

Submission:

Royal Commission into Victoria's Mental Health System

30 June 2019

Achieving Better Mental Health Outcomes for Students with Cognitive Disability

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I Executive Summary

- [1] This submission has been written as a reflection of the experiences of students with cognitive disabilities in the Victorian education environment, and the threats posed to their mental health. This submission is intended to respond to terms 1 and 4.2 as outlined in the Terms of Reference for The Royal Commission into Victoria's Mental Health System.
- [2] In focusing on the educational experiences of Victoria's students with cognitive disabilities we have identified five key areas of concern. In each of these areas we believe that the failings of education providers are directly contributing to the acquisition of mental illness and poor mental health amongst students with cognitive disabilities.
- [3] These five areas, and our recommendations to address the relevant issues, can be summarised as follows
- a. Bullying
 - i. **Recommendation 1** – Consistent and comprehensive data is collected by the Department of Education on the incidences of bullying involving students with disabilities
 - ii. **Recommendation 2** – Data is publicly available
 - iii. **Recommendation 3** - Specific programs to target bullying on the basis of disability
 - iv. **Recommendation 4** - Reform of the *Equal Opportunity Act 2010* to include protection from bullying as a reasonable adjustment
 - v. **Recommendation 5** - Reform of the *Disability Standards for Education* to include a higher requirement for the protection from bullying
 - vi. **Recommendation 6** – Ensure that the outstanding recommendations from the *Held Back* Report are immediately implemented

b. Use of restrictive practices

- i. **Recommendation 1** – Consistent and comprehensive data is collected by the DET on incidents involving the use of restraint or seclusion on students with cognitive disabilities
- ii. **Recommendation 2** – Data is publicly available
- iii. **Recommendation 3** – Department of Education and Training to provide immediate incident reports to parents/guardians following the use of restrictive practices
- iv. **Recommendation 4** – Regulation 25 of the *Education and Training Reform Regulations 2017* is repealed
- v. **Recommendation 5** – Increase the use of, and schools' access to, positive behaviour support programs

c. Reasonable adjustments and supports

- i. **Recommendation 1** – Consistent and comprehensive data is collected by the Department of Education and Training on the use and effectiveness of reasonable adjustments
- ii. **Recommendation 2** – That the Department of Education and Training and Victorian Registration & Qualifications Authority gather data concerning the reasons for the home schooling of Victorian students
- iii. **Recommendation 3** – Data is publicly available
- iv. **Recommendation 4** – That the decision-making process for reasonable adjustments is revised to emphasise the primacy of the needs of the student with a disability
- v. **Recommendation 5** – That the Department of Education and Training provides increased funding for schools to provide reasonable adjustments

d. Student support groups and individualised learning plans

- i. **Recommendation 1** – That the use of Student Support Groups and Individualised Learning Plans are mandated for all students with cognitive disabilities

- ii. **Recommendation 2** – Individualised Learning Plans specifically incorporate measurable goals
 - iii. **Recommendation 3** – Specialists play an active role in Student Support Groups and Individualised Learning Plans when this would benefit the student.
 - iv. **Recommendation 4** – That the Department of Education and Training implement a process to monitor schools to ensure the use and quality of Student Support Groups and Individualised Learning Plans
- e. Department of Education and Training culture
- i. **Recommendation 1** – That an independent investigation is made into the Department of Education and Training

II Introduction

- [4] The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including: information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with a disability, and to generally promote equality for those with a disability.
- [5] The Victorian Department of Education and Training (DET) is the single most common subject of complaints and requests for advice and assistance every year at the DDLS. The negative experiences of students in the education environment, (particularly those with cognitive disabilities) have a life-long impact on these young people. Poor mental health can create and exacerbate existing disabilities and prevents a student from getting the most out of their education. We submit that providing a safer, more inclusive, education experience assisting students with cognitive disabilities to develop to their individual capacity will not only improve their quality of life, through the reduction or mental illness, but potentially reduce the need for disability-related supports in the future.
- [6] In focusing on the experiences of students with cognitive disabilities it is important to initially note that disability is a diverse spectrum and the experience of different disabilities is not homogenous. The DDLS do not suggest that students with other disabilities do not have negative experiences at school. In fact, the plethora of reports produced over an extended period of time, both in Victoria and throughout Australia, confirms that this is the case.¹

¹ Victorian Equal Opportunity & Human Rights Commission, *Held back: The experiences of students with disabilities in Victorian schools* (Final Report, September 2012) <<https://www.humanrightscommission.vic.gov.au/our-resources-and-publications/reports/item/184-held-back-the-experiences-of-students-with-disabilities-in-victorian-schools-sep-2012>>; Victorian Equal Opportunity & Human Rights Commission, *Held back: The experiences of students with disabilities in Victorian schools: Analysis Paper* (Analysis Paper, July 2017) <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and->

Nor do we suggest that the issues we have identified exclusively apply to students with cognitive disabilities. For instance, social exclusion and bullying applies broadly to students with disabilities. Rather we seek to confine our submission to a group of disabilities where there is a strong link between the practices of education providers and a greater risk of mental illness in students.

- [7] We make this submission in response to terms 1 and 4.2 as outlined in the Terms of Reference. The submission is designed to provide insight into the experiences of students with cognitive disabilities, an already vulnerable group, in the Victorian education environment; looking at the actions of education providers in creating and exacerbating mental illness and poor mental health in these students, and to provide recommendations to ameliorate the harm currently caused.
- [8] This submission will begin by providing a broad overview of the connection between disability and mental illness, and poor mental health. In doing so, we acknowledge that the experience of disability is diverse and the factors that influence poor mental health in people with disabilities are broad and not confined to their experiences in the education environment.
- [9] It will then consider each of the five identified areas of concern: bullying, violence and abuse through the unnecessary use of restraint and seclusion, the failure to provide reasonable adjustments, the inconsistent use of

[publications/reports/item/1602-held-back-the-experiences-of-students-with-disabilities-in-victorian-schools-analysis-paper](#)>; UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, 118th meeting, UN Doc CRPD/C/AUS/1 (12 September 2013).; Australian Law Reform Commission, *Equality, Capacity, and Disability in Commonwealth Laws* (Discussion Paper No 81, May 2014); Victorian Equal Opportunity and Human Rights Commission, Submission to the Department of Education) *The Education and Training Reform Regulations Review* (2017) <<https://www.humanrightscommission.vic.gov.au/policy-submissions/item/1546-submission-to-the-education-and-training-reform-regulations-2017>>; Victorian Auditor-General's Office, *Programs for Students with Special Learning Needs* (Report, August 2012).; Department of Education and Training, *Review of the program for students with disabilities* (Report, April 2016) <<https://www.education.vic.gov.au/Documents/about/department/PSD-Review-Report.pdf>>; Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (Final Report, November 2015); PricewaterhouseCooper, *Disability expectations: Investing in a better life, a stronger Australia* (Report, November 2011); Education and Employment References Committee, 'Access to real learning: the impact of policy, funding and culture on students with disability' (Final report, Parliamentary Library, Parliament of Australia, January 2016).

Individual Learning Plans (ILPs) and Student Support Groups (SSGs), and the DET's persistent culture of inaction and unwillingness to take responsibility for their failings.

- [10] Within each of these topics, we will consider the connection between the issues of concern and the increased risk of mental illness or poor mental health. We will identify the existing legal obligations on education providers and why these are currently failing to protect students with cognitive disabilities. We will also outline the prevalence of these concerning issues and behaviours in Victorian schools. Finally, the submission will provide recommendations for Victoria and, in particular, the DET on how they could produce better mental health outcomes for these students.

III Key Definitions

Bullying

- [11] Bullying constitutes “*aggressive, intentional acts carried out, by a group or an individual, repeatedly and over time against a victim who cannot easily defend him or herself.*”² Our understanding of bullying includes both physical and verbal actions.

Cognitive Disabilities

- [12] We use the term ‘cognitive disabilities’ to broadly include all disabilities that encompass differences in an individual’s brain functions such as communication, social skills, attention, sensory comprehension, and reasoning ability. In the education environment this includes, but is not limited to, students who have:
- a. Autism Spectrum Disorder (now one person in 70 in Australia³);
 - b. Attention Deficit Hyperactivity Disorder;
 - c. Conduct Disorder;
 - d. Oppositional Defiant Disorder;

² Ersilia Menesini and Christina Salmivalli, ‘Bullying in schools: the state of knowledge and effective interventions’ (2017) 22.1 *Psychology, Health and Medicine* 240, 241.

³ Autism Spectrum Australia, *About Aspect* (Web page, 2019) <<https://www.autismspectrum.org.au/content/about-aspect>>.

- e. Language/Learning Difficulties;
- f. Intellectual disability.

Individualised Learning Plans

- [13] ILPs are plans which are intended to facilitate the implementation of a tailored approach to the education of students with disabilities that reflects their individual capacities and needs. The production of ILPs is the key task of the SSG. ILPs should identify:
- a. the student's strengths and weaknesses
 - b. achievable short and long term educational/social/learning objectives that address their strengths and weaknesses
 - c. specific strategies to achieve those objectives
 - d. process for monitoring and reviewing the progress of the student when applicable.
- [14] Key to the production of an effective ILP is the use of the 'SMART' principle of goal setting. This involves ensuring that the goal is:
- e. Specific
 - f. Measurable
 - g. Achievable
 - h. Realistic
 - i. Timebound
- [15] ILPs are variously known as 'Negotiated Education Plans', 'Educational Adjustment Programs', 'Individual Learning Plans', 'Learning Plans', 'Individual Education Plans', 'Personalised Intervention Programmes', and 'Supervisory Plans'.

Mental Illness

- [16] We acknowledge the definition of 'mental illness' used in the Terms of Reference. We have continued to use this term for consistency and understand 'mental illness' as referring to "*conditions that affect how an*

individual feels and thinks."⁴ However, we would like to stress that our understanding incorporates the serious potential consequences of having a mental illness including the acquisition of psychosocial disabilities, suicide ideation and other extremely serious outcomes.

- [17] The definition of mental illness provided in the Terms of Reference is broad and could be interpreted to cover a range of disabilities including cognitive disabilities. Our understanding of mental illness explicitly excludes those with cognitive or intellectual disabilities.

Reasonable adjustments

- [18] 'Reasonable adjustment' is a legal term which is important to the obligation of education providers to provide supports, adjustments, and accommodations for students with disabilities to ensure they can access the education they are entitled to.

Restrictive Practices

- [19] We use the term 'restrictive practices' to collectively refer to the use of restraints and seclusion.

A restraint involves the use of physical, mechanical or chemical means to prevent, restrict or subdue a person's movement for the primary purpose of influencing that person's behaviour.

- [20] Seclusion is the solitary confinement of a person in a room or area from which their exit is prevented by a barrier or another person. Seclusion includes a situation where a person is of the belief that they are not permitted to leave the area.

⁴ SANE, *What is mental illness* (Web page, 2019) <<https://www.sane.org/information-stories/facts-and-guides/what-is-mental-illness>>.

- [21] We believe it is important that the inappropriate or unnecessary use of restrictive practices is appreciated for what it is: assault and false imprisonment.

Students with Disabilities

- [22] In this submission we use the term 'students with disabilities' to refer to young people with disabilities between the ages of 5-18 and who would be expected to attend either primary or secondary school. We acknowledge that some of the issues discussed in this submission, for example bullying and the failure to provide reasonable adjustments, may affect people with disabilities in older age groups including those attending university or in the workforce. However, considering those groups in detail is beyond the scope of the current submission.

Student Support Group (SSG)

- [23] SSGs are groups designed to facilitate productive and cooperative dialogue between various people about ensuring the best interests of the student are met. The membership of SSGs is required to include the principal of the school, the teacher of the student, and the parent/guardian of the student. The membership of SSGs may include an advocate, if the parent/guardian would like one, and the student. The SSG may consider information provided by specialists or medical/care experts but they cannot be a member.
- [24] The primary role of the SSG is to facilitate the production of an ILP and to ensure that this is monitored and reviewed when appropriate.

IV Disability and the Link to Mental Illness and Poor Mental Health

[25] To provide some general context to our submission it is worth briefly providing some insight into the connection between disability, mental illness and poor mental health. Research in Australia and abroad has indicated that there is a strong correlation between disability and the presence of mental illness. For example, a 2012 UK study found that 30% of those with long term physical conditions also have mental health concerns and that 46% of people with mental health concerns have a physical disability.⁵ Similar results have been identified in Australia. In 2009, the Australian Bureau of Statistics (ABS) found that 59% of those with a mental illness also have a physical disability.⁶ In a 2010 study, the Australian Institute of Health and Welfare found similar a similar correlation except with those who have intellectual and sensory disabilities.⁷ Although these studies were conducted almost a decade ago, less comprehensive but more recent research suggests that the picture has not changed. A University of Melbourne study of 8000 men found that those

⁵ Chris Naylor et al, 'Long-term conditions and mental health: the cost of co-morbidities (Research Report, The King's Fund and Centre for Mental health, February 2012), 5.

⁶ Brian Pink, 'Australian Social Trends: March 2009' (Research Paper, Australian Bureau of Statistics, March 2009), 15.

⁷ 'Health of Australians with disability: health status and risk factors' (Research Report, Australian Institute of Health and Welfare, November 2010), 6.

with a disability were more than twice as likely to have suicidal thoughts.⁸ This strongly suggests that there is an ongoing mental health crisis amongst people with disabilities in Victoria.

