

REGULATING RESTRAINT AND SECLUSION IN AUSTRALIAN GOVERNMENT SCHOOLS: A COMPARATIVE HUMAN RIGHTS ANALYSIS

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The misuse of restraint and seclusion in Australian primary and secondary schools has received considerable exposure in recent years. Several Australian jurisdictions have recently reviewed laws and policies governing their use in schools. Yet reports about the inappropriate use of these practices remain prominent and raise concerns about whether existing regulatory frameworks do enough to protect the rights of children with disabilities in schools. This paper undertakes the first comparative analysis of existing regulatory frameworks governing the use of restraint and seclusion in Australian government schools, both primary and secondary, and considers whether existing frameworks are compliant with international human rights obligations under the Convention on the Rights of Persons with Disabilities ('CRPD')¹ and the Convention on the Rights of the Child ('CRC').² The paper reveals substantial variation in regulation between jurisdictions, and demonstrates that significant reform is necessary to bring existing regulatory frameworks into alignment with human rights norms.

I INTRODUCTION

School principals and teachers have statutory and common law responsibilities to maintain safe and supportive school environments.³ At times, education staff are required to respond to challenging behaviours that present a risk to the particular student or others. Restraint⁴ (the use of force through physical or other means to control student behaviour) and seclusion (solitary confinement from which the student's free exit is prevented) are authorised by statute or government policy as part of a school's permissible range of disciplinary and protective entitlements to manage a student's challenging behaviour, and to protect the student and others

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¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 24 January 2007) ('CRPD').

² *Convention on the Rights of the Child*, opened for signature 20 November 1989, GA/RES/44/25 (entered into force 2 September 1990) ('CRC').

³ Joan Squelch, 'School Discipline and the Law in Australia' in Charles Russo et al (eds), *Global Interest in Student Behaviour: An Examination of International Best Practices* (Rowman & Littlefield, 2014) 26; Des Butler and Ben Mathews, *Schools and the Law* (Federation Press, 2007). For discussion regarding common law duties, see, for eg, *Geyer v Downs* (1977) 138 CLR 91; *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁴ As noted later in this paper, this analysis only considers physical and mechanical forms of restraint. Other forms of restraint, such as chemical or psychological restraints are not considered.



from harm.⁵ While these practices may be used on any student, research indicates that students with disabilities are more likely to experience restraint and seclusion in a school environment.⁶

Restraint and seclusion infringe fundamental human rights such as bodily integrity, liberty and autonomy.⁷ They may breach various international human rights obligations including those under the CRPD and CRC that compel states parties to ensure inclusive and equal access to education,⁸ and to protect children with disabilities from violence, abuse, and inhuman or degrading treatment.⁹ If used inappropriately, they may also breach domestic law and policy including criminal law, civil laws of battery or negligence, workplace health and safety laws, discrimination laws and human rights laws, and may pose disciplinary implications for teaching staff.¹⁰ Their use

⁵ Butler and Mathews, above n 3; David Weissbrodt et al, 'Applying International Human Rights Standards to the Restraint and Seclusion of Students with Disabilities' (2012) 30 *Law and Inequality: A Journal of Theory and Practice* 287, 288; Roberta Hibbard and Larry Desch, 'Maltreatment of Children with Disabilities' (2007) 119 *Pediatrics* 1018, 1020; Darcie Lyons, 'Restraint and Seclusion of Students with Disabilities: A Child Rights Perspective from Victoria, Australia' (2015) 23 *International Journal of Children's Rights* 189, 192–3; Anthony Shaddock, Sue Packer and Alasdair Roy, *Report of the Expert Panel on Students with Complex Needs and Challenging Behaviour* (Education Directorate (ACT), 2015) <https://www.education.act.gov.au/__data/assets/pdf_file/0003/856254/Attach-4-Expert-Panel-Report-Web.pdf> 153.

⁶ The disproportionate use of restraint and seclusion on students with disabilities may be a result of various factors, as discussed in greater detail below, including because a student's disability is more likely to manifest in or be misunderstood as a behavioural issue as a result of their individual needs not being met: Weissbrodt et al, above n 5, 288; Hibbard and Desch, above n 5, 1020; Lyons, above n 5, 192–3; Susan Villani et al, 'A Descriptive Study of the Use of Restraint and Seclusion in a Special Education School' (2012) 41 *Child Youth Care Forum* 295, 306; Susana Gavidia-Payne, 'Behavioural Support for Parents of Children with Intellectual Disability and Problem Behaviour: an Overview of the Literature' (2002) *Journal of Intellectual and Developmental Disability* 27, 31–5.

⁷ Lyons, above n 5, 192–3; Shaddock, Packer and Roy, above n 5, 154; Brenda Scheuermann et al, 'Professional Practice and Ethical Issues Related to Physical Restraint and Seclusion in Schools' (2016) 27(2) *Journal of Disability Policy Studies* 86, 89, 94; Senate Standing Committee on Community Affairs, 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* (2015) [4.92]–[4.94] ('*Senate Committee Report on Violence, Abuse and Neglect*'); Victorian Equal Opportunity and Human Rights Commission, *Held Back: The Experiences of Students with Disabilities in Victorian Schools* (2012) 122; John Tobin, 'Time to Remove the Shackles: The Legality of Restraints on Children Deprived of Their Liberty Under International Law', (2001) 9 *International Journal of Children's Rights* 213, 214.

⁸ Shiralee Poed, Kathy Cologon and Robert Jackson, 'Gatekeeping and Restrictive Practices with Students with Disability: Results of an Australian Survey' (Paper presented at The Inclusive Education Summit, Adelaide, October 2017) 2–3; Senate Standing Committee on Education and Employment, Parliament of Australia, *Access to Real Learning: The Impact of Policy, Funding and Culture on Students with Disability* (15 January 2016) 31, 71 ('*Access to Real Learning Report*'); Scheuermann et al, above n 7, 89; Weissbrodt et al, above n 5, 297, 307; Patricia Bourke, 'Inclusive Education Reform in Queensland: Implications for Policy and Practice' (2010) 14 *International Journal of Inclusive Education* 183, 183.

⁹ Weissbrodt et al, above n 5, 306–7; *Senate Committee Report on Violence, Abuse and Neglect*, above n 7; Victorian Equal Opportunity and Human Rights Commission, above n 7, 108; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th sess, 2–13 September 2013, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 35; Lycette Nelson, 'Out of the Institution, Into the Classroom: Legal Challenges to the Use of Restraint and Seclusion in School Settings in the United States' (2017) 53 *International Journal of Law and Psychiatry* 97, 98; Human Rights Committee, *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* 44th sess (adopted 10 March 1992) [6].

¹⁰ Lyons, above n 5, 232; Shaddock, Packer and Roy, above n 5, 153; Poed, Cologon and Jackson, above n 8, 1–2. For a general discussion of duty of care in relation to student misconduct, see Squelch, above n 3, 26–9.

poses risks of physical harm, emotional trauma, and in some cases death.¹¹ As a result, their use has been heavily scrutinised in media reports¹² and government inquiries,¹³ which have exposed troubling reports of their misuse, and a lack of consistent and robust regulation in school settings. Several Australian jurisdictions have recently reviewed their policies and guidelines in an effort to identify best practice in the use of restraint and seclusion, and to provide greater clarity regarding the use of these practices in school settings.¹⁴ However this has occurred in a piecemeal fashion with very little guidance provided at a national level,¹⁵ contributing to poor alignment in

¹¹ Scheuermann et al, above n 7, 89–91; Janice LeBel et al, ‘Restraint and Seclusion Use in US School Settings: Recommendations from Allied Treatment Disciplines’ (2012) 82 *American Journal of Orthopsychiatry* 75; Douglas Gagnon, Marybeth Mattingly and Vincent Connelly, ‘The Restraint and Seclusion of Students With a Disability: Examining Trends in US School Districts and Their Policy Implications’ (2017) 28 *Journal of Disability Policy Studies* 66, 67; United States Government Accountability Office, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centres* (2009).

