices.<sup>87</sup> The Public Advocate in Victoria has also issued a statement on restraint and seclusion,<sup>88</sup> identifying these as a 'significant incursion on a person's liberty [engaging] a number of human rights'<sup>89</sup> provided by the Victorian *Charter of Human Rights and Responsibilities Act 2006* ('CHRA')<sup>90</sup> including 'protection from torture and cruel, inhuman or degrading treatment',<sup>91</sup> 'freedom of movement'.<sup>92</sup> The Charter also protects liberty and security of person, unless affected in accordance with legal procedure.<sup>93</sup> Australian

students with disability also have the right not to be harassed in relation to their disability, defined to include actions that are ‘reasonably likely ... to humiliate ... the person’.<sup>44</sup>

The evidence from a number of sectors and reports is that inappropriate use of restraint, that may violate the students’ dignity, human rights and right to a safe environment, does occur in Australia and is an identified concern. In light of the challenges mounted in the US, the question is what protection is offered to Australian school students through policy and law. Education policies on use of restraint and physical force are discussed in the following section.

### III POLICIES AND STUDENT PROTECTION IN AUSTRALIAN EDUCATION

Measures through Australian funding legislation have led to national endorsement of the *National Safe Schools Framework* (‘NSSF’),<sup>45</sup> following a parallel path to the US *No Child Left Behind* legislation,<sup>46</sup> to ensure that Australian schools are ‘safe, supportive and respectful teaching and learning communities that promote student wellbeing’.<sup>47</sup> As a general framework, the NSSF does not specifically address restrictive practices. However, positive behaviour management by schools and teachers is one of nine elaborated key elements of a safe school.<sup>48</sup> The NSSF also identifies need for clear procedures for confidential reporting, ongoing data collection and monitoring of incidents of ‘child maltreatment, harassment or violence by staff, parents, carers and students, and [staff response]’.<sup>49</sup> It does not directly mandate systems of record keeping and reporting to higher authorities.

The NSSF, applicable to both government and nongovernment schools,<sup>50</sup> requires development of safe school policies.<sup>51</sup> State and territory government education authority have developed policy guidelines or templates for schools to use.<sup>52</sup> Although state and territory system level policies are not necessarily developed by state and territory Catholic sectors, government policies are available to follow. Similarly, systemic level policies are not developed for independent schools although guidance may be given.<sup>53</sup> The following discussion examines policy directives for government schooling in Australia, in the expectation that similar principles apply across all schools.<sup>54</sup> Policies for higher diligence have not been identified in nongovernment school sectors:<sup>55</sup> with the proviso also that student enrolments in nongovernment schools, and especially in independent schools, are governed by contracts between parents and the school. Such contracts may provide greater leeway for schools to restrain or seclude students for behavioural issues as part of agreed codes of conduct.

After the release of the VEOHRC report on the school experiences of students with disabilities, initiatives were implemented to improve knowledge and practice in Victorian schools with respect to use of restrictive practices. These include: professional development for principals; access to documents related to restrictive practices including documents from health and psychological experts on how to reduce the need for restrictive practices in the disability sector; and engagement of a consultant to work with teachers in this area.<sup>56</sup> Victoria has taken a proactive lead in criticising practices of restraint and seclusion in schools, particularly for students with disability. However, while use of restrictive interventions and reporting of use to a central authority whose duties include developing guidelines and standards and monitoring ‘restrictive practices’ are regulated by law for disability residential settings,<sup>57</sup> they are only governed by policy directives in Victorian schools.

Victorian state education department policy<sup>58</sup> authorises restraint—‘use of physical force to prevent, restrict or subdue movement of a person’s body or part of their body for primary purpose of behavioural control’<sup>59</sup>—under three conditions similar to those identified in the US

law cases an emergency and potential harm to the student or others is ‘imminent’, the restraint is to prevent the student harming themselves or others, no reasonable alternative is available. Appropriate standards and procedures are to be followed.<sup>60</sup> Restraint is not to be used to provoke or punish a student or to intentionally harm a student. Minimum force is to be used for minimum time, and proportionate to the characteristics of the student. *Only staff trained in restraint should use it, preferably with another staff as witness present.* The principal and student’s parents are to be notified immediately. The incident *may* need to be reported centrally using online processes.<sup>61</sup>

Safe school policy in the ACT identifies that teachers are to engage in effective classroom practice that promotes a safe learning environment but may ‘use physical restraint when acting to prevent students injuring themselves or to prevent students injuring other students’.<sup>62</sup> Similar to Victorian policy, restraint is to be used as a last resort, with force ‘no greater than reasonably necessary’ and for ‘the minimum time required to achieve its aim’, but not as punishment or to enforce compliance.<sup>63</sup> Critical incidents that significantly threaten student or staff safety are to be reported to the ‘School Network Leader immediately by telephone and in writing within 24 hours’,<sup>64</sup> however it is not clear that instances involving restraint reach a threshold of criticality.

Restraint is clearly authorised in government schools in New South Wales as teachers are to report and document incidents of restraint of students or violence involving students, to ensure information is available if allegations are made about teachers.<sup>65</sup> ‘Poor or unacceptable practice’ with students with disabilities includes use of unnecessary force to make physical contact to prompt a student or to force compliance, unless concerned for safety of the student or others.<sup>66</sup> Legal advice to NSW government schools identifies physical restraint to be used only to prevent threat of injury to persons or damage to property and where no other recourse is available, under standard expectations that the degree of restraint ‘is [that] reasonably necessary in the circumstances’ and dependent on the ‘age, size and strength of the student and staff member’.<sup>67</sup>

Northern Territory policy Safe Schools NT implements the NSSF and the nine key elements, emphasising positive behavioural support.<sup>68</sup> Schools are expected to detail behaviour management approaches that are consistent with policy. Overall policy and templates provided do not address issues of restraint or other restrictive practices.<sup>69</sup>

Queensland’s government schools develop policies for safe and supportive learning environment through approved school-based Responsible Behaviour Plans for Students<sup>70</sup> using a template with mandated headings. An exemplar plan identifies that ‘Staff may make legitimate use of physical intervention if all non-physical interventions have been exhausted’ and a student poses a serious threat to themselves or others’ but only to prevent injury. Again, restraint is not to be used as punishment or to enforce compliance.<sup>71</sup> Physical intervention is used only as an immediate or emergency response or as part of a student’s individual plan, including prevention of self-harming behaviours.<sup>72</sup> When physical restraint is used an incident report is to be prepared, although how the report is handled is not stated clearly. A guideline on appropriate restraint training for staff states

**Consider training that:**

- respects the rights of the student and keeps risks to a minimum
- is thoroughly evidence based, quality assured and has built-in evaluation procedures
- reduces the need for restraining as far as practicable

- holds the view that restraining students is for their safety and never about discipline or punishment
- is provided by appropriately trained personnel
- is ethical and complies with legal requirements
- is appropriate to the particular needs of the students within school community
- gives staff the skills they need to effectively support students
- reviews and updates the training regularly to take into account new research findings and evidence
- considers:
  - departmental policies and procedures
  - how staff behaviour can affect behaviour of students
  - de-escalation strategies
  - care for students and staff following incidents involving physical restraint.<sup>73</sup>

A similar policy for a specialised school for students with disability had similar expectations for use of restraint but noted that instances of physical restraint are to formally documented on a central online datafile.