[26] There has been little consensus on the cause behind the increased prevalence of mental illnesses and poor mental health among people with disabilities. Some have suggested that it is a consequence of genetic or biological differences.⁹ However, as with other members of society, environmental and social factors play a significant role in the acquisition or exacerbation of mental illness.¹⁰ These factors include family life, employment, education, personal relationships and support networks, and general social inclusion/isolation. The reason that people with disabilities may be more vulnerable to acquiring mental illnesses is that they often have poorer outcomes in these environmental and social areas.

[27] For our submission we have focused on the impact of the education system on the mental health of students with cognitive disabilities for the following reasons. Firstly, the acquisition or exacerbation of mental illness and poor mental health during the formative years of young people's lives has the potential to dramatically reduce their quality of life in later years. Secondly, mental illness and poor mental health can impede children in developing to their full capacity. Thirdly, mental illness and poor mental health can exacerbate existing disabilities or create new disabilities. This causes unnecessary personal harm and may create unnecessary support or care needs in later life creating further costs for the state/Commonwealth. Because of these reasons we believe it is imperative that action is taken to improve the educational experience of students with cognitive disabilities and thus work to mitigate the threats to their mental health.

⁸ Allison Milner et al. 'The relationship between disability and suicide: prospective evidence from the Ten to Men cohort' (2018) 24, *Journal of Public Health*, 4.

⁹ Julie McMillan and Jane Jarvis, 'Mental Health and Students with Disabilities: A Review of Literature' (2013) 23.2 *Journal of Psychologists and Counsellors in Schools*, 237.

¹⁰ Ed Carson and Lorraine Kerr, *Australian Social Policy and the Human Services* (Cambridge University Press, 2017), 21.

V Areas of Concern

A Bullying

- [28] Bullying constitutes “*aggressive, intentional acts carried out, by a group or an individual, repeatedly and over time against a victim who cannot easily defend him or herself.*”¹¹ Bullying includes overtly aggressive acts such as physical assault, verbal and physical harassment, and intimidation. However, it is important to appreciate it also incorporates less overt acts such as belittling, social rejection and isolation, and relational/reputational damage. Bullying can occur both online and offline.
- [29] In the education environment, it is submitted that in addition to the strict definition of bullying, students who have consistently negative experiences at school, for months and years, sometimes daily, may be experiencing a different kind of bullying.
- [30] The rationale is as follows. When students with cognitive disabilities are clearly in need of specific supports, those supports are not provided, and the outcome for the student is distressing, to allow that situation to prevail long term may not be able to be described as “aggressive”, but certainly could be described as acts (or omissions) that are “intentional”.
- [31] Take for example a child with Oppositional Defiant Disorder who rather than receiving evidence-based supports, receives repeated suspensions, such suspensions being known to worsen behaviours and traumatise.¹² It is not conceivable that schools are unaware of the long-standing research indicating the consequences to the child for this approach. Therefore if an approach that is known to be harmful is consistently applied, one may ask how different this is to traditional peer-to-peer bullying.
- [32] The heightened risk of being bullied is, in the current community and education environment, an inherent aspect of having a cognitive disability. It is well-researched and accepted that students with cognitive disabilities are far

¹¹ Bullying in schools: the state of knowledge and effective interventions (above no 2), 241.

¹² <https://www.sciencedirect.com/science/article/abs/pii/S1054139X06001947>

more likely to suffer bullying.¹³ It is such a prevalent problem that in reality it is an expected life experience for these students. It is less well-researched why students with cognitive disabilities are particularly vulnerable to being targeted. The likely reason is that they, due to the inherent nature of their disability, simply present as “*easy targets*.”¹⁴ For instance, Nick Dubin, suggests that the low tolerance of frustration, problems with reading social cues, odd use of language, monotropism, gullibility and poor academic results makes young people with cognitive disabilities stand out from their peers as unusual and thus vulnerable.¹⁵

[33] This section of the submission will begin by outlining the well-accepted causal relationship between bullying and mental illness and poor mental health. It will then consider the existing legal framework around the duty of education providers to protect students with cognitive disabilities, ultimately suggesting that education providers are obligated and expected to protect their students from bullying. It will then, looking at the limited evidence available, suggest that Victoria’s education providers are currently failing to protect students with cognitive disabilities from bullying. Finally, it will outline our recommendations for how this situation could be remedied.

1 *The Connection Between Bullying and Mental Illness and Poor Mental Health*

[34] Research has consistently pointed to the strong connection between bullying and mental illness. In a 2010 report produced by the United States Department of Education, it was found that bullying led to “*lowered academic achievement and aspirations...Increased anxiety... Loss of self-esteem and*

¹³ Rebekah Heinrichs *Perfect Targets: Asperger Syndrome and Bullying: Practical solutions for surviving the social world* (AAPC Publishing 2003), 7; Mary Konstantareas, ‘Anxiety and Depression in Children and adolescents with Asperger Syndrome in Kevin Stoddart (ed.), *Children, Youth and Adults with Asperger Syndrome: Integrating Multiple Perspectives* (Jessica Kingsley Publishing 2005) 51; Liza Little, ‘Middle-class mothers’ perceptions of peer and sibling victimization among children with Asperger Syndrome and nonverbal learning disorders’ (2002) 25(1) *Issues Comprehensive Paediatric Nursing* 47, 50; Melissa Sreckovic, Nelson Brunsting and Harriet Able ‘Victimization of students with autism spectrum disorder: A review of prevalence and risk factors’ (2014) 8(9) *Research in Autism Spectrum Disorders*, 1155, 1169; Robert Kowalski and Cristin Fedina ‘Cyber bullying in ADHD and Asperger Syndrome populations’ (2011) 5(3) *Research in Autism Spectrum Disorders*, 1201, 1205.

¹⁴ Nick Dubin, *Asperger Syndrome and Bullying: Strategies and Solutions* (Jessica Kingsley Publishers, 2007) 30.

¹⁵ *Ibid*, 30-42.

confidence... depression and post-traumatic stress...self-harm and suicidal thinking... [and] feelings of alienation in the school environment, such as fear of other children."¹⁶ Importantly, many of these consequences have long-lasting effects on the bullied student and have a continuing effect on their quality of life into adulthood.¹⁷ It is important to note that this report was produced to provide general information on the nature and impact of bullying not specifically focusing on students with cognitive disabilities. While this does mean that it is of reduced value when considering the impact of bullying on students with cognitive disabilities there is no strong reason to believe that the consequences for these students would be remarkably different.

- [35] A 2019 study on the experiences of Australian students with Autism Spectrum Disorder seems to confirm the similar impact of bullying on those with cognitive disabilities.¹⁸ In particular it was found that the bullying created or exacerbated feelings of anxiety in the student. This in turn leads to reduced social participation and increased periods of, and desire for, isolation. Of particular interest for students with cognitive disabilities is that this behaviour is often among the reasons that these students are targeted and bullied in the first place. Thus, it creates an escalating situation where the bullied student becomes increasingly vulnerable to and the victim of bullying. Ultimately, the student involved no longer wanted to go to school or similar social situations which affected their education and quality of life in the short and long term.
- [36] Another potentially dramatic consequence of bullying is that it can prevent the victim in developing to their full capacity. For students without disabilities this can be seen in reduced academic results and a failure to reach the student's full academic ability.¹⁹ This is important as it significantly impacts the future of the student involved. While the reduced academic performance is equally

¹⁶ U.S. Department of Education 'Dear Colleague Letter Harassment and Bullying (October 26, 2010) Background, Summary, and Fast Facts' *Office for Civil Rights: Reading Room* (Discussion Paper 25th September 2018) <<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.html>>.

¹⁷ Judith Wiener and Meghan Mak 'Peer Victimization in children with Attention-Deficit/Hyperactivity Disorder' (2008) 46(2) *Psychology in the Schools*, 116, 116-117.

¹⁸ Jill Ashburner et al. 'How are students on the autism spectrum affected by bullying? Perspectives of students and parents' (2018) 19(1) *Journal of Research in Special Educational Needs*, 27, 28.

¹⁹ Dieter Wolke and Suzet Tanya Lereya 'Long-term effects of bullying' (2015) 100(9) *Archives of Disease in Childhood*, 879, 881.

applicable for students with cognitive disabilities, a failure to develop and learn as expected can have a potentially wider effect for that cohort. For students with cognitive disabilities bullying can exacerbate their existing impairments. This can result in higher support needs for the student than would otherwise be required and thus increased costs for the state/Commonwealth.

- [37] A further layer in relation to the bullying of students with cognitive disabilities is when the bully is a school staff member. School staff contribute to bullying in the following situations.
- a. When staff continuously ignore reports of bullying from students, they could be seen to be complicit in such bullying. When bullying occurs due to, for example, a child having Autism Spectrum Disorder, on the basis of their difference, seemingly odd mannerisms, or what is seen to be “annoying” behaviours, staff who have the same prejudices can downplay or ignore the bullying due to a subjective belief that such bullying is justifiable. Their omissions in addressing bullying could be seen to encourage and maintains bullying behaviours in schools.
 - b. Constant punitive responses to behaviours that cannot be separated from a child’s disability begin to replicate general bullying as the child cannot escape the attention or the consequence. For example a child with Attention Deficit Hyperactivity Disorder who is constantly berated for calling out in class, not staying in their seat and other hyperactive acts is likely to be more traumatised at such conduct coming from teachers who are in a position of power, than they are through the conduct of their peers.

- [38] The inadequate funding provided to Victorian schools to support students with disabilities, focused on later in this submission, results in a situation where at times the very enrolment of students of disabilities causes staff anxiety and stress, given their knowledge that they will not be receiving the support they need to provide educational access to that cohort. Such anxieties can be self-fulfilling, and result in staff acting disproportionately in relation to students with

cognitive disabilities, such as the calling of police to address behaviours of concern, as opposed to providing intensive expert behavioural support. Another disproportionate response is to exclude the child with the cognitive disability from excursions and camps, in anticipation of difficulties. After repeated treatment of this nature, it is not difficult to see how students can develop trauma related to consistent negative experiences from teachers, as well as from students.

2 Current Legal Framework

[39] It is important to establish that Victorian education providers do owe a legal obligation to students with cognitive disabilities to provide them an environment free from bullying. This obligation is shaped and informed by a range of both domestic and international legal documents which are explored below.

(a) Domestic

(i) Teachers' Duty of Care

[40] Although not codified in legislation, it is well-accepted in Australian negligence law that teachers and schools owe a duty of care to protect their students from harm.²⁰ This is a non-delegable duty that requires them to take “*reasonable care to avoid harm being suffered*” but is not a guarantee that no harm will be suffered.²¹ It is worth noting that the nature of the duty and what it requires is determined by the specific relationship between the student and the teacher or school. Importantly, there have been a number of cases around Australia that have recognised that this duty of care can extend to protecting students from bullying.²² The DET recognises that this duty does extend to “*implementation of strategies to prevent bullying*” and the “*provision of suitable and safe premises*”.²³

²⁰ *Geyer v Downs* [1977] 138 CLR 91.

²¹ *Richards v Victoria* (1969) VR 136.

²² *Trustees of Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) NSWSC 346; *Oyston v St Patrick's College* [2013] NSWCA 135.

²³ Department of Education and Training, *School Policy: Duty of Care* (Web Page, 31 January 2019) <<https://www.education.vic.gov.au/school/principals/spag/safety/Pages/dutyofcare.aspx>>.

- [41] Traditionally, this duty of care has focused on protecting a student's physical bodily integrity. However, beginning in the early 2000s Australian courts and legislatures have progressively opened themselves to considering psychiatric harm as a legitimate and remediable form of loss.²⁴ Importantly, this appears to widen the duty to protecting students from both the physical and psychiatric harm suffered when experiencing bullying in the school environment.
- [42] Theoretically, the duty of care owed to students by schools and teachers should extend to all harm suffered from bullying. If this were the case it would offer students with cognitive disabilities a route to holding education providers to account if the duty of care was breached. However, there are practical issues that prevent this from occurring. Particularly, for students with cognitive disabilities it is difficult to separate the 'pre-existing condition' from the exacerbation as the law requires.²⁵ In addition, for those students with cognitive disabilities that affect their ability to communicate it can be difficult to determine the nature of the harm. These issues have been highlighted before in law reform reports responding to access issues in the justice system, however, no effective responses were forthcoming from those submissions.²⁶ As such, while the duty of care likely exists it can be difficult to enforce practically for students with cognitive disabilities.

(ii) *Disability Discrimination Act 1992*

- [43] As a piece of federal legislation the *Disability Discrimination Act 1992 (DDA)* is binding on the Victorian DET and Victoria's schools and teachers.²⁷ Relevantly for considering the issue of bullying, under the *DDA* it is unlawful to

²⁴ *Tame v New South Wales* (2002) 211 CLR 317; *Wrongs and other acts (law of negligence) Bill 2003* (Vic).

²⁵ Comcare, *Explanation of Permanent Impairment Provisions* (Web Page, 20 March 2014) <https://www.comcare.gov.au/_data/assets/pdf_file/0003/73722/Explanation_of_Permanent_Impairment_Provisions_PDF_66.5_KB.pdf>; Health, Education, Labor, and Pensions Committee, United States Senate, *Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases* (Final Report, February 12, 2014) 26-27.

²⁶ Office of Public Prosecutions Victoria, Submission No IDAJ20 to Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers* (9th September 2011); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 123, August 2014).