¹² See, for eg, Lucy Stone, ‘The “Grey Areas” of Restrictive Practice for Students with a Disability in Tasmanian Schools’, *The Examiner* (online), 10 February 2018 <<https://www.examiner.com.au/story/5167400/the-grey-areas-of-restrictive-practice-in-schools/?cs=95>>; Pallavi Singhal, ‘Damning Report Into NSW Schools Finds “Unacceptable” Mistreatment’, *The Sydney Morning Herald* (online), 22 September 2017 <<http://www.smh.com.au/national/education/damning-report-into-nsw-schools-finds-unacceptable-mistreatment-20170921-gym0hy.html>>; Pallavi Singhal, ‘NSW Schools Using Restraints and Isolation Against Guidelines, Ombudsman Finds’, *The Sydney Morning Herald* (online), 11 August 2017 <<http://www.smh.com.au/national/education/nsw-schools-using-restraints-and-isolation-against-guidelines-ombudsman-finds-20170811-gxu0d5.html>>; Henrietta Cook, ‘Allegations of Students in Cage-like Structures Triggers Investigation’, *The Age* (online), 22 September 2015 <<http://www.theage.com.au/victoria/allegations-of-students-in-cagelikestructures-triggers-investigation-20150921-gjrnd8.html>>; Richard Baines, ‘Claims 11yo Girl with Autism Left Isolated, Unsupervised at Tasmanian School’, *ABC News* (online), 27 September 2015 <<http://www.abc.net.au/news/2015-09-26/claims-autistic-child-left-unsupervised-at-tasmanian-school/6807292>>; Matthew Doran, ‘Use of Cage for Boy with Autism at Canberra School Prompts Call for National Education Standard’, *ABC News* (online), 3 April 2015 <<http://www.abc.net.au/news/2015-04-03/experts-slam-need-to-cage-boy-wth-autism-at-canberra-school/6369470>>; Emma Macdonald and Georgina Connery, ‘Child Reportedly Contained in Cage-like Structure at ACT Primary School’, *The Canberra Times* (online), 3 April 2015 <<http://www.canberratimes.com.au/actnews/child-reportedly-contained-in-cagelike-structure-at-act-primary-school-20150402-1mdj0b.html>>.

¹³ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7; Senate Standing Committee on Education and Employment, above n 8. For inquiries into the use of restraint and seclusion (and other restrictive practices) in other service settings, see, for eg, William Carter QC, *Challenging Behaviour and Disability: A Targeted Response*, Report to Minister for Communities, Disability Services and Seniors (July 2006) (‘Carter Report’); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 243–60.

¹⁴ Victorian Equal Opportunity and Human Rights Commission, above n 7; Shaddock, Packer and Roy, above n 5; JFA Purple Orange, *An Overview of Restrictive Practices, and the Key Issues for Consideration in Relation to the Establishment of an Office of the Senior Practitioner: A Public Discussion Paper Prepared for the ACT Government to Assist Public Consultation* (2017); Deloitte, *Review of Education for Students with Disability in Queensland State Schools* (2017); New South Wales Ombudsman, *Inquiry into Behaviour Management in Schools: A Special Report to Parliament Under s 31 of the Ombudsman Act 1974* (2017); Legislative Council Portfolio Committee No 3 — Education, Parliament of New South Wales, *Education of Students with a Disability or Special Needs in New South Wales Report No 37* (2017).

¹⁵ Existing national guidelines and frameworks do not directly address the use of restraint and seclusion in schools. The *Disability Standards for Education 2005* provide guidance to education and training providers regarding their obligations to ensure students with disabilities have equal access to education: Department of Education and Training (Cth), *Disability Standards for Education* (2005). The *National Safe Schools Framework* provides guiding principles to ensure safe and supportive school communities: Department of Education and Training (Cth), *National Safe Schools Framework* (2010) 2. The implementation of the National Disability Insurance Scheme (NDIS), and the National Disability Insurance Scheme Quality and Safeguarding Framework provided an opportunity to develop a consistent approach to the regulation of restrictive practices across different service settings throughout Australia. However this

understanding and implementation of restraint and seclusion in government schools across Australia.¹⁶ Despite such recent attention, there remains limited knowledge about the use and regulation of restraint and seclusion in government schools in Australia, and no previous study has undertaken a robust analysis of regulatory frameworks in all Australian jurisdictions.¹⁷ It is timely that the first comparative analysis of regulatory frameworks across Australia be undertaken to understand the current state of regulation and where improvements may be made to protect the rights and wellbeing of children with disabilities better in school settings.

This paper begins by considering current literature on the nature and extent of restraint and seclusion in Australian schools, and the impacts of their use. Part 3 examines international human rights norms under the CRPD and CRC that are implicated by the use of restraint and seclusion, and identifies minimum human rights standards that should guide the regulation of these practices. Part 4 presents a comparative analysis of current regulatory frameworks governing the use of these practices in primary and secondary government schools¹⁸ in each Australian jurisdiction. The analysis considers key components of each framework, including types of practices regulated, criteria for their use, and safeguards designed to promote appropriate use of these practices and protect the rights of children with disabilities in these settings. Each of these components is critically analysed for its compatibility with international human rights norms identified in Part 3. This analysis reveals significant gaps and a wide variation in regulation between jurisdictions. Finally, the paper provides recommendations that would encourage greater alignment with Australia's human rights obligations and improved protections for the rights and interests of students with disabilities in government schools across Australia. While this analysis is limited to the Australian context, it provides observations that may inform the development of regulatory frameworks in international jurisdictions.

Framework is limited to the regulation of NDIS-funded supports and providers, meaning the majority of restraint and seclusion practices used in school settings will not fall within the purview of this framework: National Disability Insurance Agency, *Operational Guidelines – Planning and Assessment – Supports in the Plan – Interface with School Education* (2014); National Disability Insurance Agency, *Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (2015); New South Wales Ombudsman, above n 14, 33. The *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, which provides national policy guidance on the use of restrictive practices, is limited to the disability service sector and does not address the use of restraint and seclusion in school settings: Department of Social Services (Cth), *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014) ('*National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*').

¹⁶ See, for eg, Victorian Equal Opportunity and Human Rights Commission, above n 7, 119.

¹⁷ LeBel et al, above n 11, 76; Poed, Cologon and Jackson, above n 8, 27. Even in international jurisdictions, such as the United States, where there has been significant consideration of the use of restraint and seclusion in school settings, there remains limited data about, and understanding of the frequency of restraint and seclusion: Gagnon, Mattingly and Connelly, above n 11, 73.

¹⁸ This paper does not consider the regulation of physical restraint and seclusion in non-government, religious or independent school settings.

II PHYSICAL RESTRAINT AND SECLUSION IN SCHOOLS

A *Defining Restraint and Seclusion*

1 *Restraint*

Restraint encompasses a range of interventions intended to manage student behaviour. This paper considers only physical and mechanical forms of restraint, as chemical restraint and psychological restraint are generally not directly regulated in education legislation or policy.¹⁹

Physical restraint has been defined as the ‘use ... of physical force to prevent, restrict or subdue movement of a person’s body, or part of their body, for the primary purpose of influencing the person’s behaviour’.²⁰ Mechanical restraint involves the use of a device, such as a harness or straps.²¹ The degree of force used is generally considered irrelevant, although forms of restraint that involve a particularly high degree of physical intervention, such as prone restraint (restrained on a surface with face and torso facing down) and supine restraint (restrained on a surface with face and torso facing up)²² may be distinguished and regulated separately from other forms of restraint.²³

Physical restraint is distinct from physical redirection. Physical redirection involves a low degree of physical intervention that is intended to block, deflect or redirect a student’s actions. Unlike forms of restraint, a student is able to move away or disengage from the intervention freely. This might include for example deflecting or blocking a student from hitting another person, or ‘guiding a student’s arm away from their mouth to prevent biting behaviour’.²⁴ Similarly, physical interventions that are intended to assist or guide a student will not generally be considered physical

¹⁹ ‘Chemical restraint’ has been defined as ‘the use of medication or chemical substance for the primary purpose of influencing a person’s behaviour or movement’: *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15, 5. Psychological or psycho-social restraints include the use of coercion or limit-setting to manage behaviours: *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15, 5; Victorian Equal Opportunity and Human Rights Commission, above n 7, 106.

²⁰ *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15, 5, which defines physical restraint in terms of the use of ‘sustained or prolonged use’ of force, and provides an example of this as including ‘a physical force or action lasting longer than approximately 30 seconds’. See also Shaddock, Packer and Roy, above n 5, 153. Elsewhere, restraint is not defined in terms of the ‘sustained or prolonged’ use of force, including in the education sector: see, for eg, Department of Education and Training (Vic), *Restraint of Students* (2018) <<http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx>>; and the disability services sector: see, for eg, *Disability Services Act 2006* (Qld) s 144. Restraint is also not defined in these terms in existing international human rights jurisprudence. A broader interpretation, which is not dependent on a temporal aspect of use of restraint or seclusion is adopted for the purposes of this paper. However it is important to note the different terminology, and the different interpretations different bodies or individuals may employ in the practice of physical restraint.

²¹ *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15, 5.

²² See, for eg, Richard Barnett et al, ‘Perceptions of Supported and Unsupported Prone-Restraint Positions’ (2016) 23 *Journal of Psychiatric and Mental Health Nursing* 172; Scheuermann et al, above n 7.

²³ Scheuermann et al, above n 7, 91; Nelson, above n 9, 99.