South Australian school sectors—the government Department of Education and Children’s Services, Catholic Education and the Association of Independent Schools—have developed joint guidelines for school ‘protective practices’.<sup>74</sup> Staff are advised that they may make legitimate use of physical restraint if nonphysical interventions have been exhausted or are not possible, and only if ‘someone’s safety is clearly threatened’.<sup>75</sup> As noted in previous policies, restraint must be reasonable in the circumstances and proportionate, and again the minimum force taking into account ‘age, stature, disability, understanding and gender’ of the child.<sup>76</sup> Parents should be informed at enrolment about such policy and staff should receive training. The incident should be documented, records kept with the ‘site leader’ and other reporting guidelines be followed.<sup>77</sup> More explicitly than policy in other states and territories, the policy indicates what restraint should *not* involve:

- force applied to the head or neck
- restrictions to breathing
- punching
- kicking
- holding by the hair or ear
- confining a child or young person in a locked room or limited space
- placing children under school age in ‘time out’ or ‘time away’.<sup>78</sup>

As in other states, the Tasmanian government department of education provides guidelines and principles for the safe school policies that schools are to enact.<sup>79</sup> The policy does not address

the specifics of managing critical incidents or restraint. Individual school policies that addressed restraint and reasonable use of force specifically were not identified.

Finally, the Western Australian government policy guide for behaviour management in schools<sup>80</sup> also identifies physical restraint as allowable, but expects school principals to develop an environment where this is not necessary. It is only to be used when other less intrusive alternatives have failed or are deemed inappropriate, and only when there is risk to the student or another person, or damage to property. It is to be used with extreme caution and as advised in training. When restraint is used, the manner of its use is to *minimise or prevent harm* and to stop as soon as possible. If restraint is to be used on an ongoing basis, it should be in the student's individual plan, which requires consultation and communication with their parent. A *specific policy guideline on managing physical contact and restraint* is available, including the use of 'planned intervention' after consultation with parents as a final step in management of inappropriate behaviour.<sup>81</sup> Incidents of use of physical restraint are to be documented and notified on the day or following day to the principal and parent as soon as possible. Notification to the Standards and Integrity Directorate may also be necessary.<sup>82</sup> The principal is to record the information on the online notification system, including

- location of the incident,
- name of witnesses (staff and/or students),
- incident outline including student's behaviour, what was said, steps taken, degree of force applied, and how applied,
- student's response and outcomes, and
- details of any injury or damage to property.<sup>83</sup>

In summary, restraint is acceptable in Australian schools under circumstances in the main where the safety of a student or other students or staff is perceived to be threatened. Policies that address restraint provide guidelines for when and how restraint should occur, when reasonable force may be used, and expectations that teachers or other staff should receive training in appropriate restraint. General guidelines are provided on documentation and reporting of restraint incidents in some policies—such reporting does not appear to be a legal requirement in any state or territory nor is it clear how reported incidents are handled, in-house within schools or within the state authority. No evidence of consistent record-keeping and statistical reporting of incidents is apparent in any jurisdiction. Given the independence of nongovernment schools, apart from the requirement to have safe school and behaviour management policies, record-keeping and management of restraint incidents appear to be less formalised in general than in government schools.

The dilemma then, is that while policies and guidelines for appropriate practice exist with clear statements about limited use, circumstances of use and appropriate use of force or restraint, the incidents of restraint, force and student seclusion identified in Australian reports, especially for students with disabilities, appear to violate expected professional practices.

Several state guidelines note that using restraint to meet a duty of care and ensure student safety is permitted and that teachers are acting legally with '[c]ommon law defences such as self-defence and defence of others remain legitimate reasons for the use of physical restraint'.<sup>84</sup> In Queensland, procedures are published for management of *allegations of staff harm in the area of student protection*.<sup>85</sup> When an allegation of physical harm including direct or indirect restraint is made against a teacher or other school employee, which might later be determined as punitive in

controlling student behaviour or protecting the student or others from potential harm, a referral is to be made to the Ethical Standards Unit for a decision as to an appropriate intervention.

If there is no physical injury or minor scratches and minor bruising to the student and the employee has no known adverse history or pattern of behaviour, this incident may be dealt with via localised fact finding culminating in informal resolution being facilitated between the parties .... More serious physical contact and or a pattern of known conduct by an employee must be referred to the Ethical Standards Unit for formal assessment.

Reasonable physical intervention/restraint is an option when:

- a student threatens or engages in acts of violence towards another student, students or employees
- a student threatens to or engages in harm to themselves
- a student threatens to or engages in significant damage to property, or
- other strategies including de-escalation communication strategies have been tried and have been unsuccessful, or are not practical in the circumstances.<sup>86</sup>

The Western Australian guidelines for staff note that 'use of physical contact or restraint increases the risk of complaints involving misconduct. Staff should be mindful of their obligations and that their conduct may be subject to later scrutiny'.<sup>87</sup>

Legal advice to teachers in New South Wales on physical restraint of students notes that restraint of students without their consent may be an assault, and that '[i]n extremely rare cases criminal or civil action is taken against a member of staff who has restrained a student', defences available to staff include self-defence, defence of others, defence of property and lawful chastisement.<sup>88</sup> An allegation of 'assault, ill-treatment or neglect of a child' is reportable conduct in New South Wales under s 25 of the *Ombudsman Act 1974* (NSW). This excludes use of reasonable force for discipline and management of children and use of physical force that is 'trivial or negligible'.<sup>89</sup> The provider, that is a school, determines if the matter is reportable. How many such complaints are made throughout Australian school systems and their outcomes are not known.

The question that arises in Australian schools is the grounds for legal challenges that students, and parents on their behalf, could bring if they consider that restraint, force or seclusion has not been undertaken in the appropriate manner by teachers. Australia is not a litigious nation and hence legal challenges on such matters are not frequent, despite the reported incidents. The following section examines a number of potential grounds for legal challenges for misuse of restrictive practices in Australian law.

#### IV POTENTIAL LEGAL CHALLENGES FOR MISUSE OF RESTRAINT, FORCE AND SECLUSION

Several grounds of complaint are available to students and parents (or others with standing) on their behalf in Australian law.<sup>90</sup> Misuse of restraint, force or seclusion may give rise to a civil action of tort of trespass to the person<sup>91</sup>—'where a plaintiff's rights in relation to his or her body have been infringed by the direct interference, whether intentional or negligent, of another, in the absence of lawful justification. ... [may be] assault, battery and false imprisonment'.<sup>92</sup> If malfeasance was found, remedies could range from an apology to monetary damages including medical expenses. The burden of proof is on the plaintiff. While in the absence of clear evidence

of physical or emotional harm or documented evidence, trespass to the person could be hard to establish, in a civil action, the standard for the burden of proof is the balance of probabilities. As one parent noted, however, proving the use of restraint by a teacher was unnecessary and excessive in the circumstances might be difficult to establish in retrospect, and could give rise to similar findings as in the US cases that the maltreatment had not occurred or the restraint was reasonable under policy in the circumstances.

More seriously, misuse of force and restraint may give rise to a criminal charge of assault against a school staff member.<sup>93</sup> Criminal charges clearly have severe consequences for a staff member if proven including imprisonment. For students and parents, however, two further issues arise in establishing a claim: the burden of proof will be beyond reasonable doubt, and most criminal codes note that the assault must be intentional.

The student or parent who considers that restraint has been used inappropriately, especially excessively, may raise a claim under the tort of negligence which requires in these settings, in brief, that a duty of care is owed by the provider to an individual, that there has been a breach of the duty, that the breach caused some damage or harm, 'provided the damage is within the defendant's scope of liability'.<sup>94</sup> A duty of care to maintain a safe environment is owed by schools and staff and stated in national and state policies as well as explicitly or implicitly in safe school policies expected to be established by all Australian schools.<sup>95</sup> Negligence would require establishing that the duty of care was breached, that some resultant damage occurred, and was reasonably foreseeable. In schools, the further issue is whether the employer of the teacher has a *non-delegable duty*—to ensure 'that reasonable care is taken by others'<sup>96</sup> especially where there is 'vulnerability or special dependence of the person to whom the duty is owed'<sup>97</sup>—and/or vicarious liability for 'harmful acts or omissions by others',<sup>98</sup> which imposes liability on the employer for any established breach of the duty of care by a teacher in the course of their employment. It has been argued elsewhere that a teacher who sexually abused students acted so far outside the expectations of their professional role, that is, their course of employment, that the employer was not liable.<sup>99</sup> However, given requirements for policies on safe schools and behaviour management strategies, guidelines for managing restraint and, in many instances, reporting restraint, it would seem difficult for school management to indicate that they were not aware of or responsible for a staff member's excessive use of restraint or force with a student.