²⁷ *Disability Discrimination Act 1992* (Cth).

contravene a disability standard.²⁸ The *Disability Standards for Education* includes an obligation to implement strategies to prevent harassment which is framed in such a way as to include bullying.²⁹ The problem with *The Disability Standards for Education* is that this is a low requirement and fails in practice to provide a substantive protection for students with disabilities.

- [44] It is also conceivable that the requirement for reasonable adjustments to be made for students with disabilities in the *DDA* could be used to require schools to put in place measures to protect students vulnerable to bullying.³⁰ However, this understanding of the *DDA* and the protections it provides to students with disabilities was rejected by the Federal Court in 2018.³¹

(iii) *Equal Opportunity Act 2010*

- [45] The *Equal Opportunity Act 2010 (EOA)* is binding on the DET and Victoria's schools and teachers.³² Practically, it operates in a similar way to the *DDA*. As such, it also requires education providers to make adjustments for students with disabilities. However, the similarities in intention and framework between the *EOA* and *DDA* suggest that the *EOA* would likely be interpreted similarly. If this was the case the decision in *Varasdi v State of Victoria* suggests the *EOA* would also not provide a route for students with disabilities to force schools to provide safe environments and to protect them from bullying.

(iv) *Victorian Charter of Human Rights and Responsibilities 2006*

- [46] Under the *Victorian Charter of Human Rights and Responsibilities 2006 (the Charter)* public authorities are required to act in a way that is compatible with the human rights codified in *the Charter* or must at least give proper consideration to them.³³ Importantly in this context a recognised human right under *the Charter* is protection of families and children which provides that

²⁸ *Ibid* s 32.

²⁹ Attorney- General, *The Disability Standards for Education* (2005), 8.1(a), 8.3(1).

³⁰ *Ibid* 5(2).

³¹ *Varasdi v State of Victoria* [2018] FCA 1655.

³² *The Equal Opportunity Act 2010* (Vic).

³³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.

every child has the right to such protection that is in their best interests.³⁴ This would seem to suggest that education providers need to create an education environment that appropriately protects students from bullying. However, *the Charter* provides no standalone right to a remedy and as such is of limited practical use for enforcement.

(v) *Department of Education Policies*

- [47] Although not strictly a legally binding obligation it is worth considering the DET's current bullying policy as an insight into what it expects and requires of Victorian schools. The DET's 'School Policy: Bullying' only requires schools to have "a statement about bullying and cyberbullying behaviours in the *Rights and Responsibilities* section of their *Student Engagement Policy*."³⁵ The policy also provides a range of general recommendations of what schools should consider putting in place.³⁶ It is important to appreciate these are recommendations and not requirements, and therefore the DET's bullying policy is not difficult to comply with and provides limited protection for students.
- [48] The DET further provides under its 'Bully Stoppers' program that schools "should" develop a bullying prevention policy.³⁷ While this program provides clearer guidance on what an adequate prevention program should include it is not a mandatory requirement of Victorian education providers to implement such a policy nor is there a requirement that the policy implemented complies with the 'Bully Stoppers' program.
- [49] It is worth noting that both these policies have been explicitly criticised as being inadequate and ineffective in protecting students with disabilities.³⁸ In *Held Back*, the Victorian Equal Opportunity and Human Rights Commission's 2012 report, it was expressly recommended that the DET should "implement

³⁴ *Ibid*, s17.

³⁵ Department of Education and Training, *School Policy: Bullying* (Web Page, 24 January 2019) <<https://www.education.vic.gov.au/school/principals/spag/safety/Pages/bullying.aspx>>.

³⁶ *Ibid*.

³⁷ Department of Education and Training, *Bully Stoppers: Bullying Prevention Policy* (Web Page, 28 November 2018) <<https://www.education.vic.gov.au/about/programs/bullystoppers/Pages/prinprevent.aspx>>.

³⁸ *Held back* (above no 1), 79-80; *Held back: Analysis Paper* (Above no 1) 8.

specialised programs to target and address bullying on the basis of disability” if it wanted to provide an inclusive and bully-free environment for students with disabilities.³⁹

- [50] As such, neither of these policies suggest that the DET has put in place procedures and processes that adequately reflect their obligation to provide a safe and bully-free environment.

(b) International Legal Sources

- [51] It is important to note initially that while international conventions are useful in understanding the internationally recognised standards and human rights that Australia has agreed to they are not in themselves binding obligations domestically within Australia.

- [52] The international conventions below are particularly important to the *DDA* as s12(8) explicitly requires that the *DDA* be applied so that it gives effect to provisions under international conventions Australia is a signatory to.⁴⁰

(i) Convention on the Rights of Persons with Disabilities

- [53] Australia ratified the *Convention on the Rights of Persons with Disabilities (CRPD)* in December of 2008.⁴¹ The *CRPD* is the peak international agreement detailing the intention to treat persons with disabilities as full members of society and outlines specific human rights that persons with disabilities are entitled to.

- [54] As noted, while Australia has signed and ratified the *CRPD* unless the provisions are expressly codified in Australian legislation, the *CRPD* is an influential document rather than a document containing binding obligations.

³⁹ *Held back* (above no 1), 80.

⁴⁰ *Disability Discrimination Act* (Above no 26), s 12(8).

⁴¹ *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, A/RES/61/106) (entered into force 3 May 2008).

With this in mind there are two articles within the *CRPD* that are important when considering a school's obligation to provide an inclusive and bully-free environment for students with disabilities.

- [55] Firstly, Article 7 provides that “*States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*”⁴² Importantly, the Committee for the Convention on the Rights of Persons with Disabilities has frequently interpreted this as including a responsibility to protect students with disabilities from bullying so as to allow them to access education on an equal basis as other students.⁴³ In Australia's initial report on compliance with the *CRPD*, the Committee expressly criticised “*that there is no comprehensive national policy framework for children, including children with disabilities, that articulates how the rights of children should be implemented, monitored and promoted.*”⁴⁴
- [56] Secondly, Article 24 provides that “*States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning.*”⁴⁵ The Committee, in General Comment 4, has provided guidance on what exactly this article is designed to protect. In particular they have interpreted “*inclusive education*” as including a “*respect for and value of diversity*” and thus an obligation to provide “*effective measures to prevent abuse and bullying*”.⁴⁶

⁴² Ibid, Art 7.

⁴³ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland*, 356th meeting, UN Doc CRPD/C/GBR/CO/1 (3 October 2017); UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Denmark*, 169th meeting, UN Doc CRPD/C/DNK/CO/1 (30 October 2014).

⁴⁴ *Concluding observations on the initial report of Australia* (above no 1)

⁴⁵ *Convention on the Rights of Persons with Disabilities* (above no 40), art 24(1).

⁴⁶ UN Committee on the Rights of Persons with Disabilities, *General Comment No 4: Right to Inclusive Education*, UN Doc CRPD/C/GC/4 (2 September 2016), para 11.

(ii) *Convention on Rights of the Child*

- [57] Australia ratified the *Convention on Rights of the Child (CRC)* in December of 1990.⁴⁷ The *CRC* is the peak international agreement detailing and outlining specific human rights applicable to children.
- [58] For the same reasons as the *CRPD*, the *CRC* is an influential document rather than containing binding obligations. With this in mind there are three articles that are important.
- [59] Firstly, Articles 28 and 29 enshrine the right of children to education.⁴⁸ Importantly, in the Committee's first General Comment, they stated that "a school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of Article 29 (1)."⁴⁹
- [60] Secondly, Article 23 provides that "*States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*"⁵⁰ Once again, the Committee has interpreted this to include a responsibility on State Parties to ensure they "*take all measures to combat school bullying and pay particular attention to children with disabilities providing them with the necessary protection while maintaining their inclusion into the mainstream education system.*"⁵¹

2 *Failure to Protect Students with Disabilities from Bullying*

- [61] As the above discussion indicates it is indisputable that there is an obligation on Victorian education providers to ensure that they provide an inclusive and

⁴⁷ *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁴⁸ *Ibid*, Art 28, Art 29.

⁴⁹ UN Committee on the Rights of the Child, *General Comment No 1: Article 29(1), The aims of education*, 26th session, UN Doc CRC/GC/2001/1 (17 April 2001).

⁵⁰ *Convention on the Rights of the Child* (above no 46), Art 23.

⁵¹ UN Committee on the Rights of the Child, *General Comment No 9: The rights of children with disabilities*, 43rd Session, UN Doc CRC/C/GC/9 (27 February 2007), para 43.

bully-free environment. Looking at the current situation in Victoria it is clear, that education providers are not complying with this obligation.

- [62] When considering whether there is a current problem of bullying on the basis of disability in Victoria's education system, it is initially worth noting that there is a lack of Victoria-specific data. While there is a large repository of international research and data on the prevalence of bullying of students with cognitive disabilities in primary and secondary education settings, in Victoria statistics rely upon ad-hoc research by academics or advocacy groups.
- [63] In an annual survey of Australian students with disabilities and their families conducted in 2017, Children and Young People with Disability Australia (CYDA) found that 55% of students with a disability had experienced bullying in the last 12 months.⁵² This is a marginal difference from the statistics produced by the *Held Back* report in 2012.⁵³ This suggests very little has changed between 2012 and 2017 and that students with disabilities are still particularly prone to being the victims of bullying. Although this did not distinguish the results on the basis of type of disability it does provide a snapshot of the situation in relation to disability in general.
- [64] Even if incidents of bullying are reported by students with disabilities or their families, there is no guarantee that schools will act promptly and appropriately to prevent further incidents. Our anecdotal knowledge of the failure of schools to respond to reports of bullying is confirmed by the *Held Back* Report, where it was found that 75 per cent of parents were unhappy with their school's response to a report of bullying because there was no response or it was inadequate.⁵⁴
- [65] There is no clear Australian data on the prevalence of bullying amongst students with cognitive disabilities. However, research has been conducted in

⁵² Children and Young People with Disability Australia, *CYDA Education Survey 2017* (Survey Results, 2018, <<https://www.cyda.org.au/education-survey-results-2017>>.

⁵³ *Held Back* (above no 1), 71-72.

⁵⁴ *Ibid*, 77.

the United Kingdom and the United States where results have suggested that children with cognitive disabilities are far more vulnerable to bullying than other forms of disability. In a range of studies on Autism Spectrum Disorder it was consistently found that more than 60% of children with Autism were regularly bullied.⁵⁵ A similar result was found in relation to cyberbullying of students with Attention Deficit Hyperactivity Disorder and Asperger Syndrome.⁵⁶ Both the UK and the United States have broadly similar social values and legal frameworks with Australia and as such it is likely that the prevalence of bullying of students with cognitive disabilities in those nations would also be found in Victoria.

3 Recommendations

Recommendation 1 – Consistent and comprehensive data is collected by the Department of Education on the incidences of bullying involving students with disabilities

- [66] We recommend that the DET be required to implement a data collection process that would allow them to consistently, comprehensively, and regularly collect data on the incidences of bullying involving students with disabilities. This is important because accurate and representative data is often the starting point for truly understanding the nature of a problem.⁵⁷
- [67] Better data on the issue will allow us to better understand in particular which groups of students with disabilities are particular vulnerable and at what ages they are most vulnerable. This would then allow for the creation of more effective and targeted preventative measures.
- [68] One option for doing this would be to modify the information collected when reporting incidents of bullying under the ‘Bully Stopper’s program to include a way to identify it as being associated with a student with disabilities. The

⁵⁵ Victimization of students with autism spectrum disorder: A review of prevalence and risk factors (above no 12), 1169.

⁵⁶ Cyber bullying in ADHD and Asperger Syndrome populations (above no 12), 1205.

⁵⁷ UNICEF, *Data for Children* (Strategic Framework, April 2017), 1.

existing ‘Bully Stoppers’ program emphasizes the importance of useful data but neither makes its collection mandatory nor recognizes that specific data on students with disabilities is necessary.

Recommendation 2 – This data is publicly available

- [1] We recommend that as far as practically possible that this data should be publicly available. While it is important that data is collected by the DET to allow for the production of appropriate and targeted preventative methods, without this information being publicly available it is difficult to ensure accountability. By ensuring this data is open and publicly available, it will help ensure that the DET takes meaningful steps to reduce the prevalence of this issue.⁵⁸

Recommendation 3 - Specific programs to target bullying on the basis of disability

- [2] We recommend that the DET require schools to implement specific programs to target bullying involving students with disabilities.
- [3] Currently, the Australian Government in conjunction with the various State and Territory Governments have implemented a program to tackle the issue of bullying: ‘Bullying. No Way!’. However, this is a program designed to tackle general issues of bullying and previous recommendations and reports indicate there needs to be a targeted response to bullying involving students with disabilities.⁵⁹
- [4] As established above, students with disabilities, particular those with cognitive disabilities, are especially vulnerable to being bullied. This dramatically affects their mental health both in the short term and the long term. This more than justifies putting in place a program designed specifically to tackle the issue and protect these students.

⁵⁸ Organisation for Economic Co-operation and Development, ‘Open Government Data’, *Digital government* (Information document, 2019) <<http://www.oecd.org/gov/digital-government/open-government-data.htm>>.