²⁴ *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15, 5; Department of Education and Training (Vic), *Restraint and Seclusion: Physical Interventions* <<http://www.education.vic.gov.au/school/teachers/studentmanagement/Pages/physicalintervention.aspx#link62>>.

restraint.²⁵ While theoretically distinct from physical restraint, this distinction may not always be clear in practice, and physical redirection may easily escalate into physical restraint if the student is unable to, or believes that they are unable to disengage from the intervention.²⁶

2 *Seclusion*

Seclusion has been defined as the ‘solitary confinement of a person in a room or area from which their free exit is prevented.’²⁷ This includes circumstances in which a person ‘believes they cannot or should not leave an area without permission’ even if their exit is not physically blocked.²⁸ Seclusion is commonly associated with the use of restraint, as a form of restraint may be used in directing a student to seclusion.²⁹ Seclusion may be used in preference to restraint where a student’s behaviour is identified as being unsafe, and restraint would pose high risk of injury to staff or the student.³⁰

Other commonly used practices such as time out³¹ share features similar to seclusion, but are theoretically distinct.³² Time out involves a student withdrawing to an isolated area from which their free exit is not prevented, allowing the student to regulate their emotions or behaviours in a safe environment before returning to school activities.³³ Time out practices also exist on a continuum, from less intrusive forms such as sitting in a particular area of a classroom, to more restrictive forms involving isolation in a different room.³⁴ Some schools operate a dedicated time out room for this purpose.³⁵ Time out may be student-initiated or teacher-directed.³⁶

²⁵ *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15, 5; Department of Education and Training (Vic), above n 24; Victorian Equal Opportunity and Human Rights Commission, above n 7, 106.

²⁶ Gagnon, Mattingly and Connelly, above n 11, 73.

²⁷ Australian Psychological Society, *Evidence-Based Guidelines to Reduce the Need for Restrictive Practices in the Disability Sector* (2011) 11.

²⁸ *Ibid*; Victorian Equal Opportunity and Human Rights Commission, above n 7, 106. See also Shaddock, Packer and Roy, above n 5, 153.

²⁹ Joseph Ryan, Reece Peterson and Michael Rozalski, ‘State Policies Concerning the Use of Seclusion Timeout in Schools’ (2007) 30(3) *Education and Treatment of Children* 1.

³⁰ Barbara Trader et al, ‘Promoting Inclusion Through Evidence-Based Alternatives to Restraint and Seclusion’ (2017) 42 *Research and Practice for Persons with Severe Disabilities* 75, 82.

³¹ ‘Time out’ practices are also referred to as ‘withdrawal’: see, for eg, *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 101–2.

³² Other commonly used practices that share some features of seclusion and time out include detention and in-school suspension rooms. These practices should not share all features of seclusion, in that a student may not be isolated, may be supervised, or may not be prevented from leaving. However there appears to be potential for these practices to also be misused such that they amount to a form of seclusion: Trader et al, above n 30, 79. This is not considered in any detail in this paper, but may warrant further research.

³³ Susan Bon and Perry Zirkel, ‘The Time-Out and Seclusion Continuum: A Systematic Analysis of the Case Law’ (2014) 27 *Journal of Special Education Leadership* 35, 38; Gregory Everett, ‘Time-Out in Special Education Settings: The Parameters of Previous Implementation’ (2010) 12 *North American Journal of Psychology* 159, 161.

³⁴ For a more detailed discussion of the continuum of time-out and seclusion practices, see Bon and Zirkel, above n 33, 37.

³⁵ Dedicated time out rooms may also be referred to as safe rooms, calm rooms, quiet rooms, low sensory rooms and low stimulation rooms: Bon and Zirkel, above n 33.

³⁶ Bon and Zirkel, above n 33, 37–8.

The distinction between seclusion and time out can be easily confused, particularly if time out is teacher-directed, as the distinction may depend on whether the student perceives their isolation or exit from an area to be voluntary. A student's perception may be influenced by various relational or environmental factors including any power imbalance between student and teacher, or experiences of feeling coerced into taking time out under the threat of other sanctions.³⁷ Time out has become recognised as an effective therapeutic intervention that involves minimal imposition on the student's rights and wellbeing, if it is used appropriately.³⁸ Given its similarity to seclusion, which is increasingly being recognised as an inappropriate intervention,³⁹ and its potential for misuse,⁴⁰ it is important that regulatory frameworks define and distinguish both interventions clearly.⁴¹

3 Purpose of Seclusion and Restraint

Restraint and seclusion are typically justified on the basis that they are necessary to protect the student or others from harm.⁴² They should be distinguished from practices that do not serve a protective purpose, such as those used for a punitive or disciplinary purpose. Restraint and seclusion are theoretically distinct from corporal punishment for example, which involves the use of force for punitive purposes and is prohibited in most jurisdictions.⁴³ However, recent research has demonstrated that, in practice, restraint and seclusion are used in school settings for a variety of purposes beyond or in addition to a protective purpose, including as a means of coercion, discipline, convenience or retaliation,⁴⁴ and to prevent damage to property.⁴⁵ As noted below, the use of restraint or seclusion for non-protective purposes appears to be inconsistent with human rights norms.

B Current Use in Australian Government Schools

There is currently limited data on the frequency or circumstances of use of restraint and seclusion in Australian government schools. There is no current requirement nationally for this data to be recorded and monitored, and, as discussed below, existing recording and monitoring requirements

³⁷ Gagnon, Mattingly and Connelly, above n 11, 73; Scheuermann et al, above n 7, 91; Victorian Equal Opportunity and Human Rights Commission, above n 7, 106. See also Shaddock, Packer and Roy, above n 5, 153.

³⁸ Bon and Zirkel, above n 33, 38; Everett, above n 33, 161.

³⁹ See, for eg, Bon and Zirkel, above n 33, 35; Gagnon, Mattingly and Connelly, above n 11, 66–7; LeBel et al, above n 11; New South Wales Ombudsman, above n 14, 26; *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15; Melbourne Social Equity Institute, *The Seclusion and Restraint Project: Report* (2014).

⁴⁰ For example, recent inquiries have revealed circumstances where students are effectively secluded in 'time out' rooms: see New South Wales Ombudsman, above n 14, 26–31.

⁴¹ New South Wales Ombudsman, above n 14, ix; Bon and Zirkel, above n 33, 36–8.

⁴² Weissbrodt et al, above n 5, 288; Shaddock, Packer and Roy, above n 5, 15.

⁴³ Weissbrodt et al, above n 5, 288; Committee on the Rights of the Child, *General Comment No 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, 42nd sess, UN Doc. CRC/C/GC/8 (2 March 2007) [15].

⁴⁴ Weissbrodt et al, above n 5, 288; Lyons, above n 5, 190; Victorian Equal Opportunity and Human Rights Commission, above n 7, 110–13; *Senate Committee Report on Violence, Abuse and Neglect*, above n 7; *Access to Real Learning Report*, above n 8, 31.

⁴⁵ As considered further below, it is evident that restraint and seclusion may be permitted in some jurisdictions to prevent damage to property.

in each Australian jurisdiction do not provide for rigorous analysis of restraint and seclusion data.⁴⁶ In two recent national surveys of families, advocates and students with disabilities, approximately one in five respondents reported the use of restraint or seclusion at school.⁴⁷ Similar surveys conducted in Queensland, Victoria and the Australian Capital Territory (ACT) returned similar results,⁴⁸ with as many as 87 per cent of teacher respondents in the ACT reporting having used strategies of ‘putting a student in a different location’ (such as seclusion or time out) in the previous 12 months.⁴⁹ A recent New South Wales Ombudsman inquiry revealed that 22 per cent of schools had reported the use of a time out facility or equivalent facility in 2016, and that time out facilities had been used in New South Wales schools to seclude students.⁵⁰ Anecdotal evidence from recent enquiries and media reports has also revealed alarming examples of the use of restraint and seclusion on students with disabilities, including circumstances of students being tied to chairs,⁵¹ locked in a cupboard,⁵² and secluded in caged areas.⁵³ While these reports do not provide comprehensive data, and the full extent to which restraint and seclusion are used in Australian government schools remains unknown, they indicate that restraint and seclusion practices are relatively widespread. Further, while the frequency of restraint and seclusion incidents is unknown, and the most serious of implications (such as death) are rare, the very possibility of such impacts, as well as the range of other physical and psychological trauma that restraint and seclusion may cause, demand that these practices be tightly regulated.⁵⁴

C Students with Disabilities

Research indicates that these practices are disproportionately used on students with disabilities, particularly students with intellectual or mental impairments such as anxiety disorders and conduct disorders.⁵⁵ This is significant, as recent data indicates intellectual and mental impairments are widespread in Australia’s youth, with up to one in seven children aged between 4 and 17 years having been assessed as having a ‘mental disorder’.⁵⁶ While limited research exists in Australia, in the United States it has been reported that students with a disability are up to 20 times more

⁴⁶ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 65, 114.

⁴⁷ Poed, Cologon and Jackson, above n 8, 6–7; Children and Young People with Disability Australia, *Education Survey 2016: National Summary of Results* (2016).

⁴⁸ In Queensland, a parent survey ‘revealed that approximately one in four parents and carers believed that their child had been subjected to restraint at school’: Deloitte, above n 14, 108. In Victoria, ‘34 parents reported the use of restraint on their child at school, ... 128 parents reported that their child had been placed in “special rooms”, ... [and] 514 educators reported having used restraint’: Victorian Equal Opportunity and Human Rights Commission, above n 7, 105. For similar findings in the ACT, see Shaddock, Packer and Roy, above n 5, 152.