The US cases considered in our companion article demonstrated not only apparent excessive use of force, with one case resulting in the student's death, but also excessive use of force with students with disabilities. In Australia, students with disabilities who considered that restraint using force or seclusion had been exercised inappropriately may be able to bring a claim of indirect discrimination under the various discrimination acts of Australian states and territories, as noted in the Victorian HREOC report:

the use of restraint or seclusion could be an unreasonable requirement or condition that disadvantages [students with disability] because of their disability. ... In this case, whether there was another way to keep the child and others safe, or an alternative way to improve behaviour using other methods would be factors to consider in determining whether unlawful discrimination has occurred.<sup>100</sup>

Such discrimination would be unlawful 'if the restraint or seclusion is not related to the immediate protection of another person, for example where it is used for general behavioural control or punishment'.<sup>101</sup>

The Victorian Office of Public Advocate reasoned that restraint may be considered a form of harassment that humiliates a student with disability.<sup>102</sup> The *Disability Standards for Education 2005* (Cth) identify actions that ‘humiliate, offend, intimidate or distress the person’ with disability as discriminatory practice.<sup>103</sup> A provider must have ‘policies, procedures and codes of conduct for staff and students [that] explicitly prohibit harassment and victimisation of the associates of students with disabilities, on the basis of disability’ and ‘professional development programs offered to the provider’s staff [to] ensure that policies, procedures and codes of conduct, including matters of harassment and victimisation, are known and understood by staff’.<sup>104</sup> Noncompliance with the Standards without a reasonable defence is a breach of the *Disability Discrimination Act 1992* (Cth).

Teachers who act inappropriately would also be subject to administrative law procedures with respect to their employment contracts and codes of conduct, with subsequent implications for their continued registration as teachers. The following section examines a number of identified cases involving use of force, teachers and students and the consequences for all involved.

## V AUSTRALIAN CASE LAW

In contrast to the US cases, no civil action against a teacher, school or authority by a student or parent on their behalf regarding inappropriate use of restraint by a teacher was identified in reported and unreported Australian case law, despite the incidents noted by parents and discussed earlier. The legal advice on restraint to NSW teachers addressed the question:

What happens if a staff member is subject to legal proceedings as a result of physically restraining a student?

Should a member of staff be subject to criminal assault proceedings by the police or by private prosecution, he or she may apply to the Department for Crown representation. *It should be noted that such criminal proceedings are extremely rare. Given the defences available to staff, the probability of a staff member who has acted professionally and reasonably being convicted is virtually nil.*

In the even more unlikely event that civil proceedings are commenced against a member of staff, he or she may similarly apply to the Department for Crown representation. If granted, staff will be indemnified for any verdict against the staff member and any legal costs incurred as a result of the proceedings. It should be noted that there is no record of any proceedings of this nature ever being taken against a staff member (emphasis added).<sup>105</sup>

This does not mean such actions have not commenced, however, Australia education authorities and schools are active in settling out of court to prevent opening the perceived flood gates of litigation or damage to reputation of schools. Civil litigation in Australia also places heavy reliance on mediation and dispute resolution to resolve such challenges. While monetary compensation may have been paid to families or students for unreasonable restraint, no records were identified.

A number of cases that have arisen have involved not physical harm to students by teachers but harm to teachers by students. For example, occupational health and safety claims have been made by teachers as a result of physical or psychological injury caused by violent students, including injury caused in the process of restraining students.<sup>106</sup> Complaints have been upheld for failure of the employer to undertake adequate risk assessments under occupational health and safety legislation.

Other cases have also considered teacher failure to initiate necessary physical action and restraint in order to protect students from another person or student.<sup>107</sup> Where violence has occurred or may occur and a teacher has not endeavoured to maintain discipline, a breach of duty of care may be involved.<sup>108</sup>

In an industrial relations claim for breach of occupational health and safety and damages four teachers were reported to have suffered physical or psychological injury from having to restrain a 15 year old boy.<sup>109</sup> The physical restraint occurred in the principal's office when the student became aggressive, threatening both the staff and injury to himself. Two staff received physical injuries. The student returned to school the next day and threatened staff and students with a knife, and then a metal baseball bat. The school's management was focused on the appropriate educational structure for the student, rather than the safety of teachers and others. Two breaches of occupational health and safety were held. Further, the court found that the focus of the school on the needs of the student was to the detriment of provision of a safe working environment for the teachers.<sup>110</sup> The restraint of the boy in these circumstances is clearly within the general policy guidelines as to when restraint can be used in schools.

As noted, some evidence of complaints against teachers can be found in teacher disciplinary cases and appeals for reinstatement following dismissal or cancellation of their teacher registration following incidents in schools involving violence, including violence towards students. Matters come to public notice not through a legal challenge with the injured student as plaintiff, but by appeals in industrial relations courts by teachers for reinstatement. For example, an application against a reprimand for misconduct and lack of natural justice involved an incident where a female teacher hit a primary school female student on the head with her hand. The issue that led to dismissal was a finding that the degree of force used was not reasonable or necessary 'to maintain or reestablish order',<sup>111</sup> in keeping with policy frameworks. Regulations indicated a teacher could make students using physical contact with students, including restraint, as reasonable, to manage and maintain order.<sup>112</sup> The teacher noted in evidence that she had not been trained as to the nature of a 'reasonable degree of force'.<sup>113</sup> Six allegations of physical contact were made against the teacher, who identified that some contact may have occurred unintentionally but without force, and that the 'hit' in question was a 'tap' on the head. The Commission determined that natural justice had been followed and the reprimand was reasonable in the circumstances, although it questioned whether this was the appropriate procedure to address the matter.<sup>114</sup>

In another case,<sup>115</sup> a private school teacher was found by the school's authority to have exercised inappropriate physical handling of a student (lifting, grabbing by shoulders, shaking, grabbing by neck and pushing into a chair) in response to a behavioural issue, and dismissed. The teacher denied the allegations with the defence that physical contact did occur but to ensure the student's safety. Concerns of the Commissioner<sup>116</sup> were that physical contact appeared to have occurred out of 'frustration' with 'persistent misbehaviour' by the student—the teacher 'reacted unwisely by grabbing hold of the student'<sup>117</sup>—but that the term 'physical aggression' was unwarranted, implying 'a greater use of physical force than I believe to have been employed'.<sup>118</sup> The Commissioner found insufficient evidence to consider two other allegations of physical contact or expressions of anger. Overall, termination of employment was found disproportionate to the first matter of physical contact. Further, procedural fairness had been denied to the teacher.

In a third case in New South Wales,<sup>119</sup> a teacher's employment was terminated on the basis of alleged poor performance, including student behaviour control and inappropriate physical contact by the teacher with students to address behavioural issues.<sup>120</sup> The teacher involved did not attend available meetings to address the allegations or implementation of an improvement plan and was

consequently terminated. The application for reinstatement was dismissed, on the grounds of misconduct in failing to engage in the processes identified by the school and authority. However, the allegations of inappropriate physical contact were not able to be explored.