⁵⁹ *Held Back*, 80 (above no 1); *Held Back: Analysis Paper*, 8 (above no 1);

- [5] This program should both target bullying and establish a more inclusive school environment particular by raising awareness around disability with an approach aimed at the whole school.⁶⁰ It is crucial to appreciate that a ‘whole school’ approach requires not just educating and setting standards for students but also for faculty. This is necessary for faculty not only so that they can recognize bullying on the basis of disability when it occurs, but also to ensure they do not participate intentionally or unintentionally.⁶¹
- [6] One potential option would be following the model provided by the ‘Safe Schools’ initiative which aims to provide a more inclusive and welcoming environment for lesbian, gay, bisexual, transgender and intersex students.⁶² A similar program could be designed and implemented for students with disabilities.

Recommendation 4 - Reform of the *Equal Opportunity Act 2010* to include protection from bullying as a reasonable adjustment

- [7] We recommend that the *EOA* is reformed to more expressly include the protection from bullying as a reasonable adjustment. This would reflect the fact that it is, in today’s current climate, an inherent fact of their disability that students with disabilities are more vulnerable to bullying.
- [8] This is needed as currently there is no effective legal route for redress or enforcement for students with disabilities whose school has failed to provide them with a safe learning environment. Providing a legal route to redress is important as otherwise the obligation on schools to provide a safe environment for their students, as recognised under their duty of care, is effectively meaningless.

⁶⁰ *Asperger Syndrome and Bullying: Strategies and Solutions* (above no 13), 127-128.

⁶¹ *Ibid*, 131-134.

⁶² Department of Education and Training, *Department program: Safe Schools* (Policy Document, 8th October 2018) <<https://www.education.vic.gov.au/about/programs/Pages/safeschools.aspx?Redirect=2#link92>>.

[9] Ideally, this would be done by inserting two new provisions into the *EOA*. Firstly, inserting a section below s40 of the *EOA* that recognises the obligation on education providers to implement measures to protect students with disabilities they know to be vulnerable to bullying. This provision could be framed as follows:

'41 Educational Authority must make reasonable adjustments to prevent harassment of person with impairment

- 1) An Educational Authority must provide reasonable strategies or adjustments to prevent harassment of a person with a disability after the Educational Authority has become aware of the harassment.
- 2) For the purposes of (1) harassment is defined as an action taken in relation to the person's disability that is reasonably likely, in all the circumstances, to humiliate, offend, intimidate or distress the person

Inserting such a change would expressly recognise that students with disabilities are inherently more vulnerable to being bullied and that implementing strategies to prevent such bullying is a reasonable and necessary adjustment for these students to participate in the education environment.

[10] Secondly, inserting a new offence provision under Part 12 of the *EOA*. This provision could be framed as follows:

'187 Offence of failure by Educational Authority to provide reasonable adjustment to prevent harassment

- 1) An Educational Authority must not fail to provide reasonable strategies or adjustments to prevent harassment of a person with a disability after the Educational Authority has become aware of the harassment.

- 2) For the purposes of (1) harassment is defined as an action taken in relation to the person's disability that is reasonably likely, in all the circumstances, to humiliate, offend, intimidate or distress the person
- Penalty: 60 penalty units, in the case of a natural person;
- 300 penalty units, in the case of a body corporate.

Implementing such an offence provision would recognise the societal recognition of the danger and prevalence of bullying on the basis of disability. It would also work to ensure education providers understand that society currently recognises that education providers are failing to provide this protection for students with disabilities and such protection is expected.

Recommendation 5 - Reform of the *Disability Standards for Education* to include a higher requirement for the protection from bullying

- [11] We recommend that the *Disability Standards for Education* are reformed to more expressly recognise the obligation on education providers to protect students from bullying and to modify the requirement to make it harder for education providers to establish compliance.
- [12] Compliance with the *Disability Standards for Education* is a complete defence to a claim under the *Disability Discrimination Act 1992*. While conceptually this is a workable system for it provide any practical protection requires stringent standards being in place.
- [13] The current iteration of the *Disability Standards for Education* do not impose high enough requirements to be an effective tool in protecting students. While bullying fits under the definition of harassment and vindication under part 8.1,

the standards in part 8.3 do not set a high enough bar for compliance.⁶³

[14] Part 8.3(1) requires strategies to be put in place by education providers.⁶⁴

There is no requirement for the strategies to be at all effective in reducing bullying of students with disabilities. In practice this means schools who implement a general strategy against bullying will receive protection under the *DDA* despite bullying on the basis of disability demonstrably requiring a specifically targeted program. This protection will apply regardless of whether the strategies are effective, and regardless of whether students are actually protected from bullying

[15] To resolve this issue we recommend that Part 8 of the *Disability Standards of Education* is reformed as follows:

Part 8.3 – Standards for eliminating harassment and victimisation

(1) An education provider must develop and implement strategies and programs specifically designed to prevent harassment or victimisation of a student with a disability, or a student who has an associate with a disability, in relation to the disability.

Recommendation 6 – Ensure that the outstanding recommendations from the *Held Back Report* are immediately implemented

[16] We recommend that the still outstanding recommendations from the *Held Back Report* are implemented at the soonest possible opportunity.

[17] The *Held Back Report* provided an in-depth analysis of the challenges facing Victorian students with disabilities and how education providers are failing to adequately support and nurture them to allow them to develop to their full capacities.

⁶³ *The Disability Standards for Education* (above no 28), 8.3.

⁶⁴ *Ibid*, 8.3(1).

- [18] At the last review of the *Held Back* report, assessing the improvements and continuing problems for Victorian students with disabilities, it was noted that a number of recommendations had yet to be implemented.⁶⁵ As such, progress in a number of areas of student life and the education system remain slow.
- [19] Implementing the remaining recommendations is crucial to improving how Victoria provides education to students with disabilities in a way that is safe and allows them to develop to their full potential.

⁶⁵ *Held Back: Analysis Paper* (above no 1), 2.

B Use of Restrictive Practices

[20] Broadly speaking, restrictive practices are used as a tool to respond to 'behaviours of concern' when exhibited by people with disabilities.⁶⁶ 'Behaviours of concern' are behaviours which are perceived as posing a threat to either the individual or those interacting with them.⁶⁷ However, evidence suggests that restrictive practices are being used outside this narrow situation and instead as a "*means of coercion, discipline, convenience, or retaliation.*"⁶⁸ This is particularly problematic given that there is no evidence that restraint or seclusion or effective in responding to behaviours of concern. Of greater concern is that restrictive practices have resulted in the injury or death of students with disabilities.⁶⁹

[21] This section of the submission will begin by outlining the causal relationship between the use of restrictive practices on students with cognitive disabilities and mental illness and poor mental health. It will then consider the existing legal framework around the permissible use of these practices in Victorian legislation and contrast this with the expectation under international human rights conventions which suggests they should not be used. It will then, looking at the limited evidence available, suggest that the use of restrictive practices is common in Victorian Education settings and that this poses a threat to the mental wellbeing of Victorian students with cognitive disabilities. Finally, it will outline our recommendations for how this situation could be remedied.

1 Restrictive Practices and the Connection to Mental Illness and Poor Mental Health

[22] It is well-established that the use of restrictive practices pose a distinct range of both physical and psychological threats to those involved. Research makes

⁶⁶ *Equality, Capacity, and Disability in Commonwealth Laws* (above no 1)

⁶⁷ Education Rights, *Behaviours of Concern* (Web site, 2019)

<<https://www.educationrights.com.au/information/challenging-behavioursrestrictive-practices/behaviours-of-concern/>>.

⁶⁸ *Equality, Capacity, and Disability in Commonwealth Laws* (above no 1)

⁶⁹ Harvard Centre for Risk Analysis quoted in National Disability Rights Network, *School is Not Supposed to Hurt: Investigate Report on Abusive Restraint and Seclusion in Schools* (January 2009), 7.

clear that physically restraining a student poses a physical threat both to the student and the intervening adult.⁷⁰ However, data on the physical injuries and deaths caused by the use of restraints is collected on an ad hoc basis in Australia and overseas. This makes providing an accurate picture difficult but a Harvard Center for Risk Analysis suggested that the use of restraint or seclusion lead to approximately 150 deaths per annum.⁷¹

[23] There is also a growing acceptance in research that the use of restraint and seclusion has a severe negative impact on the mental wellbeing of children with cognitive disabilities. In addition to injury and death, reports have linked the use of restraint and seclusion with an increase in self-harming behaviour, the creation of distrust of the person restraining the student who would otherwise be an important member of their support network, post-traumatic stress disorder, anxiety, distress, and feelings of loss of dignity.⁷²

[24] While the impact on the mental health of students with cognitive disabilities may be argued by some to be justifiable if the use of restraint or seclusion was an effective tool, the evidence is that this is not the case. The introduction of various other strategies to understand the behaviours of concern and build strategies around avoiding situations that may trigger the problematic behaviours has proven to dramatically reduce the need for restrictive practices to the point where they potentially may not be needed at all.⁷³ Implementing a Positive Behaviour Support (PBS) program may be one way to do this. A PBS program is designed to positively reinforce good behaviour, identify problematic behaviour, understand the purpose of the student when

⁷⁰ Glen Dunlap, Cheryl Ostryn and Lise Fox, 'Preventing the Use of Restraint and Seclusion with Young Children: The Role of Effective, Positive Practices' (2011) *Technical Assistance Center on Social Emotional Intervention*, 1, 2.

⁷¹ *School is Not Supposed to Hurt: Investigate Report on Abusive Restraint and Seclusion in Schools* (above no 68), 7.

⁷² Wilfred Beaudoin and Adam Moore, 'Living Without Restraint: One Parent's Reflections and Recommendations for Supporting At-Risk Individuals With Developmental Disabilities' (2018) 56(3) *Intellectual and Developmental Disabilities* 155, 156; Barbara Trader et al, 'Promoting Inclusion Through Evidence-Based Alternatives to Restraint and Seclusion' (2017) 42(2) *Research and Practice for Persons with Severe Disabilities*, 75, 78; Nancy M Fitzsimons *Combating Violence & Abuse of People with Disabilities: A Call to Action* (Paul H. Brookes Publishing, 2009), 44. 4

⁷³ Cadeyrn Gaskin, Keith McVilly and Jane McGillivray, 'Initiatives to reduce the use of seclusion and restraints on people with developmental disabilities: a systematic review and quantitative synthesis' (2013) 34(11) *Research in developmental disabilities* 3946,3958-3959.

exhibiting the problematic behaviour, and then proactively prevent those triggers from occurring.⁷⁴

2 Current Legal Framework

[25] It is important to, when considering the use of restrictive practices in Victorian educational settings, identify the domestic legal obligations and powers that sanction the use of these methods on students with cognitive disabilities. It is then important to explore other quasi-legal documents from both domestic and international sources which suggest that use of restrictive practices should be prohibited in Victorian schools.

(a) *The right to use restraint and seclusion in the Education and Training Reform Regulations 2017*

[26] The *Education and Training Reform Regulations 2017* is the key document that governs the legal use of restraint and seclusion in the Victorian education system. It is binding on all public schools in Victoria and details key rights and obligations of education providers. Regulation 25 provides that “*A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour that are dangerous to the member of staff, the student, or any other person.*”⁷⁵

[27] The right to use restraint and seclusion in Regulation 25 is framed in broad, ambiguous language that relies upon the subjective judgment of the member of staff in question. As such, the DET provides some further guidance in a range of different documents including the ‘restraint of students’ school policy. However, much of the information contained in these documents is inconsistent and, moreover, the documents are guides only and provide no mandatory rules on how restrictive practices are to be used.⁷⁶

⁷⁴ Autism Spectrum Australia, ‘What is Positive Behaviour Support?’ (Information sheet, December 2015) <<https://www.autismspectrum.org.au/uploads/documents/Aspect%20Practice/PBS/Aspect-Practice-What-is-Positive-Behaviour-Support.pdf>>.

⁷⁵ *Education and Training Reform Regulations 2017* (Vic), reg 25.

⁷⁶ *Submission to The Education and Training Reform Regulations Review* (above no 1) 2-3.

[28] It is worth noting that the lack of mandatory rules on how restrictive practices are to be used in Victoria has been raised as an issue before. A number of submissions that were made to the DET from advocacy agencies and human rights bodies through the 2017 *Review of the Education and Training Reform Act* highlighted this issue. The failure of the DET to make appropriate reforms evinces a clear rejection of the concerns raised.⁷⁷

(b) *Other influential sources*

[29] It is worth noting that all of the legal and quasi-legal sources discussed below suggest that restrictive practices should not be used as they breach students' human rights. However, such sources and advocacy submissions have had a negligible effect on reviews of the *Education and Training Reform Act* and the continued use of restrictive practices in schools. This is a firm indication that the current domestic legislative approach to ensuring and protecting human rights must be strengthened.

(i) *Victorian Charter of Human Rights and Responsibilities 2006*

[30] As discussed above, there are inherent limitations on the practical usefulness of *the Charter* in providing a route for the legal enforcement of an individual's human rights. However, it remains an important recognition of the rights all Victorians are entitled to and the obligation of Victorian public authorities to respect and comply with those rights.

[31] With this in mind there are two rights recognised in *the Charter* that are relevant. First, s10 of *the Charter* enshrines an individual's right to not be subjected to torture, cruel or inhuman treatment, or medical or scientific treatment without consent.⁷⁸ This is important as the use of restrictive practices is generally considered to come under this definition. Secondly, s17 provides that every child has the right "to such protection as is in his or her

⁷⁷ Victorian Equal Opportunity and Human Rights Commission's submission to The Education and Training Reform Regulations Review (above no 1); Law Institute of Victoria, Submission to Department of Education and Training, *Education and Training Reform Regulations Review* (9 August 2017); Disability Advocacy Victoria, Submission to Department of Education and Training, *Education and Training Reform Regulations Review* (24 June 2017).