⁴⁹ Shaddock, Packer and Roy, above n 5, 152.

⁵⁰ New South Wales Ombudsman, above n 14, 28. A recent inquiry in New South Wales also heard that advocacy groups ‘are getting increasing reports of restraint and seclusion’: Legislative Council Portfolio Committee No 3 — Education, above n 14, 24; and 106 where the same inquiry reported serious concerns about ‘harm caused to students when practices like restraint and seclusion’ are used.

⁵¹ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 105.

⁵² *Ibid* 103; Lyons, above n 5, 190; Victorian Equal Opportunity and Human Rights Commission, above n 7, 109.

⁵³ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 102; Macdonald and Connery, above n 12. See also Legislative Council Portfolio Committee No 3 — Education, above n 14, 178–9.

⁵⁴ LeBel et al, above n 11.

⁵⁵ Gagnon, Mattingly and Connelly, above n 11, 66.

⁵⁶ The most prominent mental disorders include anxiety disorders, major depressive disorders, attention-deficit/hyperactivity disorder (ADHD) and conduct disorders: David Lawrence et al, *The Mental Health of Children and Adolescents: Report on the Second Australian Child and Adolescent Survey of Mental Health and Wellbeing* (2015) 3–4; Trader et al, above n 30, 75.

likely to experience restraint or seclusion at school.⁵⁷ The likely reasons for this are varied. Students with disabilities are more likely to experience skills deficits or impairments in social communication that may manifest in or be misunderstood as disruptive or challenging behaviours.⁵⁸ Students with disabilities may exhibit disruptive behaviours as a means of communicating frustration when their individual needs are not met.⁵⁹ Importantly, it may not be the student's disability in itself that causes behaviours of concern, but rather a failure to identify and accommodate the student's individual needs, including communication or sensory difficulties, or underlying factors such as past experiences of trauma from exposure to abuse or violence.⁶⁰ Education staff may not be suitably trained or resourced to meet the individual needs of students with disabilities, or to use more therapeutic and less restrictive interventions to minimise or avoid escalating behaviours.⁶¹

Furthermore, while historically there has been a 'strong tradition of educating children with disabilities in segregated settings',⁶² a recent shift towards inclusive education has resulted in students with disabilities more likely to participate in mainstream education services.⁶³ As a result, government schools have taken on a greater role in providing frontline services to children with disabilities, including through counselling, support programs and school nurses, and, increasingly, they are becoming the location in which intellectual or mental impairments are first identified and responded to.⁶⁴

To adapt to this shift, schools have engaged in more whole-of-school positive behaviour support programs to promote more inclusive and effective learning environments for all students,⁶⁵

⁵⁷ Gagnon, Mattingly and Connelly, above n 11, 66–7.

⁵⁸ Weissbrodt et al, above n 5, 289; Hibbard and Desch, above n 5, 1018; Lyons, above n 5, 192–3.

⁵⁹ Weissbrodt et al, above n 5, 288; Hibbard and Desch, above n 5, 1020; Lyons, above n 5, 192–3. According to Gavidia-Payne, 'challenging behaviour is demonstrated by approximately 45 per cent of children with intellectual disabilities, including aggressive, destructive, attention-seeking, self-injurious, sexually inappropriate, noisy and hyperactive behaviour': Gavidia-Payne, above n 6, 31–5.

⁶⁰ Lyons, above n 5, 192–3; Department of Education and Training (Vic), *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools* (2017) 12–15 ('*Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*').

⁶¹ Deloitte, above n 14, 108; Scheuermann et al, above n 7, 91–2.

⁶² Poed, Cologon and Jackson, above n 8, 2–3.

⁶³ Peter Mittler, 'The UN Convention on the Rights of Persons with Disabilities: Implementing a Paradigm Shift' (2015) 12 *Journal of Policy and Practice in Intellectual Disabilities* 79; Sarah Arduin, 'A Review of the Values that Underpin the Structure of an Education System and its Approach to Disability and Inclusion' (2015) 14 *Oxford Review of Education* 105, 105.

⁶⁴ Lawrence et al, above n 56, 89.

⁶⁵ This includes the implementation of comprehensive school-wide environments that establish clear behavioural expectations and promote and reward positive social behaviours: see *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60, 12–15; Catherine Bradshaw, Mary Mitchell and Philip Leaf, 'Examining the Effects of School-Wide Positive Behavioural Interventions and Supports on Student Outcomes: Results from a Randomised Controlled Effectiveness Trial in Elementary Schools' (2010) 12 *Journal of Positive Behavior Interventions* 133. Examples of positive behaviour support interventions include functional analysis and assessment, positive reinforcement, addressing external stimuli, offering choices and providing prompts, altering schedules or routines, and 'reinforcement interventions to strengthen prosocial alternatives to challenging behaviours, behaviour reductive procedures such as timeout or response cost procedures, and finally, response interruption or redirection': Scheuermann et al, above n 7, 90; John Nevin and Timothy Shahan, 'Behavioral Momentum Theory Equations and Applications' (2011) 44 *Journal of Applied Behavior Analysis* 877; Mark O'Reilly et al, 'A Systematic Examination of Different Parameters of Pre-session Exposure to Tangible Stimuli that Maintain Problem Behavior'

including students with disabilities. The purpose of these programs is to encourage an approach to behaviour management that emphasises prevention of behavioural incidents and the implementation of less restrictive and evidence-based support practices.⁶⁶ However, while positive behaviour supports have been demonstrated to reduce the incidence of restraint and seclusion practices,⁶⁷ and are strongly supported at a national level,⁶⁸ they have not been adopted universally in Australian government schools. In 2017, approximately half of all schools in New South Wales and Queensland had adopted a positive behaviour support approach to behaviour management.⁶⁹ Furthermore, positive behaviour support programs do not necessarily eliminate the use of restraint and seclusion, even if well-resourced, and oriented towards the reduction and elimination of these practices.⁷⁰ As such, while positive behaviour support programs are important, it remains critical that regulatory frameworks provide clear guidance on the acceptable use of restraint and seclusion in schools.

D *Impacts and Efficacy*

Restraint and seclusion have been reported to cause physical injury (including death in extreme cases),⁷¹ psychological trauma, and decline in social behaviours.⁷² Their use may escalate student behaviours, particularly if the student has past experiences of abuse.⁷³ Furthermore, these practices fail to identify and address the function of a student's behaviour, and instead seek to manage or

(2009) 42 *Journal of Applied Behavior Analysis* 773; Gregory Hanley, Brian Iwata and Brandon McCord, 'Functional Analysis of Problem Behaviour: A Review' (2003) 36 *Journal of Behavior Analysis* 147; Cara Phillips and Timothy Vollmer, 'Generalised Instruction Following with Pictorial Prompts' (2012) 45 *Journal of Applied Behavior Analysis* 37.

⁶⁶ Trader et al, above n 30, 79–80.

⁶⁷ Gagnon, Mattingly and Connelly, above n 11, 73; Shaddock, Packer and Roy, above n 5, 149; Deloitte, above n 14, 101.

⁶⁸ Department of Education and Training (Cth), *Safe Schools*, above n 15; Joy Cumming and Ralph Mawdsley, 'Protecting Children in Australian Schools: Teacher Use of Force and Restraint and Legal Challenges' (2014) 20 *International Journal of Law and Education* 93, 97; Australian Government, *Australian Government Response to Commonwealth Senate Community Affairs References Committee Report: 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* (March 2017) 21 ('*Australian Government Response to Senate Committee Report on Violence, Abuse and Neglect*').

⁶⁹ For discussion on the implementation of positive behaviour supports in New South Wales, see New South Wales Ombudsman, above n 14, 2–3. For discussion on the implementation of behaviour supports in Queensland, see Deloitte, above n 14, 101. Data was not identified for other jurisdictions.

⁷⁰ Bradshaw, Mitchell and Leaf, above n 65; Stephen Lassen, Michael Steele and Wayne Sailor, 'The Relationship of School-Wide Positive Behaviour Support to Academic Achievement in an Urban Middle School' (2006) 43 *Psychology in Schools* 701; Shaddock, Packer and Roy, above n 5, 17, 149; Teri Marx and Joshua Baker, 'Analysis of Restraint and Seclusion Legislation and Policy Across States: Adherence to Recommended Principles' (2017) 28 *Journal of Disability Policy Studies* 23, 23.

⁷¹ Gagnon, Mattingly and Connelly, above n 11, 67; Scheuermann et al, above n 7, 90; Surabhi Kumble and Bernadette McSherry, 'Seclusion and Restraint: Rethinking Regulation from a Human Rights Perspective' (2010) 17 *Psychiatry, Psychology and Law* 551, 553.