A Deputy Principal in Western Australia, Mr Ayling, was similarly disciplined when he restrained two students by holding his arms out to prevent the students leaving the school, following an incident involving damage to furniture that had led to a one-day suspension, and while the students were to wait for an adult to collect them. The teacher physically restrained one student by holding her arm, resulting in a struggle, then grabbed her arm, forced it behind her back, and pushed the student against a wall.<sup>121</sup> He was alleged to have used unreasonable force 'in circumstances not authorised, justified or excused by law'.<sup>122</sup> It was noted that the teacher was a very tall man and the student very small. The mother of the girl complained to the police. Police concluded a criminal offence had not occurred; a review for breach of discipline was then undertaken. Following an initial investigation, a breach of discipline was found with the penalty imposed a reprimand and a fine of one day's pay, based on the finding by the school that he had used his 'position and superior strength'. As Ayling denied the charge, a further investigation was undertaken, which resulted in the imposition of the more serious penalty of a pay reduction for six months. Mr Ayling applied to have the penalty and decision overturned. Senior Commissioner Smith held that procedural processes were sufficient, that a breach of discipline had occurred as found by the investigators and school, but that the original penalty of a reprimand and a fine of one day's pay should apply.

In Queensland a teacher was suspended and, following an investigation, had his contract terminated for breach of the code of conduct, after slapping a 14 year old boy in the classroom. At the same time, an assault charge was not found by the Magistrate's Court, on the basis that 'teachers are allowed to use "reasonable force"' to control their class. The Minister for Education highlighted the difference between professional expectations under disciplinary charges, and legal charges—'under our code of conduct teachers have to use proper and appropriate disciplinary measures'.<sup>123</sup> Another teacher was suspended for 15 months, with reinstatement dependent on satisfactory psychological reports, for swearing at or in front of students on several occasions and for grabbing a student by the throat and pushing him into a pole, later elbowing a student and throwing a duster at a student, pushing another student. From 2005 to 2011 he had been cautioned on several occasions, and had his remuneration reduced for six months. Evidence identified that the teacher behaved in these ways when under personal stress and depression.<sup>124</sup> At the time of writing, the teacher had not yet regained registration.

In contrast to the US cases, these cases have not specifically involved students with disabilities. A case involving a teacher in a specific purposes school in NSW, with students with emotional disorders and mental disabilities and illnesses, led to dismissal of a teacher who physically restrained a student with what appears considerable force while on probationary employment.<sup>125</sup> Following an enquiry, the teacher's employment was annulled and his name placed on a register that meant a risk assessment would be required for any further appointment in a government education institution. Through the union, the teacher applied for reemployment and monetary compensation. It was noted that the employer recognised the need for a reasonable form of physical restraint in the circumstances,<sup>126</sup> with 'abundance of evidence to suggest that the applicant's actions, however badly chosen they may have been, were designed to bring the situation with which he was confronted under control'.<sup>127</sup> Deputy President Grayson identified that the Commission must 'traditionally, express its strong disapproval of misconduct such as occurred here' but noted 'extenuating circumstances'.<sup>128</sup> He criticised the restraint policy of the

school, to wait for another teacher to arrive before intervening, as ineffective in circumstances of *immediate threat and violence* that could be expected to arise in the school. The teacher had not yet received training in dealing with such situations. While the punch to the stomach may have been necessary for safety, the punch to the back of the head was held differently. Grayson DP commented that the second punch was not necessarily conduct 'which is so reprehensible of itself as to leave DET with no alternative but to bring the applicant's teaching career to a summary end'<sup>10</sup> The dismissal and indefinite exclusion from working in government schools was found to be of undue severity and overly harsh, with the allegations not made out<sup>11</sup> The order was for reemployment in a school identified by the applicant, to be taken as continuous, and for backpay from the date of the original decision less any earnings since that time, with consideration to be given to the removal of the teacher's name from the register.

The order for reinstatement was stayed while the employer, the Department of Education, sought leave to appeal. Leave to appeal was granted by the Full Bench of the Commission,<sup>12</sup> with payment of half the financial remedy to be paid, to be repayable if the appeal succeeded, and with interest to be payable on the balance if the appeal fails. In considering the evidence heard and statements made by Grayson DP and giving leave for the appeal, the Commission identified that the 'extenuating circumstances' were not explained and stated:

It is difficult to conceive of any extenuating circumstances which could ameliorate the gravity of the misconduct found by Grayson DP: the assault to the back of the head of a disabled thirteen year old boy (with sufficient violence to require medical intervention) by a person in a unique position of trust and responsibility — his teacher.<sup>3</sup>

They found no grounds for mitigation for use of such force, even on the assumption the teacher was acting in self-defence. No report on the appeal is available or information as to treatment or recompense to the student involved.

## VI CONCLUSION AND RECOMMENDATIONS

The focus of this article was prompted by the serious nature of use of seclusion and restraint with students in the US, the sometimes serious physical consequences for students but limited consequences in law for their teachers. This article has highlighted several elements in the use of restraint, force and seclusion, or more generally restrictive practices in Australian schools. Firstly, the creation of safe schools and behaviour management policies, with emphasis on positive behaviour management support, is national policy with state and territory guidelines. Policies are required for all schools. Policies and law identify that restrictive practices may be necessary in very limited circumstances, for limited time and with application appropriate to the circumstances and the status of the child. Appropriate use in these circumstances is deemed lawful for teachers. Insufficient information could be identified with respect to policies regarding school-sanctioned use of restraint of students in nongovernment schools, whether Catholic or independent.

This discussion has also identified evidence that inappropriate use of restraint and restrictive practices is occurring with students in Australia, reported by parents, most notably as in the US, for students with disabilities. Authorities such as the Australian Government Department of Education, Employment and Workplace Relations, Children with Disability Australia, the Australian Civil Society Shadow Report, the Office of the Public Advocate and the Victorian Human Rights and Equal Opportunity Commission have expressed concern regarding

inappropriate use of restraint.<sup>133</sup> Significantly, there is consistent comment on the lack of official reports and statistics available with respect to such treatment of students.

We briefly examined legal challenges that would be available to students and families but noted that no challenges regarding physical restraint by students had occurred against teachers, schools or authorities. We argue that the significant attention paid to safe school policies in Australia, and the various guidelines and restrictions placed on teacher use of restrictive practices and expectations for professional training increase, not decrease, the responsibility of school authorities when a teacher acts inappropriately. School managers should be in a state of knowing what is happening in classrooms.

Various statements from state authorities have provided legal advice to teachers that it is rare that they would be subject to legal proceedings for physically restraining a student, and that no such action had occurred in New South Wales. A brief examination of appeals by teachers for reinstatement following established claims of inappropriate physical restraint of students would indicate, however, that such actions are occurring. The evidence of the Australian cases, with the exception of the high level of violence with a young boy with disability, is that when inappropriate behaviours are reported and addressed, our police and criminal law jurisdictions, courts and tribunals, and administrative processes allow considerable leniency to schools and teachers in restraint and use of force with students, despite clear policy expectations and guidelines about the nature of physical interaction education themselves consider acceptable. Similarities to findings in the US cases emerge.

One of the issues is that the *evidence* provided in this discussion of restraint with children in schools, especially children with disability, is from a social science research perspective, and would not meet legal requirements of direct evidence, unless the harm to a child was as apparent as in the US cases. The incidents reported in the sources cited are reports by parents, teachers and others, the lack of reported incidents is noted. A qualifier provided in the report by VEOHRC, which was sufficiently concerned to dedicate a chapter to the 'specific issue of concern' of restraint and students with disability, was that 'Where allegations of the inappropriate use of restraint or seclusion are made, these cannot be substantiated or contested'.<sup>134</sup>

What is evident in Australian courts is lack of legal challenges by students or their parents. Many legal processes are not transparent for parents, and many parents, and students, especially students with disability and their parents, feel disempowered and helpless in making complaints about such behaviours within the school sector and legal system. This was exemplified in comments from VEOHRC report:

While the overall reporting by parents of incidents of restraint and seclusion was relatively low in terms of numbers, those incidents that were reported were relatively severe. However, some parents expressed the view that their concerns about restraint and violence in schools were not taken seriously:

I believe physical abuse of children at specialist schools is happening too often now and schools and teachers are getting away with it. Even though my son told me exactly what his teacher did to him, the school principal did not take it seriously, she discriminated against him ... Teachers should be more accountable for their actions, they must be monitored more closely by an independent organisation as [the Department of Education and Early Childhood Education (DEECD)] is not doing anything! ... I believe cameras should be mandatory in all classrooms at the specialist schools as these children have no voice and a camera cannot lie.

where the parent reported their child being held down and hit resulting in severe bruising anxiety and self harming behaviours. The parent withdrew the child from the specialist school after the internal school investigation found the claim to be unsubstantiated.