⁷⁸ *Charter of Human Rights and Responsibilities Act* (Above no 32), s10.

*best interest.*⁷⁹ Considering the physical and psychological threats and injuries that the use of restrictive practices pose to students with cognitive disabilities it is difficult to argue that their use is ever in their best interests.

(ii) *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*

[32] This framework was produced by the Federal government to provide a national policy on the use of restrictive practices, including the use of restraint and seclusion, in the disability services sector.⁸⁰ While it does not directly apply to education providers, it does provide a clear indication of the Federal Government's view that restrictive practices should not be used on persons with disabilities, particularly children. Of particular note in that policy is the recognition that the elimination of the use of restraint and seclusion is "consistent" with the *CPRD*.⁸¹

(iii) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

[33] Australia ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) in August of 1989.⁸² CAT is the peak international agreement detailing and outlining specific protections for individuals from certain types of degrading treatment and torture.

[34] Of particular importance is Article 16 which provides that "*Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.*"⁸³ In a report produced by the Special Rapporteur detailing how CAT applies to the treatment of

⁷⁹ Ibid, s17.

⁸⁰ Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (Policy Document, 1st May 2013) <https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf>

⁸¹ Ibid, 1.

⁸² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁸³ Ibid, art 16.

people with disabilities, it was specifically identified that the use of restraint and seclusion can become a form of torture or degrading treatment.⁸⁴

(iv) Convention on the Rights of Persons with Disabilities

[35] In relation to the issue of the use of restraint and seclusion there are a number of different provisions in the *CRPD* that should prevent the use of restrictive practices against persons with disabilities. Of particular note are:

- Article 14, designed to ensure the liberty and security of person⁸⁵
- Article 15, freedom from torture, cruel and inhumane treatment, and⁸⁶
- Article 16, freedom from exploitation, violence and abuse⁸⁷

[36] The Committee for the Convention on the Rights of Persons with Disabilities has repeatedly criticised State Parties, including Australia, for the continued use of restraint and seclusions particularly in educational and medical settings.⁸⁸

(v) Convention on Rights of the Child

[37] The protection from torture, cruel, and inhumane treatment enshrined in Article 37 of the *CRC* is essentially a mirror of the similar protections under the *CRPD* and *CAT*.⁸⁹ As such, the use of restrictive practices is likely caught under this provision.

3 *The Use of Restrictive Practices by Victorian Education Providers*

[38] As the above discussion makes clear it is, firstly, evident that the use of restrictive practices, while being sanctioned under Victorian law, likely breaches human rights conventions. Secondly, that there is a clear link between the use of restrictive practices and harm being inflicted to the mental wellbeing of students with cognitive disabilities. This final section is intended

⁸⁴ UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 63rd session, Un Doc A/63/1175 (28 July 2008), 8-9.

⁸⁵ *Convention on the Rights of Persons with Disabilities* (above no 40), Art 14.

⁸⁶ *Ibid*, Art 15.

⁸⁷ *Ibid*, Art 16.

⁸⁸ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of New Zealand*, 163rd meeting, UN Doc CRPD/C/NZL/CO/1, 31; *Concluding observations on the initial report of Australia* (above no 1), 35; *General Comment No 4: Right to Inclusive Education* (above no 45).

⁸⁹ *Convention on the Rights of the Child* (above no 46), Art 37.

to suggest that restrictive practices are likely being used inappropriately and excessively in Victoria

[39] As with bullying, it is difficult to actually determine the extent of the use of restrictive practices in Victorian schools. There is no publicly available data released by the DET regarding the number or types of restrictive practices used. The DET's policy on the use of restraint and seclusion does include a requirement that any incident should be recorded but as this data is not released it is difficult to know how regularly this process is followed.⁹⁰ This issue has been raised before, chiefly in the *Held Back* report where it was noted there that the lack of any reliable and publicly available data, and the absence of an independent oversight body makes it difficult to assess the use of restrictive practices accurately.⁹¹

[40] Although this makes providing an accurate picture on the use of restraint and seclusion difficult, the evidence suggests that it continues to be a significant problem. In data that was acquired by Fairfax Media it was revealed that over an 18 month period between October 2015 and March 2017 incidents involving the restraint or seclusion of students occurred more than three times a day.⁹² In response to the Fairfax Media report the DET indicated that they were going to ensure that some of the data regarding the use of restrictive practice would be released to the public.⁹³ Prior to this submission the DDLS contacted the DET asking for access to this data and were informed that this was not publicly available.

[41] It is worth briefly describing the situation in public schools in the United States. The United States is relevant because it shares similar social and legal values to Australia and because the current iteration of the DET's policy on the use of restraint and seclusion is based primarily on the U.S.

⁹⁰ Department of Education and Training, *School Policy: Restraint of Students* (Web Page, 20 February 2019) <<https://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx>>.

⁹¹ *Held Back* (above no 1), 116; *Held Back: Analysis paper* (above no 1), 16.

⁹² Timna Jacks and Henrietta Cook, 'Secret data on school restraint and seclusion to be released' *The Age* (online, 9 June 2017) <<https://www.theage.com.au/national/victoria/secret-data-on-school-restraint-and-seclusion-to-be-exposed-20170609-gwo8t1.html>>.

⁹³ *Ibid.*

Department of Education's.⁹⁴ In the United States during the 2015-2016 school years the use of restraint or seclusion was reported 122,000 times in a student population of 56 million.⁹⁵ These practices were used 70% of the time on a student with a disability despite those students only forming 12% of the student population.⁹⁶ When comparing the Victorian statistics with those from the United States, on a per student basis there are 1.5 times more incidents involving the use of restraint or seclusion in the United States than in Australia.

- [42] The situation in the United States is important to consider for two reasons. Firstly, as the Victorian policy is based upon the American it should provide some insight into the nature and extent of the situation here. Secondly, if the Victorian DET's response to the use of restraint and seclusion revealed in the Fairfax Media report was to adopt the U.S. Department of Education's policy it raises the question whether it is likely to be effective in resolving reducing the use of restrictive practices.

4 Recommendations

Recommendation 1 – Consistent and comprehensive data is collected by the DET on incidents involving the use of restraint or seclusion on students with cognitive disabilities

- [43] We recommend that the DET be required to implement a data collection process that would allow them to more consistently, comprehensively, and regularly collect data on incidents involving the use of restraint or seclusion on students with cognitive disabilities. Accurate and representative data is the starting point for professional comprehension and analysis of the problem.⁹⁷

⁹⁴ Ibid; U.S. Department of Education, *Restraint and Seclusion: Resource Document* (Resource document, 15 May 2012) <<https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>>.

⁹⁵ U.S. Department of Education, *School Climate and Safety* (Resource document, April 2018) <<https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>>.

⁹⁶ Ibid.

⁹⁷ UNICEF, *Data for Children* (Strategic Framework, April 2017), 1.

[44] Ultimately it would then allow for the development of a more effective and targeted approach on reducing the use of these restrictive practices and introducing more appropriate strategies.

[45] One option for doing this would be mandatorily requiring schools to report such incidents.

Recommendation 2 – This data is publicly available

[46] We recommend that as far as practically possible this data should be publicly available. While it is important that data is collected by the DET to allow for the production of appropriate and targeted preventative methods, without this information being publicly available it is not possible to ensure accountability.

[47] This appears to be an entirely reasonable expectation, particularly considering the DET's commitment to making this data available in 2017.⁹⁸

Recommendation 3 – Department of Education and Training should be required to provide immediate incident reports to parents/guardians following the use of restrictive practices

[48] We recommend that the DET is required to ensure that its schools mandatorily produce detailed incident reports when a child in their care is subjected to restraint or seclusion and this report is immediately provided to the child's parents or guardian.

[49] Currently, there are inconsistent requirements in DET policies and guides in relation to when schools are required to advise parents of the occurrence of an incident and how parents should be so advised. It is not acceptable to advise parents to seek such documents through Freedom of Information legislation when information about the physical or psychological harm of their child is the subject at hand.

⁹⁸ 'Secret data on school restraint and seclusion to be released' (above no 91).

[50] This is justifiable given the trauma associated with such practices, and the need for parents to make decisions about whether they should seek medical or psychological assistance for their child.

Recommendation 4 – Regulation 25 of the *Education and Training Reform Regulations 2017* is repealed

[51] We recommend that Regulation 25 of the *Education and Training Reform Regulations 2017* is immediately repealed. This is required because, as established above, there is strong evidence that if appropriate strategies and processes are put in place there is little or no need for the use of restrictive practices in the management of students with disabilities. Regulation 25's continued presence is further unjustifiable due to the well-established potential for the use of restraint and seclusion to cause serious and long-lasting harm to the mental health of students with cognitive disabilities.

[52] At a bare minimum Regulation 25 should be redrafted to provide greater clarity on the very limited situations that restrictive practices can be used. While we recommend and believe that there is rarely a good reason to use restrictive practices, at the very least there needs to be more guidance provided by the regulations on the very limited circumstances where such practices may be justifiable.⁹⁹

Recommendation 5 – Increase the use of and school's access to positive behaviour support programs

[53] We recommend that the DET be required to ensure that its schools are trained in and use PBS programs.

[54] A PBS program is designed to positively reinforce good behaviour, identify concerning behaviour, understand that concerning behaviour and what that behaviour is a response to, and then implement alternative positive

⁹⁹Victorian Equal Opportunity and Human Rights Commission's Submission to The Education and Training Reform Regulations Review (above no 1).

behaviours and/or prevent the causes of concerning behaviour arising. There is evidence to suggest that if an effective positive behaviour support program is implemented it can dramatically reduce the need for the use of restraint and seclusion to the point they become redundant.¹⁰⁰

- [55] Currently, the DET provides a ‘School-wide positive behaviour support’ program and this needs to be revised in a number of ways.¹⁰¹ Firstly, the DET need to ensure that the program is provided without requiring schools to purchase access. This is important as schools already operate under severe financial constraints and any programs which place further financial strain on schools is likely to be unpopular.¹⁰²
- [56] Secondly, the current Victorian program is based on a coaching model which essentially requires school staff to develop the skills to identify and implement their own positive behaviour support program.¹⁰³ While developing skills in staff is important, it is unrealistic to expect them to learn skills of another profession that requires years of learning and practice to master. As such, the program should ensure access to behavioural specialists to help implement positive support programs rather than just using the coaching model. This will require increased resourcing for all schools, a subject that has been raised repeatedly over the years.
- [57] Thirdly, the steps in supporting students who have behaviours of concern must be made mandatory. There is little utility in providing optional information or programs to schools as to how to address behaviours of concern when, due to time and resource considerations, they will inevitably feel they cannot justify it.

¹⁰⁰ Lynne Webber et al ‘The impact of the quality of behaviour support plans on the use of restraint and seclusion in disability services’ (2012) 2(2) *International Journal of Positive Behaviour Support*, 3, 8; Preventing the Use of Restraint and Seclusion with Young Children: The Role of Effective, Positive Practices (above no 69), 3-4; Initiatives to reduce the use of seclusion and restraints on people with developmental disabilities: a systematic review and quantitative (above no 72), 3958-3959.

¹⁰¹ Department of Education and Training, *School-wide positive behaviour support* (Web page, 22 June 2018) <<https://www.education.vic.gov.au/school/teachers/management/improvement/Pages/swpbs.aspx#link46>>.

¹⁰² Ibid.

¹⁰³ Ibid.

C Reasonable Adjustments and Supports

- [58] The provision of supports and adjustments for students with cognitive disabilities is a crucial tool in ensuring they are able to access the education they are entitled to. Supports and adjustments are needed as a recognition that educational environments and programs are not necessarily designed to be universally accessible and for some students alterations will be needed for them to access it. Examples of supports and adjustments for students with cognitive disabilities could be the implementation of a specifically tailored education program, the provision of an aide, or provision of a speech pathologist.
- [59] Reasonable adjustments is the legal term used to cover the concept of adjustments and supports in equal opportunity and discrimination legislation.¹⁰⁴ A reasonable adjustment can essentially be understood as an adjustment made to enable an individual with a disability to fully access particular areas of public life. The failure to provide reasonable adjustments is discriminatory. Importantly, under both the *DDA* and *EOA*, education is a designated area of public life and thus the obligation to provide reasonable adjustments applies to education providers. As such, reasonable adjustments are a crucial tool in ensuring students with disabilities have the support and adjustments they need to access education on an equal basis with other students.
- [60] This section of the submission will begin by outlining the causal connection between the failure to provide reasonable adjustments (in both a legal and non-legal sense) and the acquisition of mental illness or poor mental health. It will then consider the existing legal framework around the duty of education providers to provide students with disabilities reasonable adjustments to access their services. It will then consider whether Victorian education providers are complying with their obligations, ultimately suggesting that many students with disabilities do not receive the reasonable adjustments they

¹⁰⁴ *Disability Discrimination Act* (above no 26); *Equal Opportunity Act* (above no 31).

need. Finally, it will outline our recommendations for how this situation could be remedied.