⁷² Australian Psychological Society, above n 27; Melbourne Social Equity Institute, above n 39, 172; Deloitte, above n 14, 51; Kumble and McSherry, above n 71, 553–4.

⁷³ Thomas Larson et al, 'Managing Treatment Resistant Violent Adolescents: A Step Forward by Substituting Seclusion for Mechanical Restraint?' (2008) 35 *Administration and Policy in Mental Health* 198, 199; Weissbrodt et al, above n 5, 289; Kumble and McSherry, above n 71, 553–4.

suppress unwanted behaviours.⁷⁴ In doing so, they may reinforce underlying factors that contribute to unwanted behaviours by compounding a sense of exclusion or non-acceptance, or by reinforcing past experiences of trauma.⁷⁵ A student who is restrained or is placed in seclusion may become disengaged from their learning environment for some time. Furthermore, a student who has experienced psychological distress through the use of restraint or seclusion may be less willing to return to the environment in which this occurred. Seclusion and restraint may have a negative impact on student-teacher relationships, student trust and willingness to engage in learning activities, and learning outcomes.⁷⁶ The long term impacts of restraint and seclusion in childhood is not well understood, but it has been suggested that these practices may contribute to long term psychological problems such as fear, anxiety, or impaired trust as a result of cumulative re-traumatisation.⁷⁷

Despite these concerns, restraint and seclusion remain relatively widespread, and some claim that restraint and seclusion practices are necessary components of a school's hierarchy of responses to student behaviours, to protect the wellbeing and interests of students and staff.⁷⁸ Evidently, restraint and seclusion engage complex ethical scenarios. While their use is intended to protect the student and others from harm, they also pose significant risks to a student's wellbeing and implicate fundamental human rights. Education personnel must navigate these complex ethical scenarios, often in very resource- and time-constrained circumstances, and attempt to strike a balance between competing values or rights.⁷⁹ It is therefore critical that education personnel are provided clear guidance about the use of these practices and the human rights implications of their use.

III CHILDREN'S RIGHTS

Australia has signed and ratified a number of international human rights instruments relevant to the use of restraint and seclusion in school settings.⁸⁰ Most relevant are the CRPD and CRC. While

⁷⁴ Liepa Vasare Gust and Natallia Sianko, 'Can Policy Reform Reduce Seclusion and Restraint of Schoolchildren?' (2012) 82 *American Journal of Orthopsychiatry* 91, 94.

⁷⁵ Nelson, above n 9, 98; Gagnon, Mattingly and Connelly, above n 11, 67.

⁷⁶ See, for eg, *Senate Committee Report on Violence, Abuse and Neglect*, above n 7 [4.129]; *Access to Real Learning Report*, above n 8, 31; Scheuermann et al, above n 7, 89, 94; Weissbrodt et al, above n 5, 307; Nelson, above n 9, 98.

⁷⁷ Australian Psychological Society, above n 27, 33–4; Sheila Kennedy and Wanda Mohr, 'A Prolegomenon on Restraint of Children: Implicating Constitutional Rights' (2001) 71 *American Journal of Orthopsychiatry* 71; Maria Brenner, 'Child Restraint in the Acute Setting of Pediatric Nursing: An Extraordinarily Stressful Event' (2007) 30 *Issues in Comprehensive Pediatric Nursing* 29.

⁷⁸ Timothy Vollmer et al, 'Association for Behavior Analysis International Position Statement on Restraint and Seclusion' (2011) 34 *Behavior Analysis* 103; Bon and Zirkel, above n 33, 36.

⁷⁹ Shaddock, Packer and Roy, above n 5, 17.

⁸⁰ This paper considers only the CRPD and CRC in detail. Other international human rights instruments are also relevant, but not considered in detail in this paper. See, for eg, *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); *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, A/RES/57/199 (entered into force 22 June 2006); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 (entered into force 3 January 1976). Australia has also expressed a commitment to the United Nations Sustainable Development Goals, which include a commitment to provide inclusive, safe and effective learning environments for all students: *Transforming Our World, The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN General Assembly, 17th sess, Agenda Items 15 and 116 (adopted 25 September 2015). Many of the principles found in these instruments also

these instruments do not address the use of restraint and seclusion directly, the principles that underpin them provide guidance on how restraint and seclusion should be regulated, and indeed have informed recent policy reform relating to the use of these practices.⁸¹ Fundamentally, this human rights framework recognises that, by virtue of their physical and mental immaturity, children require special safeguards to protect their rights and wellbeing.⁸² These instruments impose expectations and responsibilities on government departments tasked with children's care.⁸³ Ultimately, the best interests of the child must be the primary consideration in all actions concerning children.⁸⁴

A *Are Restraint and Seclusion Permissible?*

Under the CRPD and CRC, states parties are required to protect children's liberty and security of person,⁸⁵ promote their dignity and self-reliance on an equal basis with all others,⁸⁶ and protect children from physical or mental violence, injury or abuse,⁸⁷ and from cruel, inhuman and degrading treatment or punishment.⁸⁸ This includes a responsibility to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation'.⁸⁹ States parties are also compelled to accommodate students' disabilities and ensure equal access to inclusive education.⁹⁰ Having regard to the possible impacts of restraint and seclusion on children with disabilities, including deprivation of liberty, risk of physical and psychological harm, and impacts on learning outcomes, the use of restraint or seclusion is likely to implicate each of these human rights principles in some way.⁹¹

International human rights bodies have expressed significant concern about the use of restraint and seclusion in various settings, including schools. The United Nations Committee on the Rights of Persons with Disabilities ('*CRPD Committee*') has stated that it is 'concerned that persons with

influence the regulation of restraint and seclusion through human rights charters enacted in Victoria and ACT: *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

⁸¹ These human rights principles have informed recent reviews of education systems within several jurisdictions: See, for eg, Shaddock, Packer and Roy, above n 5, 154; Deloitte, above n 14, 51. Human rights principles have also informed the regulation of restraint and seclusion in other service settings. For discussion, see, for eg, Kim Chandler, Lindy Willmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis' (2014) 14 *QUT Law Review* 90.

⁸² *CRC*, preamble; Victorian Equal Opportunity and Human Rights Commission, above n 7, 109; Lyons, above n 5, 195.

⁸³ *CRC* art 3. Not all principles of the *CRC* or *CRPD* are necessarily incorporated into domestic law and policy in Australia, and therefore are not necessarily legally binding. While not specifically incorporated into domestic law, the ratification of the *CRC* and *CRPD* may give rise to a legitimate expectation that public officials, at least at a federal level, should normally act in accordance with the *CRC* and *CRPD*: *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20. For discussion see also: Sanjay Patel, 'Founding Legitimate Expectations on Unincorporated Treaties' [2010] *Judicial Review* 74; Matthew Groves, 'Substantive Legitimate Expectations in Administrative Law' (2008) 32 *Melbourne University Law Review* 470.

⁸⁴ *CRC* art 3; *CRPD* art 7(2).

⁸⁵ *CRC* art 37; *CRPD* art 14.

⁸⁶ *CRC* art 37; *CRPD* art 3, 24.

⁸⁷ *CRC* art 19; *CRPD* art 16.

⁸⁸ *CRC* art 37; *CRPD* art 15.

⁸⁹ *CRC* art 3.

⁹⁰ *CRC* art 28; *CRPD* art 24.

⁹¹ Victorian Equal Opportunity and Human Rights Commission, above n 7, 107.

disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion, in various environments, including schools...'.⁹² The CRPD Committee also made a general recommendation that Australia 'take immediate steps to end such practices'⁹³ and withdraw its interpretive declarations, stating that the CRPD permits restrictive interventions if they are 'necessary, ... last resort and subject to safeguards'.⁹⁴ However, human rights jurisprudence specific to the use of such practices in school settings remains limited, and is in some respects inconsistent with this general recommendation.⁹⁵

1 *Restraint and Seclusion for Protective Purposes*

(a) *Restraint*

The Committee on the Rights of the Child ('*the Committee*') has indicated that the reasonable use of restraint for protective purposes is permissible in school settings. The Committee noted that 'caring for children ... demands frequent physical actions and interventions to protect them',⁹⁶ and that there 'are exceptional circumstances in which teachers and others ... may be confronted with dangerous behaviour which justifies the use of reasonable restraint to control it'.⁹⁷ The Committee pointed to a clear theoretical distinction between the use of force to protect a student or others from harm, which it appears to permit, and the use of force to punish, which it does not.⁹⁸

It is also critical to recognise that in a rights-based framework, the rights of one rights holder may at times be in conflict with the claims of another rights holder. Children's rights are not without limits.⁹⁹ Where rights conflict, interference with the rights of one child may be justified if necessary and proportionate to protect the rights of others.¹⁰⁰ While not directly addressed by the Committee, its comments recognise the need to consider the rights of others when responding to challenging behaviours, particularly where those behaviours present a risk of harm to others. The use of restraint may be justified if necessary to protect others from harm, provided the restraint used is proportionate to the risk posed by the student's behaviours.