What is the point — try proving in courts that it was unnecessary restraining. The school will back the carer. I will be challenged on details. It will be a case of 'she said he said'.<sup>135</sup>

The last parent is most likely correct. Given the challenges that parents and children will face in providing a substantial legal argument to the courts, a different approach is necessary if management of students is to change to match policy expectations.

It is timely for all Australian school sectors to take more responsibility for the treatment of all students and to undertake their own investigations into the nature and extent of use of restrictive practices with students, both those with and without disabilities, and to put in place more professional development for teachers and transparent procedures for documenting and recording incidents.

Much of this discussion has focused on the VEOHRC report *Held Back* due to the comprehensive nature of the discussion of students with disability and reported inappropriate use of restraint. The VEOHRC report made several recommendations on restraint and seclusion in schools including:

- Prohibition of use of seclusion in government schools
- Notification of parents if a restrictive intervention is used
- Such interventions to be included in student's individual learning plans to be submitted to the regional disability coordinator<sup>136</sup>
- Reports of such interventions as critical incidents
- Emphasis on positive behaviour plans for students

The Victorian Public Advocate supported these recommendations, calling for further regulation of restrictive interventions with students that oversight should be transferred to the Office of the Senior Practitioner, and that until such time as this occurred, seclusion should be prohibited and more regulation of restraint should be in place.<sup>137</sup> An Implementation Plan was instigated following the VEOHRC report, with a cross-department Senior Officer's group established to further report outcomes.<sup>138</sup> A 2013 progress update reported continuing work on both reporting and complaint procedures for students with disabilities as well as further advice to inform understanding of restrictive practices and professional development directly with schools in this area, focusing on positive ways to manage challenging behaviour.<sup>139</sup> The 2014 update indicates considerable further work in educating students with disabilities as an outcome of the VEOHRC report including 'mapp[ing] existing, underway and planned programs, initiatives and resources that relate to the areas of concern set out in the VEOHRC report [which] identified some gaps in existing work and will form the basis for future discussion and planning'.<sup>140</sup>

These actions are merited not just for Victorian government schools but all schools in Australia and all sectors. Students are entitled to a safe and supportive environment in action, not just in policy. Policy clarification, professional development and record-keeping need to be enhanced across all sectors across all states and territories, if understanding and evidence are to be gained as to how restrictive practices are being implemented in schools and how they should be implemented in different circumstances. Greater risk management and systematic processes

within schools need to be the focus, rather than policies and rhetoric that espouse appropriate principles but are not carried through in practice.<sup>141</sup> As it is, in Australia, children in juvenile detention centres have greater legislated security against improper restraint than children in schools.

*Keywords:* student rights; restraint; policy; Australia.

#### ENDNOTES

- 1 See, eg, the federal initiative <<http://www.cybersmart.gov.au/>> or a state initiative <<http://www.qld.gov.au/disability/children-young-people/bullying/support-children.html>>.
- 2 See, for a summary of conditions for mandatory reporting and legislative elements, Ben Matthews and Deborah Scott, 'Mandatory Reporting of Child Abuse and Neglect' (Australian Institute of Family Studies, Australian Government, July 2013) <<http://www.aifs.gov.au/cfca/pubs/factsheets/a141787/#a12>>.
- 3 See Ralph D. Mawdsley & J. Joy Cumming, 'Restraint of Students in Schools in the USA' (2014) 19(2)/20(1) *International Journal of Law and Education*, 21.
- 4 US Constitution Bill of Rights Fourth Amendment (prohibiting unlawful searches and seizures with need to be sanctioned and reasonable).
- 5 For example, s 504 of the *Rehabilitation Act of 1973*, 29 USC, *Americans with Disability Act of 1990*, 42 USC § 12101 et seq.
- 6 Australian state constitutions also do not provide rights to individuals.
- 7 *Children and Young People Act 2008* (Australian Catholic Territory (ACT)); *Children and Young Persons (Care and Protection) Act 1998* (New South Wales (NSW)); *Care and Protection of Children Act* (NT); *Child Protection Act 1999* (Queensland (Qld)); *Children's Protection Act 1993* (South Australia (SA)); *Children, Young Persons and Their Families Act 1997* (Tasmania (Tas)); *Child Wellbeing and Safety Act 2005* (Victoria (Vic)); *Children and Community Services Act 2004* (Western Australia (WA)).
- 8 *Children and Young People Act 2008* (ACT) s 7(a).
- 9 *Children and Young People Act 2008* (ACT) ss 223, 226; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 158; *Care and Protection of Children Act* (NT) s 59; *Children and Community Services Act 2004* (WA) s 113.
- 10 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 158; *Children and Community Services Act 2004* (WA) s 118.
- 11 *Children and Young People Act 2008* (ACT) s878 (civil); *Children and Young Persons (Care and Protection) Act 1998* No 157 (NSW) s 158 (civil and criminal); *Care and Protection of Children Act* (NT) s 309 (in good faith). No challenges of inappropriate use of restraint under these legislation relevant to this discussion were identified.
- 12 *Convention on the Rights of the Child* (ratified UN General Assembly Nov 1989, Australia Dec 1990).
- 13 *Ibid* art 3(1).
- 14 *Ibid* art 28(1).
- 15 *Ibid* art 19.
- 16 *Education Act 2004* (ACT) s 26; *Education Act 1990* (NSW) s 31; *Education Act* (NT) s 6; *Education (General Provisions) Act 2006* (Qld) s 50; *Education Act 1972* (SA) s 9; *Education Act 1994* (Tas) s 41; *Education and Training Reform Act 2006* (Vic) s 1.1.2; *Schools Act 1999* (WA) s 98.
- 17 *Ibid* art 28.
- 18 *Education Act 2004* (ACT): s 9, 17 years or completion of Year 12; *Education Act 1990* (NSW) s 21B, *Education Act* (NT) s 20: Year 10 and full-time training or employment, or 17 years; *Education (General Provisions) Act 2006* (Qld) ss 9, 231: compulsory to age 16 or completion of Year 10, then 'compulsory participation phase' two years' education, employment training, or 17 years; *Education*

*Act 1972* (SA) ss 75, 76 ‘compulsory school age’ (up to 16 years), compulsory education age 16 years qualification eg school, apprenticeship, *Education Act 1994* (Tas) s 4 16 years (enrolment at age 5), *Education and Training Reform Act 2005* (Vic) s 113(1) up to 17 years, *School Education Act 1999* (WA) s 6 year turns 17 years 6 months or 18 or graduation s 11b education, training, employment final two years