1 *Failure to provide Reasonable Adjustments as a Cause of Mental Illness and Poor Mental Health*

[61] The potential for the failure to provide reasonable adjustments to cause poor mental health is an obvious one; by failing to provide reasonable adjustments education providers are setting up students with disabilities to consistently and repeatedly fail. Reasonable adjustments are provided as a recognition that many services and programs are not designed to be universally accessible and thus are provided to “*ensure students with disabilities are able to participate in courses and programs, and use facilities and services, on the same basis as students without a disability.*”¹⁰⁵ Reasonable adjustments are therefore crucial to allowing students with disabilities the opportunity to develop to their full potential in the education environment.

[62] By failing to provide reasonable adjustments, education providers effectively consign students with disabilities to undertake programs they cannot meaningful access and engage with. This inevitably leads them into a cycle of failure, which has been strongly linked with creating a sense of “*learned helplessness*” in young people where they attribute their continued failure to something being inherently wrong with them.¹⁰⁶ In turn, this leads to “*lower academic expectations, lower self-esteem, [and] more depressive tendencies.*”¹⁰⁷ Bender et al. have suggested that “*if the stress associated with the academic demands of secondary schooling for adolescents with learning disabilities does facilitate severe depression, then school itself becomes a risk factor for suicide for some students.*”¹⁰⁸ Ultimately, the failure to provide reasonable adjustments turns the education environment from the nurturing safe space it should be into a source of stress and anxiety.

¹⁰⁵ Tamara Walsh, ‘Adjustments, Accommodation and Inclusion: Children With Disabilities in Australian Primary Schools’ (2012) 17(2) *International Journal of Law and Education*, 33, 34.

¹⁰⁶ Harald Valas, ‘Learned Helplessness and psychological adjustment II: Effects of learning disabilities and low achievement’ (2001) 45(2), 101, 103 and 111.

¹⁰⁷ Ibid.

¹⁰⁸ William Bender, Cecillia Rosenkrans, Mary-Kay Crane, ‘Stress, depression, and suicide among Students with Learning Disabilities: Assessing the Risk’ (1999) 22(2) *Learning Disability Quarterly*, 143, 147.

2 Current Legal Framework

[63] It is important to initially establish that Victorian education providers do owe a legal obligation to students with disabilities to provide them with reasonable adjustments. This obligation is shaped and informed by a range of both domestic and international legal documents which are explored below.

(a) Obligations in Australian legislation

(i) Disability Discrimination Act 1992

[64] As discussed above, the *DDA* is binding on the DET and Victoria's public schools and teachers. S22 makes it illegal to discriminate against students with disabilities in the provision of education.¹⁰⁹ Importantly, the definition of discrimination includes the provision of reasonable adjustments.¹¹⁰ Theoretically, the *DDA* appears to offer a key route for students with disabilities to ensure that education providers make adjustments to enable them to access their education fully. However, in practice this has not been the case

[65] Another important aspect of the *DDA* is the *Disability Standard for Education*. As noted above, it is illegal for an education provider to contravene a standard, but also compliance with a standard acts as a defence to any alleged contravention.¹¹¹ This is important in considering reasonable adjustments because the *Disability Standard* requires education providers to consult with the student with a disability and their family in making a decision whether to provide a reasonable adjustment or not.¹¹² However, it does not stipulate how much weight should be given to that consultation nor how that consultation should be conducted. The decision in *Walker v the State of Victoria*, has in effect enabled education providers to give very little consideration to the consultation with students with a disability and their families.¹¹³ This has dramatically weakened the power of the *DDA* for

¹⁰⁹ *Disability Discrimination Act* (above no 26), s 22.

¹¹⁰ *Ibid*, s 5 and s 6.

¹¹¹ *Ibid*, s 32 and s 34.

¹¹² *Disability Standard for Education* (above no 20) Part 3.

¹¹³ *Walker v State of Victoria* [2011] 279 ALR 284.

students with disabilities attempting to ensure they get the adjustments they require.

[66] Another recent legal decision has also significantly weakened the power of the *DDA* in ensuring individuals are provided with reasonable accommodations. In *Sklavos v Australasian College of Dermatologists*, it was ruled that the decision to deny a reasonable accommodation must be because of the individual's disability.¹¹⁴ The mere detrimental effect of the failure to provide the reasonable accommodation is not enough on its own to establish discrimination thus further weakening the nature of the obligation to provide reasonable adjustments

(ii) *Equal Opportunity Act 2010*

[67] The *EOA* is binding on the Victorian DET and Victoria's public schools and teachers. The *EOA* also requires education providers to make adjustments for students with disabilities.¹¹⁵ The reasonable adjustment section in the *EOA* is a standalone one and therefore does not have the same problems in application as the *DDA*. However, VCAT has interpreted the obligations under the *EOA* similarly to the interpretation of the *DDA*, giving schools and education providers a considerable amount of discretion in deciding what is 'reasonable'.¹¹⁶ In particular schools are allowed to consider and balance a range of different factors including the nature of the adjustment, the effect of the adjustment on the student with a disability, the effect of failing to make the adjustment, and the effect on the school (including financial and other resources).¹¹⁷ By providing education providers a large discretion in determining whether a requested adjustment is reasonable or not, tribunals have dramatically limited the practical usefulness of the *EOA* students with disabilities.

¹¹⁴ *Sklavos v Australasian College of Dermatologists* [2017] 347 ALR 78.

¹¹⁵ *Equal Opportunity Act* (above no 31), s 40.

¹¹⁶ *AB v Ballarat Christian College* [2013] VCAT 1790.

¹¹⁷ *Ibid.*

[68] S40(4) of the *EOA* also expressly states that an education provider is not required to make an adjustment if they have complied with, or have been exempted from complying with, the *DDA*.¹¹⁸ Thus, if an education provider complies with the *Disability Standard for Education* then this can operate as a defence against any claim brought against their failure to provide an adjustment. Because of the problems with the *Disability Standard for Education* discussed above, this also dramatically reduces the practical utility of the *EOA* for students with disabilities.

(b) *Other Influential Sources*

(i) *Convention on the Rights of Persons with Disabilities*

[69] A child's right to reasonable adjustments to access education is enshrined in article 24(2) of the *CRPD*.¹¹⁹ It is important to note that the Committee of the Convention on the Rights of Persons with Disabilities, in General Comment 4, has advised that while consideration of lack of resources or financial constraints can be considered when determining what is 'reasonable' it should not be a deciding factor.¹²⁰ It is also worth noting that the Committee has expressly criticised Australia for the approach they have taken in determining what is a reasonable adjustment and that Australian students with disabilities are being provided with either inappropriate adjustments or no adjustment at all.¹²¹

[70] It is important to note that the Committee for the Convention on the Rights of Persons with Disabilities' General Comment 7, regarding the participation of people with disabilities in decision-making processes, is relevant to the consideration of reasonable adjustments. This document was produced to provide further guidance to State parties on their obligation to meaningfully and consistently involve persons with disabilities, including children, in decision-making processes that concern them as required under Article 4.¹²²

¹¹⁸ *Equal Opportunity Act* (above no 31), s 40(3)

¹¹⁹ *Convention on the Rights of Persons with Disabilities* (above no 32), art 24(2).

¹²⁰ *General Comment No 4: Right to Inclusive Education* (above no 45), 8.

¹²¹ *Concluding observations on the initial report of Australia* (above 1), 6.

¹²² UN Committee on the Rights of Persons with Disabilities, *General Comment No 7: on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the convention*, UN Doc CRPD/C/GC/7 (9 November 2018), paras 24-33,.

General Comment 7's insistence for "*meaningful participation*" does suggest that the restrictive interpretation of consultation in the *Disability Standards for Education* may not be in compliance with the *CRPD*.¹²³

3 *Current situation in Victorian Schools*

[71] As the above discussion makes clear, Victorian education providers are obligated under both federal and state legislation to provide reasonable adjustments for students with disabilities. However, looking at the current situation in Victoria it appears that education providers are not complying with this obligation.

[72] According to data published by the Nationally Consistent Collection of Data on School Students with a Disability 19% of the student population received an adjustment due to their disability in 2017.¹²⁴ Of this approximately 9.6% received an adjustment due to a cognitive disability.¹²⁵ While this appears promising and roughly correlative with the expected number of students with disabilities it is harder to ascertain whether the adjustments provided are truly appropriate. There is evidence which does suggest that this may not be the case. In CYDA's education survey from 2017, which surveyed 771 families of students with disabilities, it was found that 68% of respondents believed that the level of support the student receives at school is inadequate.¹²⁶ This broadly corresponds with the survey of families of students with disabilities conducted for the 2012 *Held Back* report. In that report it was found that only 32% of respondents believed that the requested adjustment was made in full, with 58% answering it was partially made and 10% answering no adjustment was made at all.¹²⁷ While both these surveys cannot claim to be comprehensive, CYDA's having 771 respondents nationally and the *Held*

¹²³ *Ibid*, para 4.

¹²⁴ Nationally Consistent Collection of Data, *2017 data on students in Australian schools receiving adjustments for disability* (Report, 2018), 3, <<http://www.educationcouncil.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/Glossy%202017%20NCCD%20Public%20Report%20FINAL.pdf>>.

¹²⁵ *Ibid*.

¹²⁶ *CYDA Education Survey 2017* (above no 51).

¹²⁷ *Held back* (above no 1), 39.

Back report having 1,800 respondents or participants in Victoria, they do both establish a trend which suggests that the supports and adjustments being provided are not adequate for the student's needs.¹²⁸

[73] Another indicator that can be used to demonstrate that education providers are failing to provide the reasonable adjustments and supports needed is through the number of students with disabilities who elect to be home schooled. Currently in Victoria there are 5742 students being home-schooled.¹²⁹ Once again neither the DET or Victorian Registration and Qualifications Authority (VRQA) publish data regarding why a family choose to home school their child.¹³⁰ The failure to collect this information is particularly curious as the relevant authorities in New South Wales do so with little difficulty and the collection of this information has been recommended by the federal Education and Employment References Committee.¹³¹ As such, it is not possible to definitively identify how many Victorians elect to home school due to their disability. However, it can be assumed that it is likely comparable to New South Wales. In New South Wales just under a quarter of all new applications in 2018 cited special learning needs as the reason they were electing to home school.¹³² Just under a fifth of the new applicants in New South Wales provided no reason and another quarter listed 'other' which does suggest that this figure could well be higher. While some of these applications could be from parents who, in good faith, genuinely believe that their child would be better suited to being home schooled, others will have made the choice because they believe that New South Wales education providers either won't or can't provide the supports and reasonable adjustments that their child requires.¹³³ This again suggests that the DET is failing to provide the adjustments and supports those students with disabilities need.

¹²⁸ *CYDA Education Survey 2017* (above no 51); *Held back* (above no 1).

¹²⁹ Victorian Registration & Qualifications Authority, *Home schooling Statistics* (Web page, 9 April 2019) <<https://www.vrqa.vic.gov.au/aboutus/Pages/hstaitistics.aspx>>.

¹³⁰ *Ibid.*

¹³¹ New South Wales Education Standards Authority, *Home Schooling Data reports relating to 2018* (Report, March 2019), 13 <<https://educationstandards.nsw.edu.au/wps/wcm/connect/426e1f11-5752-4c1c-bdcc-68b880c0e0b3/Home+Schooling+Data+relating+to+2018+for+publication+on+NESA+website.pdf?MOD=AJPERES&CVID=>>>; Access to real learning: the impact of policy, funding and culture on students with disability' (above no 1), Recommendation 8.

¹³² *Home Schooling Data reports relating to 2018* (above no 130).

¹³³ Access to real learning: the impact of policy, funding and culture on students with disability' (above no 1), 4, 25-26, 39

[74] There may be a number of reasons as to why the adjustments being provided by education providers are currently failing to adequately meet the needs of students with disabilities. There is a strong argument that the nature of the consultation and decision-making process inherently fails to give due weight to the views and needs of the student, their family, and their medical practitioner. As outlined above the school is given a wide discretion for the application and decision making processes under the *DDA* and the *EOA* for the provision of reasonable adjustments. While these processes require the school to consult with the student and their families it gives no strict advice on the weight to be given this information. This is made particularly clear in the decisions in *Walker, AB v Ballarat Christian College* and *Sievwright v State of Victoria*.¹³⁴ The strong respect for the discretion of education providers is not necessarily problematic as in an ideal world an education provider would be in a position to always put the interests of students with disabilities first. However, this is not the case. Government schools in Victoria operate under severe financial restraint which severely limits their ability to provide the supports needed. This is clear in the latest Australian Education Union *State of our Schools* survey which found that 81 per cent of principals believed they had insufficient resources to properly educate students with disabilities and 88 per cent stated they had to redirect funds from other areas of the school budget to help cater for children with disabilities.¹³⁵ This has clearly created an environment where schools, looking for the lowest-cost alternative, provide cheaper supports and adjustments that fail to meet the needs of the child.

[75] We submit that it is inappropriate for teachers and principals to be making decisions about which adjustment or support is reasonable for a student with a disability. Teachers are not experts in disability. Experience, in terms of years working with students with disabilities does not give them a sufficient knowledge base to make these decisions.

¹³⁴ *Walker v State of Victoria* [2011] 279 ALR 284; *AB v Ballarat Christian College* [2013] VCAT 1790; *Sievwright v State of Victoria* [2012] FCA 118.

¹³⁵ Fergus Hunter, 'Public schools lack resources to meet needs of 'invisible' students with disabilities' *The Age* (online 17 February 2019) <<https://www.smh.com.au/politics/federal/public-schools-lack-resources-to-meet-needs-of-invisible-students-with-disabilities-20190215-p50y0f.html>>.