⁹² Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, above n 9, 5.

⁹³ Ibid 36.

⁹⁴ Ibid 8.

⁹⁵ Indeed some have criticised the CRPD Committee's lack of clarity in making these recommendations, eg, it is notable that the Committee's recommendation in its concluding observations on Australia's initial report was that Australia 'take immediate steps to end such practices ... in order to ensure that persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions': *ibid* [36]. As Nelson has pointed out, 'the Committee limited its recommendation to a specific type of abuse' ('intrusive medical interventions'), leaving uncertain the Committee's recommendation in relation to the use of restraint and seclusion, which serve no medical purpose: Nelson, above n 9, 98.

⁹⁶ Committee on the Rights of the Child, *General Comment No 8*, above n 43, [15].

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ John Tobin, 'Understanding a Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations' in A Invernizzi and J Williams (eds), *The Human Rights of Children* (2012) 79.

¹⁰⁰ *Ibid*.

International human rights bodies have not explicitly prohibited any particular forms of restraint. However existing jurisprudence indicates that mechanical,¹⁰¹ supine, and prone restraints are not compatible with this human rights framework. Such forms of restraint would not be necessary or proportionate, or in a child's best interests in any circumstances, given the significant risks associated with their use,¹⁰² the availability of less restrictive interventions,¹⁰³ and the heightened vulnerability of students with disabilities.¹⁰⁴

(b) Seclusion

No explicit guidance has been provided in international human rights jurisprudence on the use of seclusion in school. Different interpretations have been offered about whether existing human rights norms permit its use in schools. It has been argued that while seclusion poses risks to the student's wellbeing and may infringe children's rights, in limited circumstances seclusion may be a necessary and proportionate response to protect the student or others from harm.¹⁰⁵ It has also been noted that less restrictive interventions may not be sufficient in all circumstances to manage challenging behaviours that pose a risk to the student or others.¹⁰⁶

Others claim that all forms of seclusion are incompatible with the CRC and CRPD.¹⁰⁷ These instruments create an obligation on states parties to ensure equal access to inclusive education, and to ensure students with disabilities receive appropriate care and assistance to access the same education opportunities as all other students.¹⁰⁸ If used to manage behaviours directly arising from a student's disability, seclusion arguably amounts to a failure to provide necessary and reasonable accommodations and deprives the student of education opportunities in breach of the CRC and

¹⁰¹ Other than where mechanical restraints are used for approved therapeutic purposes, such as to provide mechanical support for a student's orthopaedic needs: *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15, 5.

¹⁰² Use of mechanical, supine and prone restraints is associated with higher risk of more serious consequences for students than other forms of restraint, including death: Gagnon, Mattingly and Connelly, above n 11, 67; Scheuermann et al, above n 7, 91.

¹⁰³ Less intrusive interventions might include, eg, less intrusive forms of physical restraint, time out, or positive behaviour support strategies.

¹⁰⁴ Existing literature and human rights jurisprudence supports the elimination of these particularly intrusive interventions: see, for eg, Australian Psychological Society, above n 27, 19; Trader et al, above n 30, 82; Scheuermann et al, above n 7, 91; Nelson, above n 9, 99; Council for Children with Behavioral Disorders, 'CCBD's Position Summary on the Use of Physical Restraint Procedures in School Settings' (2009) 34 *Behavioral Disorders* 223, 227–8.

¹⁰⁵ Seclusion has been classified by some as being a necessary and effective means of reducing challenging behaviours in some circumstances. For discussion, see, for eg, Bon and Zirkel, above n 33, 38. For discussion of the potential benefits of seclusion in other service settings, see, for eg, Melbourne Social Equity Institute, above n 39, 19.

¹⁰⁶ Marx and Baker, above n 71, 23. This has been noted in recent reviews of individual jurisdictions' education systems: see, for eg, Shaddock, Packer and Roy, above n 5, 149. It was also noted in a recent review of Queensland's education system that 'even in an environment oriented toward eliminating restrictive practice to the greatest extent possible, teachers must be adequately equipped to know when and how to undertake restrictive practice': Deloitte, above n 14, 52.

¹⁰⁷ See, for eg, Nelson, above n 9, 101. The recent Commonwealth Senate Committee Inquiry in Violence, Abuse and Neglect recommended that each jurisdiction should 'establish and implement enforceable policies and guidance ... that eliminates the use of restrictive practices': *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 114. For further discussion, see, for eg, Scheuermann et al, above n 7, 93.

¹⁰⁸ Committee on the Rights of the Child, *General Comment No 9 (2006): The Rights of Children with Disabilities*, CRC/C/GC/9 (27 February 2007) [66]–[67].

CRPD.¹⁰⁹ The availability and increasing implementation of less restrictive interventions such as positive behaviour support models also gives significant weight to the argument that, in a human rights context, the use of seclusion will rarely, if ever be in a student's best interests. These concerns have led some jurisdictions to legislate prohibitions on the use of seclusion in school settings.¹¹⁰

The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated that 'there can be no therapeutic justification for the use of solitary confinement' and that 'its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment' and should be prohibited.¹¹¹ While not specific to education settings, in light of the human rights implications explored above, the heightened vulnerability of students with disabilities, and the CRPD Committee's general recommendation that all forms of restraint and seclusion be eliminated, it may be inferred that seclusion in school settings is not compatible with this human rights framework, even if used to protect from harm.¹¹² At a minimum, human rights principles demand that significant constraints be placed on the use of any form of restrictive practice, such that seclusion, if permissible at all, would rarely be considered acceptable. This is considered further below.

2 *Restraint and Seclusion for Non-protective Purposes*

As noted above, there are significant concerns that restraint and seclusion are used in schools for reasons other than to protect from harm, including as a 'means of coercion, discipline, convenience, or retaliation'.¹¹³ Existing human rights jurisprudence is clear that restraint and seclusion must not be used as a form of discipline.¹¹⁴ No direct guidance is provided in relation to their use for other non-protective purposes. However, given the significant risks to wellbeing, and risk of human rights violations that their use poses to students with disabilities, their limited therapeutic or educative value, and the heightened vulnerability of students with disabilities, any

¹⁰⁹ Weissbrodt et al, above n 5, 297.

¹¹⁰ In New Zealand for example, an amendment was made to the *Education Act 1989* (NZ) in 2016 to explicitly prohibit the use of seclusion in all schools: *Education Act 1989* (NZ) s 139AB. The push to eliminate the use of seclusion has also gained significant momentum in other service settings (such as disability and mental health services), which has largely been motivated by this human rights framework: *Carter Report*, above n 13; Chandler, Willmott and White, above n 81; *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 93–8; Gerard Niveau, 'Preventing Human Rights Abuses in Psychiatric Establishments: the Work of the CPT' (2004) 19 *European Psychiatry* 146, 150.

¹¹¹ Juan Mendez, *Statement by Mr Juan Mendez — Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 22nd session of the Human Rights Council, Agenda Item 3 (4 March 2013) 4. See also for discussion: Melbourne Social Equity Institute, above n 39, 18–19.

¹¹² It should be noted, of course, that while states parties may be compelled to eliminate the use of seclusion in school settings to ensure compliance with international human rights obligations, significant practical, economic, social and cultural factors also need to be considered within individual jurisdictions to ensure such practices are eliminated in a safe and supported manner: see, for eg, Melbourne Social Equity Institute, above n 39.

¹¹³ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 92; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 195.

¹¹⁴ Several human rights bodies have consistently condemned all forms of corporal punishment: see, for eg, Committee on the Rights of Persons with Disabilities, *General Comment No 4 (2016), Article 24: Right to Inclusive Education*, UN Doc CRPD/C/GC/4 (2 September 2016) [51]; Committee on the Rights of the Child, *General Comment No 8*, above n 43, [15]; Human Rights Committee, *CCPR General Comment No 20*, above n 9 [5]. For discussion, see, for eg, Weissbrodt et al, above n 5, 295.

use of restraint or seclusion other than for a protective purpose will arguably be incompatible with human rights norms.¹¹⁵ It is doubtful that the use of restraint or seclusion for any non-protective purpose would be in a student's best interests, or a necessary and proportionate interference with their rights. This includes the use of restraint or seclusion as a means to prevent damage to property. While restrictive practices, particularly restraint, are permitted for this purpose in other service settings,¹¹⁶ schools have a heightened responsibility to protect students from harm, including the risks associated with the use of restraint or seclusion.¹¹⁷ While there may be some interest in discouraging or preventing a student from engaging in potentially destructive behaviour, the use of interventions that pose significant risks to a student's wellbeing and rights arguably will not be in the student's best interests, or a necessary and proportionate response, unless the behaviour also poses a risk to others' safety. Certainly, existing trends indicate risk to property in itself is not a justifiable reason for using restraint or seclusion in school settings.¹¹⁸

B Limitations on the Use of Restraint and Seclusion

1 Restraint and Seclusion for Protective Purposes

It is clear that restraint and seclusion implicate various human rights and represent significant risks to the rights and interests of students with disabilities. As such, to the extent restraint and seclusion are permissible for protective purposes, human rights norms demand that significant constraints be placed on their use. This includes that they be used only:

- (i) in a manner that is safe and proportionate to the risk posed by the student's behaviours;
- (ii) if it is the least restrictive option available, or as a last resort; and
- (iii) with the minimum necessary use of force for the shortest necessary period of time.¹¹⁹

These are minimum standards for the use of restraint and seclusion in school settings, which should be clearly set out in regulatory frameworks governing the use of these practices. Arguably, these principles should be applied to any intervention that may limit a student's rights, including time out practices.¹²⁰ In practice, other more detailed systems or strategies are likely to be necessary to ensure these minimum standards are achieved. This might include specific standards for the use of seclusion or time out, such as that a time out room must provide adequate space, must be supervised at all times, and must incorporate meaningful educational activities. Other requirements might include that restraint and seclusion only be used as part of a broader multi-component intervention strategy with a focus on positive behaviour supports and function-based reinforcement, team-based and multi-disciplinary decision-making around the circumstances and nature of their use for individual students, and the implementation of a rigorous and individualised

¹¹⁵ Such practices may fall within prohibitions on all forms of cruel, inhuman and degrading treatment in schools: *CRC* art 37; *CRPD* art 15.