- 19 <http://www.childabuseroyalcommission.gov.au/>
- 20 Michael Waterhouse, ‘The Royal Commission into Institutional Responses to Child Sexual Abuse — A Sword or a Shield’ (Paper presented at the Australia and New Zealand Education Law Association (ANZELA) 22<sup>nd</sup> Annual Conference, Hobart Tasmania, 2-4 October 2013 (ANZELA, *Safe Successful and Sustainable Education: Is the Law a Sword or a Shield?* (2013) 347)
- 21 Australian Government Department of Education, Employment and Workplace Relations, *Report on the Review of the Disability Standards for Education 2005* (2012), Sally Robinson, *Enabling and Protecting— Proactive Approaches to Addressing the Abuse and Neglect of Children and Young People with Disability* (2012) Children with Disability Australia (CDA) <<http://www.cda.org.au/cda-issues-papers>>, Disability Representative, Advocacy Legal and Human Rights Organisations, *Australian Civil Society Shadow and Baseline Report to the UN Committee on the Rights of Persons with Disabilities* (June 2012) <<http://www.daru.org.au/resource/australian-civil-society-shadow-and-baseline-report-to-the-un-committee-on-the-rights-of-persons-with-disabilities>>, Office of the Public Advocate (Vic), *Position Statement—Restrictive Interventions in Educational Settings* (2013) <<http://www.publicadvocate.vic.gov.au/research/302/>>, Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Held Back The Experiences of Students with Disabilities in Victorian Schools* (Victoria, 2012)
- 22 Australian Government, Department of Education, Employment and Workplace Relations, *Report on the Review of the Disability Standards for Education 2005* (2012), 24
- 23 Sally Robinson *Enabling and Protecting Proactive Approaches to Addressing the Abuse and Neglect of Children and Young People with Disability* (2012) Children with Disability Australia (CDA) <<http://www.cda.org.au/cda-issues-papers>>
- 24 *Ibid* 13, 14
- 25 Shadow reports provide additional information to official government agency reports on compliance with international conventions
- 26 Disability Representative Advocacy, Legal and Human Rights Organisations, *Australian Civil Society Shadow and Baseline Report to the UN Committee on the Rights of Persons with Disabilities* (June 2012) 88 [240]–[243] <<http://www.daru.org.au/resource/australian-civil-society-shadow-and-baseline-report-to-the-un-committee-on-the-rights-of-persons-with-disabilities>>
- 27 Office of the Public Advocate (Vic), *Position Statement—Restrictive Interventions in Educational Settings* (2013) <<http://www.publicadvocate.vic.gov.au/research/302/>>
- 28 Victorian Equal Opportunity and Human Rights Commission (VEOHRC) *Held Back The Experiences of Students with Disabilities in Victorian Schools* (Victoria 2012) The report presents findings from a research project that included data collection through an online survey completed by 883 educators, 617 parents or carers and 60 students with disability phone in comments from fifty-two people mostly parents or carers, 15 ‘have a say days of two-hour meetings with 169 participants, 38 case studies, and submissions from 11 community and professional organisations, interviews with key informants or stakeholders from school authorities—a very substantial data base
- 29 ‘[S]imilar challenges [in] data collection [were] also evident in the Catholic system and Independent schools sector’ *ibid* 9
- 30 *Ibid* 10 By contrast services for adults did require such reporting and monitoring *ibid* 105
- 31 *Ibid* 109 Two hundred and sixteen parents also reported use of ‘time-out rooms’ but these were not necessarily viewed by parents as negative action
- 32 How ‘restraint’ was interpreted by teachers is not known as categories of restraint were not provided but was expected to include practices within the definition of restrictive intervention
- 33 VEOHRC above n 28
- 34 *Ibid* 106

- 35 The example provided was Andrea Hamblin, 'Special School Probed', *Geelong Advertiser* (Geelong), 12 September 2011 1.
- 36 *Ibid* 112.
- 37 State of Victoria, Victorian Auditor-General's Office, *Programs for Students with Special Learning Needs* (2012), 31.
- 38 Office of the Public Advocate (OPA), *Position Statement—Restrictive Interventions in Educational Settings*. (March 2013). <<http://www.publicadvocate.vic.gov.au/research/302/>>.
- 39 *Ibid* 1.
- 40 Victoria is one of two Australian states and territories to have enacted a charter of human rights—*CHHRA* (Vic) and the *Human Rights Act 2004* ('*HRA*') (ACT). The charters identify individual human rights and expectations that legislation passed in Victoria and the ACT will be compatible with or interpreted in accordance with human rights (*CHHRA* s 1(2); *HRA* s 30). Incompatibility with human rights, however, does not invalidate such legislation (*CHHRA* ss 28, 29; *HRA* s 32). The acts identify obligations for public institutions (*CHHRA* s 1(2); *HRA* s 40), but not for nonpublic bodies, although the *HRA* provides for entities that are not public authorities to apply to be declared entities subject to the institutions of a public authority (s 40D). While the Victorian Charter was referenced in the VEOHRC report, no policy statements on restraint issued in the ACT referring to the *HRA* were identified in preparation of this article.
- 41 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10. As noted, the Charter does not apply to nongovernment schools.
- 42 *Ibid* s 12.
- 43 *Ibid* s 21.
- 44 *Disability Standards for Education 2005* (Cth) 8.1(a); OPA, above n 38, 3.
- 45 *Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Act 2004* (Cth) ss 14(1)(i), 31(i).
- 46 *No Child Left Behind (NCLB) Act of 2001*, Pub. L. No. 107-110, 115, Stat. 1425 (2002), see, eg, ss 7144 (local education agencies to have assurance that schools have plans for keeping schools safe and drug free including discipline, security, and prevention).
- 47 Ministerial Council on Education, Early Childhood Development and Youth Affairs (MCEECDYA), *National Safe Schools Framework* (Carlton South, Vic, MCEECDYA, 2011), 4.
- 48 *Ibid* 4.
- 49 *Ibid* 5–6.
- 50 As public funding is provided to all Australian schools, government and nongovernment, federal control of nongovernment school policies occurs. Nongovernment schools in Australia comprise two sectors known as the Catholic sector and Independent sector, with the latter including both secular and nonsecular schools. Some 30% of Australian students are enrolled in nongovernment schools. For further information on control of nongovernment schools in Australia see, Joy Cumming and Ralph Mawdsley, 'The Nationalisation of Education in Australia and Annexation of Private Schooling to Public Goals' (2012) 17(2) *International Journal of Law and Education* 7.
- 51 See, eg, Council of Australian Governments (COAG), *National Education Agreement* (25 July 2012), [19] <[http://www.federalfinancialrelations.gov.au/content/national\\_agreements.aspx](http://www.federalfinancialrelations.gov.au/content/national_agreements.aspx)>.
- 52 See, eg, ACT: *Providing Safe Schools P-12* (2007) <[http://www.det.act.gov.au/\\_data/assets/pdf\\_file/0005/19499/Providing\\_Safe\\_Schools\\_updated.pdf](http://www.det.act.gov.au/_data/assets/pdf_file/0005/19499/Providing_Safe_Schools_updated.pdf)>; Northern Territory: Department of Education and Training *Guidelines Code of Conduct for Schools* <[http://www.education.nt.gov.au/\\_data/assets/pdf\\_file/0018/693/CodeOfConductForSchoolsGuidelines.pdf](http://www.education.nt.gov.au/_data/assets/pdf_file/0018/693/CodeOfConductForSchoolsGuidelines.pdf)>; Qld: *Safe, Supportive and Disciplined School Environment* (2013) <<http://ppr.det.qld.gov.au/education/learning/Pages/Safe,-Supportive-and-Disciplined-School-Environment.aspx>>. State departments of education may also have several documents and policies on different aspects of safe schools ranging from discipline to cyberbullying. see, eg, Department for Education and Child Development (DECD) (SA), *Safer DECD Schools* (2011) <<http://www.decd.sa.gov.au/speced2/pages/bullying/saferschools/>> (bullying, harassment and violence).