[76] This situation seems to be exacerbated by the fact that when education providers around Australia have had legal action taken against them, courts' decisions have tended to favour the education provider stressing the importance that they retain a significant degree of discretion in these matters. This is evident from the decisions in *Walker, AB* and *Siewwright*.¹³⁶ This has left students who feel aggrieved by the lack of supports and adjustments made by their education providers with little course of redress and no real way to enforce their right to adjustments.

4 Recommendations

Recommendation 1 – Consistent and comprehensive data is collected by the Department of Education and Training on the use and effectiveness of reasonable adjustments

[77] We recommend that the DET implement a data collection process that would allow them to more consistently, comprehensively, and regularly collect data on the use of reasonable adjustments and, importantly, whether the students for whom the adjustment is made believe it is effective and appropriate.

[78] As with many of the concerns identified this is not new and has been highlighted in numerous previous reports. An example of this is the 2012 Auditor General's report into the Program for Students with Disabilities which called on the DET to "*to define a 'students with special needs' cohort so that it can regularly and systemically measure and report on their learning and progress.*"¹³⁷

[79] Currently, data is collected on the number of students who receive some form of reasonable adjustment by the Nationally Consistent Collection of Data on School Students with Disability.¹³⁸ This data is minimalistic in the sense that it indicates when a school believes they have made any kind of adjustment for a

¹³⁶ *Walker v State of Victoria* [2011] 279 ALR 284; *AB v Ballarat Christian College* [2013] VCAT 1790; *Siewwright v State of Victoria* [2012] FCA 118.

¹³⁷ *Programs for Students with Special Learning Needs* (Above no 1), 19.

¹³⁸ *2017 data on students in Australian schools receiving adjustments for disability* (above no 123), 3-5.

student with a disability. It provides no insight into whether the student believes that the adjustment is adequate and effective in enabling them to fully participate. Thus, without qualitative data on the effectiveness and appropriateness of this support it is difficult to assess whether these students are being appropriately supported.

[80] We submit that collecting qualitative data on the effectiveness and appropriateness of adjustments provided will provide a clearer picture for the DET. In turn it would allow for a better identification of why these students with disabilities are not getting the support they need.

[81] It would not be particularly onerous information to collect as the DET allegedly already collects data on all adjustments that are made for students with disabilities.

Recommendation 2 – That the Department of Education and Training Victorian Registration & Qualifications Authority gather data concerning the reasons given to home school Victorian students

[82] We recommend that the DET or VRQA be required to gather and publish data concerning the reasons parents decide to home school their child.

[83] Gathering data on this is generally important as it would provide Victorian education providers and the DET an idea of why parents are not content with the service they are providing. More specifically for students with disabilities it would provide a snapshot of the number of students who feel that Victorian education providers cannot provide the reasonable adjustments and supports they need.

[84] Collecting this information would not be onerous as it would require an extra question on the application form for a parent or guardian to register their child to be home-schooled. A clear example of this is provided by New South Wales Education Standards Authority which does currently collect this data by providing an optional question on their application form.

Recommendation 3 – This data is publicly available

[85] We recommend that as far as practically possible that this data should be publicly available. While it is important that data is collected by the DET to allow for the identification of issues and responses to these, without this information being publicly available it is not possible to ensure accountability. The Organisation for Economic Co-operation and Development has linked a policy of “*open government data*” with the promotion of “*transparency, accountability and value creation*.”¹³⁹ Thus, by ensuring this data is open and publicly available, it will help ensure that the DET takes meaningful steps to ensure students with disabilities are being provided the adjustments they require.

Recommendation 4 – That the decision-making process for reasonable adjustments is revised to emphasise the primacy of the needs of the student with a disability

[86] We recommend that the DET be required to revise their ‘School Policy for Students with a disability’ to emphasise the primacy of the needs of the student with a disability when making a decision on a reasonable adjustment.¹⁴⁰ This would make the policy consistent with the Committee for the Convention on the Rights of People with Disabilities’ General Comment 7 on the participation of people with disabilities in decision-making.¹⁴¹

[87] Currently, the legal obligation imposed on education providers to provide reasonable adjustments to students with disabilities has been interpreted to give education providers a broad discretion to determine whether an adjustment is reasonable or not. While they are required to consult with the student with a disability and their family, there is no guidance on how much

¹³⁹ ‘Open Government Data’ (above no 51).

¹⁴⁰ Department of Education and Training, *School Policy: Students with a disability* (Web Page, 29 March 2019) <<https://www.education.vic.gov.au/school/principals/spag/participation/Pages/studentswithdisability.aspx>>.

¹⁴¹ *General Comment No 7*: on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the convention (above no 121).

weight should be given to their opinion. This results in inadequate or ineffective adjustments being made on the basis that the school believing that their provided adjustment is most cost-efficient and provides the same support as that requested.

[88] A revision of the policy to more explicitly emphasise that the primary consideration is the support and access needs of the student with a disability ,as expressed by them or their family or their healthcare providers, would ensure the DET is better aligned with the CRPD.

[89] One way to do this is for the DET to make many of the useful guidelines they provide mandatory. For instance, the Student Support Group guidelines outline how to form collaborative relationships between the school and students with disabilities and their families.¹⁴² These guidelines are not required to be read, and not required to be followed. We recommend that the Department be required to make these guidelines mandatory.

Recommendation 5 – That the Department of Education and Training provides increased funding for schools to provide reasonable adjustments

[90] We recommend that the DET provides increased funding for schools in the provision of reasonable adjustments. This should primarily be done by increasing funding through the Program for Students with Disabilities.

[91] Currently, the Program for Students with Disabilities provides supplementary funding for schools to fund adjustments for eligible students with a disability. However, the criteria of eligibility is currently framed so that it only covers about 4 per cent of the population.¹⁴³ Approximately 20 per cent of the student population has a disability. Students with no additional funding are expected to be covered through the global school budget. This is ineffective because of the severe financial constraints schools already operate under. This is

¹⁴² Department of Education and Training, *Student Support Groups Guidelines* (Web Page, 29 October 2018) <<https://www.education.vic.gov.au/school/teachers/health/Pages/oohcstusupp.aspx>>.

¹⁴³ *Review of the program for students with disabilities* (Above no 1), 61.

demonstrated by the *State of Our Schools* survey.¹⁴⁴ This situation is exacerbated in schools in rural and regional areas as they cannot take advantage of large numbers of students and therefore significant global funding.

[92] We submit that the most effective way to improve the current funding shortfall is to adopt the funding model identified by the Review into the Program for Students with Disabilities in 2015, which was commissioned by the DET.¹⁴⁵

[93] We submit that if the DET provides schools with more comprehensive funding for providing reasonable adjustments for students with a disability the issue of inappropriate and ineffective adjustments and supports would be largely addressed.

¹⁴⁴ 'Public schools lack resources to meet needs of 'invisible' students with disabilities' (above no 134).

¹⁴⁵ *Review of the program for students with disabilities* (above no 1), 119-134.

D *Student Support Groups and Individualised Learning Plans*

[94] This section of the submission will begin by outlining what SSGs and ILPs are and their role in the Victorian education system. Ultimately, it will be suggested that ILPs and SSGs are crucially important to ensuring a wholesome and worthwhile education for students with cognitive disabilities but that they are being inconsistently used and applied by Victorian education providers. It will then, consider why the inconsistent use of SSGs and ILPs poses a threat to the mental health of students with cognitive disabilities. It will be suggested that, as the lynchpin for a student with disabilities' education, the inconsistent and ineffective use of SSGs and ILPs is a primary cause of the other areas of concern explored in this submission. Finally, it will outline our recommendations for how this situation could be remedied.

1 What are Student Support Groups and Individualised Learning Plans and how Effectively are they used in Victoria

[95] In Victoria, the Student Support Group (SSG) is essentially positioned as the first point of call when a student with a disability seeks support from the education system in accessing the education entitled to them. Its fundamental purpose is to discuss the strengths of the student, the barriers they face in accessing education, the adjustments that need to be made for them, and routinely reviewing that information.¹⁴⁶ The members of the SSG can vary but must include the guardian or parent of the student and the principal of the school. They may also include teachers of the student, the student themselves, and an advocate to support the parent or guardian. SSG's play an important role in opening up effective dialogue between the school and the student and their representatives and thus ensure that the student is getting the support they need and is progressing as they should.

¹⁴⁶ *Student Support Group Guidelines* (above no 141), 1.

[96] SSGs are only mandatory for those students who receive funding through the Program for Students with Disabilities.¹⁴⁷ These mandatory SSGs must consist of at least the principal of the school, the parent or guardian of the child, and an advocate for the parent or guardian if requested.¹⁴⁸ The Program for Students with Disabilities is framed so that it only captures about 4% of the student population, well short of the estimated 20% who have some form of disability.¹⁴⁹ This is concerning as just because a student is deemed to be ineligible for acceptance to the Program for Students with Disabilities, does not mean that their disability does not impact their access to education. For these students, who amount to over 75% of the students with disabilities population, there is no formal requirement or expectation on the school to engage in dialogue specifically to address the barriers they face due to their disability.

[97] The DET provide guidelines on the composition of SSGs, their responsibilities, and how they could operate.¹⁵⁰ These guidelines are thorough and envisage that the SSG play a central role in ensuring the welfare and success of the student. In particular it recommends that the SSG include additional members to the minimum requirement under the PSD, particularly the teacher(s) responsible for the child, the student, and any consultants that may be relevant to the education or social needs of the student.¹⁵¹ The wider membership outlined in the guidelines would produce a more holistic, accurate, and effective SSG in our submission. The guidelines similarly provide more expansive aspirational aims for the SSG that provide further insight into the purpose and responsibilities of the SSG.¹⁵² Finally, the guidelines provide clear guidance on how the SSG should operate: suggesting that meetings be convened at least once a term and convened if any member of the SSG requests a meeting to discuss a particular concern.¹⁵³

¹⁴⁷ Ibid, 5.

¹⁴⁸ Ibid.

¹⁴⁹ *Review of the Program for students with disabilities* (above no 1), 11.

¹⁵⁰ *Student Support Group Guidelines* (above no 141), 1-3.

¹⁵¹ Ibid.

¹⁵² Ibid, 1.

¹⁵³ Ibid, 5.

- [98] The nature and purpose of the SSGs and the practical, detailed, and appropriately designed guidelines suggest that they produce an SSG that is effective in ensuring the academic success and welfare of the student. However, this is not the case. Largely the failure of the SSGs to live up to their potential is that the guidelines are just that: guidelines. There is little evidence to suggest that the mandatory SSGs required under the Program for Students with Disabilities follow the DET guidelines and even less to suggest that any optional SSG implemented for a student with a disability not on the Program for Students with Disabilities complies. In fact there is evidence to suggest that SSGs in practice do not comply with the guidelines. This was highlighted in the *Held Back* report and its follow up analysis, which found parents were often dissatisfied with the frequency of the meetings, the nature of the dialogue, the unwillingness of schools to involve specialists, and the outcomes of the meetings.¹⁵⁴ It has also been suggested in various reports that the ultimate reason for the failure of SSGs to live up to their potential is the failure of the DET to fully mandate the requirements for them and a failure to properly audit or monitor schools when they implement them.¹⁵⁵
- [99] An Individual Learning Plan (ILP) is the fruit of the discussions and labours of the SSG. It essentially is a document that provides the overarching goals and objectives for the student during their time in school. As such, it should reflect the student's strengths, their needs, the barriers they face, the outcomes they want to reach, and the adjustments and strategies to achieve those outcomes. These are all identified and established in SSG discussions. An ILP is usually designed to have relatively short-term objectives, for example goals for a term, which means that the SSG has the opportunity to review the ILP, the progress the student has made, and if necessary create new objectives or new strategies to achieve the old objective.

¹⁵⁴ *Held Back Report* (above no 1), 83-87; *Held Back: Analysis Paper* (above no 1), 12-14.

¹⁵⁵ *Held Back Report* (above no 1), 85-86, 92; *Held Back: Analysis Paper* (above no 1), 12-14; *Programs for Students with Special Learning Needs* (above no 1), 25-26.

[100] ILPs are not currently expressly required by the DET but aspects of them are incorporated in the process for application to the Program for Students with Disabilities and referred to in the guidelines for SSGs.

[101] Crucial to the success of ILPs in providing an effective tool to guide the education of students with disabilities is the regular appraisal and review of the objectives and outcomes outlined in the ILP.¹⁵⁶ Without an accurate process of review and assessment it is impossible to ascertain whether the student is learning and gaining skills, thus adequately accessing education, and also whether the strategies and adjustments made are proving to be effective. Important to facilitate this process of review and appraisal is an ILP whose outcomes and strategies are clear and quantifiable/assessable. Best practice requires the utilization of the 'SMART' principle of goal-setting. This principle essentially states that goals/outcomes must be: specific, measurable, achievable, realistic and timebound.¹⁵⁷

[102] Like SSGs, ILPs form a crucial linchpin in ensuring students with disabilities access and attain a meaningful education. Again, like SSGs, the problem is that there is no mandatory requirement for schools to provide students with disabilities an ILP and, when they do they are inadequately written, reviewed, or assessed.¹⁵⁸ Part of the reason for this problem is that an effective and appropriate ILP is entirely dependent on the SSG, whose responsibility it is to create them. If the SSG is inconsistently formed, and constituted without the relevant members, it is inevitable that they will produce a poor ILP and the review process will be lacking. Particularly important in this is the role of specialists/consultants; teachers cannot be expected to be experts in the fields of the various disabilities they interact with, however this lack of expertise must be recognised and mitigated by involving experts and specialists in the SSG process. The concern that ILPs are neither mandatory

¹⁵⁶ *Programs for Students with Special Learning Needs* (above no 1), 26-27.