¹¹⁶ Melbourne Social Equity Institute, above n 39, 32; Australian Psychological Society, above n 27, 26; Chandler, Willmott and Smith, above n 81, 113.

¹¹⁷ *CRC* art 19. See also Victorian Equal Opportunity and Human Rights Commission, above n 7, 109.

¹¹⁸ See, for eg, Victorian Equal Opportunity and Human Rights Commission, above n 7, 117; Trader et al, above n 30, 82.

¹¹⁹ See, for eg, Committee on the Rights of the Child, above n 43, [15]; Shaddock, Packer and Roy, above n 5, 17, 156; Deloitte, above n 14, 51–2.

¹²⁰ Particularly given the similarities between time out and seclusion, and the potential for misuse of time out strategies: Weissbrodt et al, above n 5, 288; Gagnon, Mattingly and Connelly, above n 11, 73.

positive behaviour support plan to guide the implementation and monitoring of these practices for individual students.¹²¹

2 *Quantifying the Risk of Harm*

It is evident that restraint and seclusion should only be used on students with disabilities to protect from risk to self or others. However, human rights instruments do not dictate whether a certain threshold of risk must be surpassed before restraint or seclusion will be justified. Burnett and Allen propose that restraint or seclusion may only be permissible where the risk of harm is ‘immediate’,¹²² while Lyons has suggested such practices should only be permitted where risk is ‘imminent’.¹²³ Others have preferred not to stipulate a quantifying element to the degree of risk at all,¹²⁴ as imposing too high a threshold may prohibit or discourage restraint or seclusion being used as an early intervention to avoid an escalation towards more serious consequences, even if its use is for a protective purpose that may be safe and proportionate in the circumstances.¹²⁵

While human rights norms do not stipulate that a certain degree of risk is required, there may be value in imposing a regulatory limit on the use of restraint and seclusion to circumstances where there is an imminent or immediate risk of harm, as this may help reinforce the need to ensure their use is proportionate, a last resort, and least restrictive. Whatever limitation is imposed, regulatory frameworks should use consistent terminology to avoid confusion and encourage consistent application of these practices.

C *Reduction and Elimination*

There is no doubt that reducing and, where possible, eliminating the use of restraint and seclusion on students with disabilities is consistent with international human rights norms.¹²⁶ States parties should set clear aspirational targets for the reduction and elimination of all restraint and seclusion practices, and take actions to ensure the entire schooling system is geared towards eliminating

¹²¹ Squelch, above n 3, 21; Scheuermann et al, above n 7, 93.

¹²² Nick Burnett and Bernard Allen, *Reducing Risk and Restraint in Asia Pacific: The Current State of Law, Policy and Guidance in Relation to the Use of Force to Control Behaviour* (Nick Burnett Publishing, 2010) 6.

¹²³ Lyons, above n 5, 227–8.

¹²⁴ See, for eg, Department of Education (US), *Restraint and Seclusion: Resource Document* (May 2012); Marx and Baker, above n 70, 24, 30. Importantly, this does not mean that restraint and seclusion may be permissible in situations where risk of harm is low or trivial. It is quite clear that restraint and seclusion may only be used if it is proportionate to the risk, as a last resort, and in a manner that is least restrictive of the student’s rights. Arguably, these requirements are likely to limit the use of restraint and seclusion to circumstances where there is a high risk of harm to self or others, even if regulatory frameworks do not specifically limit their use to situations of imminent or immediate risk.

¹²⁵ Burnett and Allen, above n 122, 6. Further, risk of harm is notoriously difficult to quantify, and different individuals may interpret quantifying terms differently, or use different terms interchangeably: Shaddock, Packer and Roy, above n 5, 156; Victorian Equal Opportunity and Human Rights Commission, above n 7, 117. It is also not clear that defining the quantity of risk has any impact on the way restraint and seclusion are implemented in practice.

¹²⁶ As set out in the US Department of Education’s *Restraint and Seclusion: Resource Document*, and noted in Inclusion BC’s *Stop Hurting Kids* report, ‘the foundation of any discussion about the use of restraint and seclusion is that every effort should be made to structure environments and provide supports so that restraint and seclusion are unnecessary’: Department of Education (US), above n 124, 1; Inclusion BC, *Stop Hurting Kids: Restraint and Seclusion in BC Schools — Survey Results and Recommendations* (2013) 5. Notably in other settings, overarching plans and guidelines have been implemented to encourage the reduction and elimination of restrictive practices: *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15.

restraint and seclusion by promoting inclusive classrooms and ensuring the skilled application of positive behaviour supports and other less intrusive means of managing student behaviours.¹²⁷

D *Reporting and Monitoring*

The use of restraint and seclusion should be subject to robust reporting mechanisms to facilitate data collection, review of individual applications of restraint or seclusion, and the identification of trends or patterns to inform future reform, training and resource allocation.¹²⁸ Monitoring frameworks should also be implemented to establish safeguards and oversight of the use of these practices.¹²⁹ Notably in other settings, following significant scrutiny of the human rights implications of their use and the need for more robust monitoring, several jurisdictions have specifically legislated the need for restraint and seclusion practices to be implemented in accordance with a positive behaviour support plan, informed by relevant expertise, and subject to regular independent review.¹³⁰ These reporting and monitoring frameworks have been implemented in recognition that restraint and seclusion have significant implications for a person's rights and wellbeing. Human rights norms demand that similar monitoring and reporting standards be imposed to regulate their use in school settings, particularly in light of the heightened vulnerability of students with disabilities.

E *Relevance for Regulatory Frameworks*

Given recent concerns considered earlier in this paper, it is questionable whether existing regulatory frameworks do enough to protect the rights and wellbeing of students with disabilities in Australian government schools. The principles and conclusions drawn from this human rights framework provide a normative foundation that should be used to inform future reform of regulatory frameworks governing the use of these practices in schools, to ensure the rights and interests of students with disabilities are protected adequately.

¹²⁷ This was recently recommended in a review of education for students with disabilities in Queensland: Deloitte, above n 14, 110.

¹²⁸ See, for eg, Nelson, above n 9, 101; Scheuermann et al, above n 7, 89; Shaddock, Packer and Roy, above n 5, 25; Deloitte, above n 14, 109–10; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, above n 9, 5; Victorian Equal Opportunity and Human Rights Commission, above n 7, 104; New South Wales Ombudsman, above n 14, ix.

¹²⁹ Nelson, above n 9, 101; Scheuermann et al, above n 7, 89; New South Wales Ombudsman, above n 14, 33; Victorian Equal Opportunity and Human Rights Commission, above n 7, 105.

¹³⁰ *Carter Report*, above n 13. For a summary of legislation and policies relevant to the use of restraint and seclusion in other service settings in each Australian jurisdiction, see *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 93–8. In other service settings, these practices may also be monitored through the ratification of the Optional Protocol on the Convention Against Torture (OPCAT) and implementation of a National Preventative Mechanism: *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, A/RES/57/199 (entered into force 22 June 2006) art 19, 20. For discussion, see, for eg, Oliver Lewis and Ann Campbell, 'Violence and Abuse Against People with Disabilities: A Comparison of the Approaches of the European Court of Human Rights and the United Nations Committee on the Rights of Persons with Disabilities' (2017) 53 *International Journal of Law and Psychiatry* 45. However it is not clear whether schools will fall within the scope of this monitoring framework, or, if they do, whether the framework would be effective in monitoring the use of restraint and seclusion in schools across Australia: Victorian Equal Opportunity and Human Rights Commission, above n 7, 122.