- 53 Use of government policies by Catholic schools is noted in VEOHRC, above n 28, 116- 117 Lack of published materials on restrictive interventions by the Independent Schools Victoria authority was also noted A sample of Australian independent school policies on managing student safety and wellbeing, as required under funding obligations, were perused While these described managing students likely to selfharm or harm others they did not refer overtly to restrictive processes The similarity of many policies indicated a common source, either legal or policy-related
- 54 Note all such policies include statements of positive support, only discussion of restraint is addressed in this article
- 55 A review of a random sample of private school policies available through policies or handbooks on the internet did not identify specific discussion of restraint procedures
- 56 VEOHRC 'Update' (24 September 2013) <<http://www.humanrightscommission.vic.gov.au/index.php/2012-10-18-01-21-18/our-projects-a-initiatives/disability-in-schools#september-2013-update>>
- 57 *Disability Act 2006* (Vic) ss 23, 24
- 58 Department of Education and Early Childhood Development (DEECD) (Vic) *Restraint of Student* (2013) <<http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx>>
- 59 Ibid 1
- 60 School staff may take reasonable and immediate actions to restrain a student to prevent danger to staff, the student or others *Education and Training Reform Regulations 2007* (Vic) s 15 Note these do not protect staff in nongovernment schools Drew Hopkins, *The Legal Obligations of a Teacher* (ACU, April 2008)
- 61 Reportable incidents are serious incidents that may involve death or serious injury, unethical staff behaviour, issues of negligence and may be serious if the incident poses a risk to the student's safety or 'allegations of or actual physical assault' DEECD, 'Reporting (Emergency and Incidents)' (2013) <<http://www.education.vic.gov.au/school/principals/spag/management/pages/reporting.aspx#H2N10062>>
- 62 Department of Education and Training (DET) (ACT), 'Providing Safe Schools P-12' (2007) DET (ACT) 1 <[http://www.det.act.gov.au/\\_data/assets/pdf\\_file/0005/19499/Providing\\_Safe\\_Schools\\_updated.pdf](http://www.det.act.gov.au/_data/assets/pdf_file/0005/19499/Providing_Safe_Schools_updated.pdf)>
- 63 Ibid 4
- 64 Ibid 1
- 65 Department of Education and Communities (DEC) (NSW), *A Guide for Teaching and Protecting Children and Young People (School Version)* (2011) 2 <[https://www.det.nsw.edu.au/proflearn/cpat/documents/cpat\\_school.pdf](https://www.det.nsw.edu.au/proflearn/cpat/documents/cpat_school.pdf)>
- 66 Ibid 6
- 67 DEC (NSW), *Legal Issues Bulletin No 9—Physical Restraint of Students* (2012) <[https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number\\_09.pdf](https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_09.pdf)> Correspondingly, not all teachers are stronger or larger than students, and restraint in a range of circumstances may put the teacher and others at the risk of more harm see Hopkins, above n 60, 24-28
- 68 Department of Education (DE) (NT), 'Safe Schools NT' DE <<http://www.education.nt.gov.au/teachers-educators/students-learning/safe-schools-nt>>
- 69 See, eg, DE, 'School Wellbeing and Behaviour' (2014) DE <<http://www.education.nt.gov.au/about-us/policies/documents/schools/school-management/school-wellbeing-and-behaviour>>
- 70 Department of Education, Training and Employment (DETE) (Qld), 'Guidelines for Developing a Responsible Behaviour Plan for Students Based on The Code of School Behaviour' (2014) <<http://education.qld.gov.au/student-services/behaviour/bm-plans.html>> The guidelines indicate that the code is not intended to cover students with 'severe self-injurious' behaviours where restraint strategies must be part of the individual's support program at 5
- 71 Department of Education, Training and Employment (DETE) (Qld Government), 'Example School Responsible Behaviour Plan for Students Based on The Code of School Behaviour' (2012) <<http://education.qld.gov.au/student-services/behaviour/bm-plans.html>>

- 72 Department of Education, Training and Employment (DETE) (Qld Government), *Safe, Supportive and Disciplined School Environment* (2012) <<http://ppr.det.qld.gov.au/education/learning/Pages/Safe,-Supportive-and-Disciplined-School-Environment.aspx>>.
- 73 Department of Education, Training and Employment (DETE) (Qld Government), 'Guidelines—Physical Restraint Training' (2012) <<http://ppr.det.qld.gov.au/education/learning/Pages/Safe,-Supportive-and-Disciplined-School-Environment.aspx>>.
- 74 Department of Education and Children's Services (DECS) (SA), Catholic Education South Australia (CESA) and the Association of Independent Schools of South Australia (AISSA), *Protective Practices for Staff in Their Interactions with Children and Young People: Guidelines for Staff Working or Volunteering in Education and Care Settings* (DECS, 2011).
- 75 Ibid 17.
- 76 Ibid.
- 77 Ibid 17–18.
- 78 Ibid 18.
- 79 Department of Education (DE) (Tas), 'Learner Wellbeing and Behaviour Policy' (2012) DE <<https://www.education.tas.gov.au/documentcentre/Documents/Learner-Wellbeing-and-Behaviour-Policy.pdf>>
- 80 Department of Education (WA), 'Behaviour Management in Schools' (2008) <<http://www.det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/policies/behaviour-management-in-schools.en?bbp.i=d0.a.1.2.1.8.1&bbp.8.policyID=13876179&g11n.enc=UTF-8&bbp.9.pane=3&selected=4>>.
- 81 Department of Education (DE) (WA), 'Physical Contact and Restraint for Managing Student Behaviour: Introduction for School Staff' (2010) <<http://det.wa.edu.au/standardsandintegrity/detcms/education/standards-and-integrity/binary-files/physical-contact-and-restraint-for-managing-students-behaviour-introduction-for-school-staff.en?oid=com.arsdigita.cms.contenttypes.FileStorageItem-id-13014157>>.
- 82 Ibid.
- 83 Ibid 4. It is not clear if this online database is inspected at a higher authority level or remains a school-based incident report.
- 84 Ibid 17.
- 85 Department of Education, Training and Employment (DETE), 'Allegations against Employees in the Area of Student Protection' (November 2012) DETE <<http://ppr.det.qld.gov.au/corp/hr/management/Pages/Allegations-Against-Employees-in-the-Area-of-Student-Protection.aspx>>.
- 86 Ibid 1–2.
- 87 DE (WA), above n 81.
- 88 DEC (NSW), above n 67.
- 89 Ombudsman New South Wales, 'Reportable Allegations and Convictions' <https://www.ombo.nsw.gov.au/what-we-do/our-work/employment-related-child-protection/reportable-allegations-and-convictions>.
- 90 The discussion here focuses briefly on common law and criminal law liability. It is possible that challenges could also arise under contract law for students in nongovernment schools, however, this area is not considered here.
- 91 Peter E Nygh and Peter Butt (Eds), *Butterworths Concise Australian Legal Dictionary*. (Butterworths, 1998, 2<sup>nd</sup> ed), 434 'Trespass to the Person'.
- 92 Ibid 'Trespass to the Person' at 434. 'Assault': 'Act or threat creates in a plaintiff a reasonable apprehension of imminent physical contact'; 'Battery': 'requires some form of touching or physical interference with the plaintiff's person'; 'False Imprisonment': 'requires a person to be deprived of his or her liberty, such that he or she has no reasonable escape from his or her confinement'.
- 93 See eg, *Crimes Act 1900* (ACT) s 24; *Crimes Act 1900* (NSW) s 61; *Criminal Code 1899* (Qld) s 245. 335; *Criminal Law Consolidation Act 1935* (SA) s 20; *Criminal Code Act 1924* (Tas) Schedule 1 s 182; *Crimes Act 1958* (Vic) s 31; *Criminal Code Compilation Act 1913* (WA) s 222. The Tasmanian Criminal Code Schedule 1 s 52 notes that 'A person authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes such excess.'