¹⁵⁷ Engaging the difficult Student, 'Smart Goals', *Individual Learning Plans* (Guide, 2019)

<<https://www.engagingthedifficultstudent.com/>>; *Held Back Report* (above no 1), 91.

¹⁵⁸ *Programs for Students with Special Learning Needs* (above no 1), 25; *Held Back Report* (above no 1), 90,92.

nor properly created has been noted before in the *Held Back* report and has yet to be properly addressed.¹⁵⁹

2 *The Importance of Student Support Groups and Individualised Learning Plans to Ensuring Good Mental Health*

[103] For students with disabilities, particularly those with cognitive disabilities, implementing and effectively utilising ILPs and SSGs is fundamental to ensuring these students can access a meaningful education.

[104] ILPs and SSGs are the high-level tools that guide the individualised education that students with cognitive disabilities require. As such, they are intrinsically connected to the other issues discussed in this submission. If a student with a cognitive disability is particularly vulnerable to being bullied or isolated socially this can be noted by the SSG and incorporated into their ILP with strategies implemented to counter the problem. If the student has exhibited behaviours of concern this can be discussed in the SSG, including with relevant specialists, and strategies, such as positive behaviour programs, implemented through the ILP. If the student requires adjustments to be made either to their education syllabus or their physical environment, then once again this would be discussed in the SSG, including with relevant specialists, to determine the exact adjustments needed.

[105] An example of the relationship between the use of SSGs and ILPs and the positive outcomes for the student is provided in the *Held Back* report:

“Overall, the comments from parents and educators combined indicate there needs to be greater communication and transparency about the use of funds, as well as a balance struck between the school’s discretion to manage the use of funds with genuine input from parents. Central to this is a relationship of trust

¹⁵⁹ *Held Back* (above no 1), 82, 92.

between parents and schools, which in turn requires greater consistency in how SSGs are established and run.”¹⁶⁰

[106] The use of SSGs and ILPs do not directly impact on a student with cognitive disabilities’ mental health in the same way as bullying, the use of restraints and seclusion, or the failure to provide reasonable adjustments. However, they are essential to preventing these problems from arising or, if they do arise, are essential in rectifying the situation. This has been emphasised in previous reports and submissions and explains why they are so important to ensuring the good mental health of students with cognitive disabilities.¹⁶¹

3 Recommendations

Recommendation 1 – That the use of Student Support Groups and Individualised Learning Plans are mandated for all students with cognitive disabilities

[107] We recommend that the use of SSGs and ILPs are mandatory for all students with cognitive disabilities (and indeed for any disability) in Victorian schools. Ensuring both SSGs and ILPs are implemented for these students is crucial as a first step to ensuring these young people have a positive education.

[108] A similar recommendation has been made the *Held Back* and the Victorian Auditor General’s report into the program for students with disabilities.¹⁶²

[109] Currently, SSGs and ILPs are only required for those students who receive funding under the Program for Students with Disabilities, approximately 4 per cent of the student population. This is far smaller than the estimated twenty per cent of the student population estimated to have a disability. The benefits

¹⁶⁰ *Held Back Report* (above no 1), 168.

¹⁶¹ *Programs for Students with Special Learning Needs* (above no 1), 20-21; *Held Back Report* (above no 1), 82-90.

¹⁶² *Programs for Students with Special Learning Needs* (above no 1), 31; *Held Back Report* (above no 1), 92.

of SSGs and ILPs are equally applicable to those students with disabilities who receive funding under the program and those who do not.

[110] SSGs offer schools, students and their families the vehicle to build a trusting cooperative relationship. Such a relationship helps to create a situation where both the school and those representing the student work constructively together for the student's best interest.

[111] ILPs, the key end product of SSGs, are important as a tool to focus the efforts of the school, the student's family and any other individuals supporting the student. ILPs are important as they identify the skills and skill gaps of the student, appropriate and relevant goals for the education of the student, and individualised strategies to help the student reach those outcomes. Importantly, if used correctly, they provide a way to review the progress of the student and measure whether the current approach taken by the school is proving effective.

[112] Without these tools, children with disability are prone to the issues discussed in this submission: bullying, restraints and seclusion, and the failure to provide reasonable adjustments. These issues all have well-documented connections to poor mental health. As such, the mandatory requirement that SSGs and ILPs are used for students with disabilities would be an important step to ensuring the good mental health of these students.

Recommendation 2 – Individualised Learning Plans specifically incorporate measurable goals

[113] We recommend that the guidance provided for ILPs in the DET's guidelines for SSGs require ILPs specifically incorporate measurable objectives.

[114] Currently, the SSG guidelines provide templates for "*personalised learning and support planning*."¹⁶³ These cover: 'understanding the student', 'goal setting', 'recording achievement', and 'program evaluation'. Broadly speaking

¹⁶³ *Student Support Group Guidelines* (above no 141), 6-13.

this covers the key aspects expected in ILPs in other nations that have implemented guidelines for or require the use of ILPs.¹⁶⁴

[115] Of particular importance to the practical effect of an ILP is ensuring that the goals chosen and the strategies implemented to achieve these goals are clearly and objectively measurable. By ensuring this is the case, ILPs can be better used to track the progress of the student, identify when and why implemented strategies are not working, and then implement new strategies that will. Without objectively measurable goals and strategies ILPs become largely toothless and ineffective.

[116] The current SSG guidelines do not provide enough guidance on the importance of measurability and how this can be implemented in an ILP. As such, we recommend that the SSG guidelines provide more specific guidance on ensuring ILPs are measurable.

Recommendation 3 – Specialists play an active role in Student Support Groups and Individualised Learning Plans when this would benefit the student

[117] We recommend that, for students with cognitive disabilities, their medical specialists play an active role in SSGs and creating ILPs.

[118] Currently, while the DET guidelines suggest that specialists may, on an ad hoc basis, provide information they play no active role in decision-making processes of the SSG or in the production of an ILP.¹⁶⁵

[119] This is problematic as these individuals are crucial to producing the educational outcomes and strategies in the resultant ILP. Teachers are not

¹⁶⁴ U.S. Department of Education, *A Guide to the Individualized Education Program* (Policy Guide, July 2000) <<https://www2.ed.gov/parents/needs/speced/iepguide/index.htm>>; Ministry of Education (New Zealand), *Collaboration for Success: Individual Education Plans* (Policy Guide, 2011), 11-13.

¹⁶⁵ *Student Support Group Guidelines* (above no 141), 1-3.

medically trained and should not be expected to have an in-depth understanding of the nature of all different disabilities and how those disabilities should be facilitated. Nor should parents be expected to have this information or knowledge.

[120] Medical and specialised knowledge is important because it allows for an ILP, particularly the goals and strategies to achieve those goals, to be tailored to the needs of the student by those with the greatest knowledge of the disability.¹⁶⁶

[121] Without specialists being actively involved in the SSG or the production of ILPs, it is less likely that the goals and strategies implemented will be tailored to the student in a way that allows them to develop to their full capacity. As such, it should be expressly permitted that specialists may be asked by a student or their parent/guardian to be involved in the SSG if requested and their attendance paid for by the school.

Recommendation 4 – That the Department of Education and Training implement a process to monitor schools to ensure the use and quality of Student Support Groups and Individualised Learning Plans

[122] We recommend that the DET is required to implement a proper process to monitor and review school's use of SSGs and ILPs.

[123] If the current iteration of the DET's guidelines for the use of SSGs were consistently complied with it is likely that they would be far more effective. The guidelines are detailed enough with appropriate content and guidance to help schools create effective SSGs and ILPs that could be utilised for the best interests of the student.

¹⁶⁶Tony Barnett, Stacey Cumming, Emma Fraser, Tara Linke, Lauren Sayer and Chantel Scrimshaw, 'A systematic review of what is known about Individualised Learning Plans (ILPs)' (Royal Children's Hospital Educational Institute, 2013), 2, <https://www.rch.org.au/uploadedFiles/Main/Content/education/A_systematic_review_of_what_is_known_about_Individualised_Learning_Plans_Final_Report_BrM_edits.pdf>.

[124] However, the guidelines remain optional and the evidence collected by the *Held Back* report and the Victorian Auditor General's report on the program for students with disabilities suggests that schools often do not consider or comply with them. Nor has the DET implemented a process to ensure the quality and consistency of the use of SSGs within schools. Without requiring schools to mandatorily comply with the guidelines or implementing a review and quality control process it is unsurprising that the current use of SSGs is ineffective in improving the quality of the student's education.

[125] By implementing some process of review the DET would better ensure that schools were meaningfully engaging the tool of SSGs as a way to open up constructive dialogue with the student, their family, and their relevant specialists. It would also ensure that they are appropriately implementing the SSG; meetings are regular, formally arranged, and clearly structured.

E Department of Education and Training Culture

[126] As is apparent from the above discussion, none of the issues that this submission has identified are new. Indeed these issues have been brought to the attention of the DET repeatedly in reports from disability advocacy and human rights bodies, official inquiries, and government audits since 2011.

The following are key examples of those:

- a. Victorian Equal Opportunity & Human Rights Commission's *Held back: The experiences of students with disabilities in Victorian schools*¹⁶⁷
- b. Victorian Equal Opportunity & Human Rights Commission's *Held back: The experiences of students with disabilities in Victorian schools: Analysis Paper*¹⁶⁸
- c. Committee for the Convention on the Rights of Persons with Disabilities' *Concluding observations on the initial report of Australia*¹⁶⁹
- d. Australian Law Reform Commission's *Equality, Capacity, and Disability in Commonwealth Laws – Discussion Paper*¹⁷⁰
- e. Victorian Equal Opportunity and Human Rights Commission's *Submission to the Department of Education for the Review of the Education and Training Reform Regulations*¹⁷¹
- f. Victorian Auditor-General's *Programs for Students with Special Learning Needs*¹⁷²
- g. Department of Education and Training's *Review of the program for students with disabilities*¹⁷³
- h. Federal Community Affairs References Committee's *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with*

¹⁶⁷ *Held back* (above no 1).

¹⁶⁸ *Held back: Analysis Paper* (above no 1).

¹⁶⁹ *Concluding observations on the initial report of Australia*, (above no 1).

¹⁷⁰ *Equality, Capacity, and Disability in Commonwealth Laws* (above no 1).

¹⁷¹ Victorian Equal Opportunity and Human Rights Commission's *Submission to The Education and Training Reform Regulations Review* (above no 1).

¹⁷² *Programs for Students with Special Learning Needs* (above no 1).

¹⁷³ *Review of the program for students with disabilities* (above no 1).

disability, and culturally and linguistically diverse people with disability

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- i. PricewaterhouseCooper's *Disability expectations: Investing in a better life, a stronger Australia*¹⁷⁵
- j. Education and Employment References Committee's *Access to real learning: the impact of policy, funding and culture on students with disability*.¹⁷⁶

[127] These reports have been written in different contexts. However, they do consistently identify similar failings, including those identified in this submission.

[128] The continuation of complaints, both legal and nonlegal, against the DET are concerning. However, this would be less concerning if there were genuine signs of improvement, and that the DET was actively responding to the issues raised. The fact similar issues are being raised in reports and complaints year after year suggests this is not the case. The fact that the most common single respondent to discrimination complaints each year at the DDLS is DET, also suggests a lack of meaningful improvements.

[129] As this submission and others' makes clear, the DET is currently failing to adequately support students with disabilities in accessing the meaningful education they are entitled to, and failing to prevent the education system being a cause of mental illness and poor mental health for students with cognitive disabilities. DET-recommended policies and procedures that do not need to be read or adhered to, the failure to properly fund schools and the continued use of restrictive practices is demonstrably causing psychological harm to Victoria's students with cognitive disabilities.

¹⁷⁴ *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (above no 1).

¹⁷⁵ *Disability expectations: Investing in a better life, a stronger Australia* (above no 1).

¹⁷⁶ Education and Employment References Committee, 'Access to real learning: the impact of policy, funding and culture on students with disability' (Final report, Parliamentary Library, Parliament of Australia, January 2016), Recommendation 8.

[130] The continued failure of the DET to respond and implement remedial measures (despite a continuing supply of reports and complaints) indicates that, at best, the DET does not view the education and mental health of students with disabilities as a priority. At worst, the DET could be seen to be seriously neglecting students with disabilities as a group. Given the consequences of an inaccessible education system for students with cognitive disabilities, including poor mental health, poverty, and social dislocation, the continuing inaction by the DET, in our view, is unacceptable.

[131] This long term inaction suggest that until leadership and culture at the DET are changed, there will not be any significant positive change in this extremely important area.

1 *Recommendations*

Recommendation 1 – That an independent investigation is made into the Department of Education and Training

[132] We submit that an independent investigation into the Department of Education be held in relation to its treatment of students of disabilities and its failure to mitigate that treatment. The DET is fully aware of the ways they are failing students with disabilities and the harm they are causing them, including to their mental health. This has been identified and brought to their attention in a range of different reports.

[133] It is apparent that until the leadership and culture at the DET is changed there will not be any real improvement in this important area. Thus, we recommend that an investigation is instituted with the intention of instigating wholesale cultural change in the DET.