- 94 Amanda Stuckley, *Australian Torts Law* (Butterworths, 3<sup>d</sup> ed, 2013) 132. Stuckley notes, however, that while the statement of elements can be reduced to these components, interpretation of each element is complex in law.
- 95 See, eg, Department of Education (WA), 'Duty of Care for Students' (2013) <http://www.det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/policies/duty-of-care-for-students>?cat-id=3457100, Department of Education and Early Childhood Development (Vic), 'Duty of Care' *School Policy & Advisory Guide* (2014) <http://www.education.vic.gov.au/school/principals/spag/safety/pages/dutyofcare.aspx>, Department of Education and Children's Services (SA), 'Duty of Care' (2007) <http://www.decd.sa.gov.au/docs/documents/1/DutyofCare.pdf>, Association of Independent Schools (advice from Charles Alexander Minter Ellison) 'The Duty of Care of Schools' (2000) <http://www.ais.sa.edu.au/resources/DutyofCareofSchools.pdf>, Department of Education & Training, 'Safe Schools are Effective Schools' (Vic), (2006) <https://www.eduweb.vic.gov.au/edulibrary/public/stuman/wellbeing/safeschoolsstrategy.pdf>
- 96 Stuckley, above n 94, 455.
- 97 Peter Williams, 'The Legal Liability of an Employer for Acts of Sexual Abuse Committed by an Employee: Recent Developments in Australian Law' (2003) 5 *Allied Health Professions* 41, 44.
- 98 *New South Wales v Lepore* [2003] HCA 4 [unpaginated].
- 99 This will not be explored further in this article but a full consideration of non-delegable duties and vicarious liability has been established in *Lepore v New South Wales & Anor* 'Lepore' [2001] NSWCA 112 and *New South Wales v Lepore* [2003] HCA 4. The teacher in *Lepore* did not participate in the appeals but had been convicted in 1989 in the NSW Court of Petty Sessions of four counts of assault (smacking young children on bare bottoms), fined \$300 in total, required to enter a good behaviour bond for two years for one count, and not to 'accept employment teaching children under sixth class'. At that trial 'the Magistrate expressed bemusement as to the offences charged not being more serious than common assault' [and] also recorded that the teacher had acted in contravention of Departmental policy for disciplining children and that none of his conduct had been brought to the attention of the headmistress' (*Lepore v New South Wales & Anor* [2001] NSWCA 112, [17]–[18]).
- 100 VEOHRC, above n 28, 108.
- 101 *Ibid*.
- 102 OPA, above n 38, 3.
- 103 *Disability Standards for Education 2005* (Cth) 8 1.
- 104 *Ibid* 8 5.
- 105 DEC (NSW), above n 67, 2 (emphasis added).
- 106 *Barry Johnson v State of NSW (Department of Education and Training)* [2006] NSWIRComm 109 (re a 15 year old boy in mainstream government high schools), *Maurice Michael O Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* [2003] NSWIRComm 74 (re physical and emotional injuries to teacher aides by student in school for specific purposes with mix of students with physical, intellectual and severe behavioural issues) (unsuccessful appeal) *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O Sullivan* [2005] NSWIRComm 198, *Rees v Lumen Christi Primary School* [2011] VSCA 361 (appeal by teacher aide working with aggressive students, suffered emotional and physical injury including incident where had to restrain a child (in 2003), and lack of support and implementation of appropriate processes by employer, awarded \$46,500 by jury for physical injury in original unreported hearing, appeal allowed on basis of misdirection by trial judge and retrial to occur).
- 107 *P Moran v Department of Education and Training* [2004] AIRC 503 (teacher alleging wrongful dismissal for failure to intervene in student altercation where student was physically and emotionally harmed, dismissal upheld. Defence of teacher was that he had been instructed not to touch students. Award of 14 weeks pay as compensation for procedural issues), *Moran v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 1311 (following previous allegations, Victorian Institute of Teaching cancelled teacher registration of Mr Moran in 2006, application for review led to order registration to be reinstated January 2008 following significant period of suspension on grounds lack of intervention, the tribunal determination was a serious lapse of judgment but not

- serious incompetence).
- 108 Hopkins, above n 60.
- 109 *Barry Johnson v State of NSW (Department of Education and Training)* [2006] NSWIRComm 109.
- 110 *Barry Johnson v State of New South Wales (Department of Education and Training)* [2006] NSWIRComm 275 [16].
- 111 *The State School Teachers' Union of WA (Incorporated) v The Director General, Department of Education* [2012] WAIRComm 127, [24]. The judgment identifies the lengthy processes used to determine that misconduct had occurred, with the impact on the children involved a relatively minor consideration.
- 112 Ibid [38].
- 113 Ibid [42].
- 114 Ibid [130]: 'What has been unfortunate about this entire incident in my opinion is that those who have carried out the investigation and inquiry is that (sic) they have summarised Ms Scott's actions to be 'relatively minor' and therefore subjected the penalty at the level of the reprimand. Taking into account the number of years of experience and the area in which she lives including the environment, her profession and the issues I have already raised in this decision I do wonder whether in fact this is the way in which matters of discipline ought be raised with the teaching profession.'
- 115 *Raymond Alan Eisenmenger and Lutheran Church of Australia, Queensland District* (No. B1662 of 2003) (2005) QIRC.
- 116 Including presentation of evidence two years after the event.
- 117 Ibid (unpaginated).
- 118 Ibid.
- 119 *Harvey v Department of Education and Training of New South Wales* [2009] NSWIRComm 1076.
- 120 On one occasion the teacher was alleged to have grabbed student by the shirt near the throat, pushing the student backwards, and making contact with the student's throat with knuckles: *ibid* [8]. Further complaints of inappropriate conversations with male and female students and preferred treatment of female students were made: *ibid* [11].
- 121 *Peter John Ayling v Director-General Department of Education and Training* [2009] WAIRComm 413. The teacher denied pushing the student against the wall and stated that the student had kicked at him and slapped at his left arm.
- 122 Ibid 'The Charges' [1].
- 123 Tony Moore, 'Minister Defends Decision to Stand Down "Slap" Teacher' *Brisbane Times* (Brisbane, February 15, 2008) <<http://www.brisbanetimes.com.au/articles/2008/02/15/1202760577925.html>>.
- 124 *Queensland College of Teachers v Mears* [2012] QCAT 327.
- 125 *New South Wales Teachers Federation (on behalf of Anthony Mossfield) and NSW Department of Education and Training* [2005] NSWIRComm 464. The teacher was reported to have punched the student in the stomach with a closed fist with sufficient force to wind him and make him cry, picked him up by clothing, putting arms around the student to restrain him from behind, and punching the student in the back of the head, requiring medical attention: *ibid* [4]. The focus was on the first and last matters. The student had a history of violence and self-harm and was reported to be throwing equipment at the teacher at the time and to have headbutted the teacher: *ibid* [17].
- 126 Ibid [27].
- 127 Ibid [29].
- 128 Ibid [40].
- 129 Ibid [39].
- 130 Ibid [44].
- 131 *New South Wales Department of Education and Training v New South Wales Teachers Federation (on behalf of Mossfield)* [2006] NSWIRComm 10.
- 132 *New South Wales Department of Education and Training v New South Wales Teachers Federation (on behalf of Mossfield)* [2006] NSWIRComm 210 [26].
- 133 See above n 22.
- 134 VEOHRC, above n 28, 107.

- 135 Ibid 113
- 136 Ibid 14
- 137 OPA, above n 38
- 138 VEOHRC, above n 28
- 139 VEOHRC, 'Held Back The Experiences of Students with Disabilities in Schools—September 2013 Update from DEECD' <<http://www.humanrightscommission.vic.gov.au/index.php/2012-10-18-01-21-18/our-projects-a-initiatives/disability-in-schools#september-2013-update-from-deecd>>
- 140 VEOHRC, 'Held Back The Experiences of Students with Disabilities in Schools—March 2014 Update from DEECD' <<http://www.humanrightscommission.vic.gov.au/index.php/2012-10-18-01-21-18/our-projects-a-imiatiives/disability-in-schools#march-2014-update-from-deecd>>
- 141 Risk management has been noted as critical, expanding policy approaches, for managing school bullying. David Eljiz 'Responding to Inappropriate Sexualised Behaviours in Students', Presentation to ANZELA Qld Chapter, Brisbane, 16 May 2014. Recent court findings in a bullying case noted that a school's response to bullying complaints proved to be *ad hoc*, rather than systematic with 'haphazard' record keeping and 'no clear record was maintained as to the course followed when complaints were received, what conclusions were drawn from any investigation conducted and importantly, what was done by way of response, if bullying or other inappropriate behaviour towards the student was uncovered'. *Oyston v St Patrick's College* [2011] NSWSC 269, [36]