IV EXISTING REGULATORY FRAMEWORKS

The regulation of restraint and seclusion in Australian schools is complex. Each Australian state and territory has legislative power for the provision and regulation of education in government schools.¹³¹ In South Australia, Victoria and Western Australia, education regulations specifically permit the use of restraint but provide little guidance for its use.¹³² Education legislation and regulations in other jurisdictions govern responsibilities for student discipline or behaviour management in government schools, but do not directly regulate the use of restraint and seclusion.¹³³ In each jurisdiction, direct guidance on the use of restraint and seclusion is provided primarily through various departmental policies and guidelines.¹³⁴ These operate within a broader framework of legal and ethical responsibilities derived from a range of other legislative and common law sources.¹³⁵ The implementation of these policies and guidelines may also vary at a

¹³¹ Under the Australian Constitution, each state and territory government has responsibility for providing schooling in their respective jurisdiction: Squelch, above n 3, 21; Butler and Mathews, above n 3; *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 93, 107; Lyons, above n 5, 193.

¹³² In South Australia, *Education Regulations 2012* (SA) reg 12(a) provides that ‘an authorised person may, if necessary, use reasonable force ... to restrain on school premises ... any person who, in the opinion of the authorised person, is posing an immediate threat to the safety of another person, so as to prevent the person from causing harm to that other person...’. In Victoria, *Education and Training Reform Regulations 2017* (Vic) reg 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’. In Western Australia, *School Education Regulations 2000* (WA) reg 38 also provides that ‘a member of staff of a government school may, in the performance of the person’s functions, take such action, including physical contact with a student or a student’s property, as is reasonable (a) to manage or care for a student, (b) to maintain or re-establish order, or (c) to prevent or restrain a person from placing at risk the safety of any person, or damaging any property’. It should also be noted that in Queensland, the *Criminal Code Act 1899* (Qld) s 280 provides that ‘it is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person’s care such force as is reasonable under the circumstances’; and in WA, the *Criminal Code Act Compilation Act 1913* (WA) s 257 provides that ‘it is lawful for a parent or a person in the place of a parent, or for a schoolmaster, to use, by way of correction, towards a child or pupil under his care, such force as is reasonable under the circumstances’.

¹³³ *Education (General Provisions) Act 2006* (Qld); *Education (General Provisions) Regulation 2017* (Qld); *Education Act 2009* (NSW); *Education Regulation 2017* (NSW); *Education and Training Reform Act 2006* (Vic); *Education Act 2004* (ACT); *Education Regulation 2005* (ACT); *Education Act 2016* (Tas); *Education Regulations 2017* (Tas); *Education Act 1972* (SA); *School Education Act 1999* (WA); *Education Act 2015* (NT); *Education Regulations 2017* (NT). See also *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 93, 107; Lyons, above n 5, 193–6.

¹³⁴ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 93, 107; Lyons, above n 5, 193–6. Each individual school may also implement its own behaviour management plan or policy, which may offer guidance on the use of restraint or seclusion, and should align with the jurisdiction’s policies and guidelines on the use of restraint and seclusion. However it has been reported that school-based behaviour management plans do not necessarily align with broader legislative and policy-based standards for behaviour management: Clem van der Weegen, ‘Defining “Reasonable Force” in the Modern School Environment’ (2013) 18 *International Journal of Law and Education* 83.

¹³⁵ This includes, eg, criminal law, workplace health and safety laws, anti-discrimination laws, tort law, mandatory reporting laws and, in some jurisdictions, human rights laws: Shaddock, Packer and Roy, above n 5, 153–6; Deloitte, above n 14, 25–8, 107–9; van der Weegen, above n 134; Lyons, above n 5, 193–6. There is little reported or unreported case law that considers the use of restraint and seclusion in school settings. Some comment is made in cases involving occupational health and safety claims made by teachers as a result of physical or psychological injury caused by violent students, including injury caused in the process of restraining students: *Barry Johnson v State of NSW (Department of Education and Training)* [2006] NSWIRComm 109. There are also a number of disciplinary proceedings involving situations in which teaching staff have used excessive force, or have failed to intervene to manage dangerous behaviours: *New South Wales Teachers Federation (on behalf of Anthony Mossfield) v NSW*

local level, as many jurisdictions vest behaviour management responsibilities in a regional or local body.¹³⁶ National policy initiatives such as the *Disability Standards for Education*¹³⁷ and the *National Safe Schools Framework*¹³⁸ provide some guidance on maintaining inclusive, safe and supportive school environments for all students, but do not address the use of restraint and seclusion directly. As a result, regulation of restraint and seclusion in government schools varies significantly between jurisdictions.

A Scope and Method of Analysis

This analysis focuses on the relevant policies and guidelines that directly regulate the use of restraint and seclusion in government schools,¹³⁹ as these resources are most likely to influence restraint and seclusion practices in each jurisdiction directly. Recent research has highlighted the need for distinct policy and guidelines to ensure teachers and principals have easy access to clear guidance and are equipped to manage complex behaviours in a consistent and rights-based manner.¹⁴⁰ Reference is made to relevant education legislation and regulations in Victoria, South Australia and Western Australia where necessary, to provide context in those jurisdictions. Relevant policies and guidelines were identified and accessed between January and March 2018 via each jurisdiction's online departmental policy library.¹⁴¹ Each jurisdiction's education department was approached for support to ascertain relevant policies and guidelines, including those not publicly accessible.¹⁴² Results were cross-referenced against a literature review, including recent independent and governmental reviews of state and territory education services. Key aspects of each jurisdiction's frameworks were assessed for their compatibility with human rights norms considered above, categorised by reference to (i) types of restraint and seclusion regulated, (ii) terminology and definitions, (iii) criteria for use, and (iv) recording and monitoring

Department of Education and Training [2005] NSWIRComm 464; *Moran v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 1311; *Harvey v Department of Education and Training of New South Wales* [2009] NSWIRComm 1076. For discussion, see, for eg, Cumming and Mawdsley, above n 69. While these cases do not provide clear principles on the acceptable use of restraint or seclusion practices, they highlight the complex legal systems within which these practices operate, and the significant consequences that their use poses for both students and teaching staff.

¹³⁶ Behaviour management responsibilities are often devolved to school principals. For discussion, see, for eg, Squelch, above n 3, 16–17.

¹³⁷ Department of Education and Training, *Disability Standards*, above n 15.

¹³⁸ Department of Education and Training, *Safe Schools*, above n 15.

¹³⁹ This includes both primary and secondary education settings.

¹⁴⁰ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 106; Department of Education, Employment and Workplace Relations (Cth), *Report on the Review of Disability Standards for Education 2005* (2012) 18. In a recent review of behaviour management in NSW schools, it was noted that 'principals expressed a view that guidance relating to restraint and seclusion is in "bits and pieces"', and there would be benefit in having 'overarching guidance that brings the elements together and provides greater detail about what they can and cannot do': New South Wales Ombudsman, above n 14, 32. In a similar review of behaviour management in Queensland schools, it was noted that only half of teacher respondents to a survey 'felt they had clarity around restrictive practices', and that 'the current policy around the actual use of restrictive practices is imprecise, leaving substantial room for interpretation by principals and school staff': Deloitte, above n 14, 108–9. The lack of clear and precise regulation on restraint and seclusion in school settings is an issue that has been identified in many international jurisdictions: Weissbrodt et al, above n 5, 290.

¹⁴¹ This involved the use of key search terms including 'behaviour', 'discipline', 'restraint', 'seclusion', 'time out', 'withdrawal', 'isolation', and 'restrictive practice', and other variations of these terms.

¹⁴² For completeness, support was sought from each jurisdiction's education department to confirm results were comprehensive.

requirements. Findings were tabulated for each of these key elements to facilitate a comparative analysis,¹⁴³ and to identify gaps and variation in regulation between jurisdictions.

B Results and Analysis

1 Types of Restraint and Seclusion Regulated

Significant variation was identified in the types of restraint and seclusion regulated in each jurisdiction.

Table A: Types of practices regulated per jurisdiction

Jurisdiction	Type of practices regulated	
	Restraint	Seclusion/time out
Queensland	Physical restraint only	Time out only
NSW	Physical restraint only	Time out only
Victoria	Physical and mechanical restraint	Seclusion and time out
ACT	Physical restraint	Seclusion and time out
Tasmania	Physical restraint only	NA
South Australia	Physical restraint only	Seclusion and time out
Western Australia	Physical restraint only	Protective isolation and withdrawal
Northern Territory	Physical restraint only	NA

All jurisdictions permit the use of physical restraint and provide some degree of guidance on its use.¹⁴⁴ Only two of these jurisdictions (Victoria and the ACT) regulate the use of specific types of

¹⁴³ Not all findings are presented in tabulated form in the analysis below. Tabulated form is used only where necessary or valuable to clarify the following analysis.

¹⁴⁴ Department of Education (Qld), *Safe, Supportive and Disciplined School Environment* (December 2017) <<http://ppr.det.qld.gov.au/education/learning/Pages/Safe,-Supportive-and-Disciplined-School-Environment.aspx>> 1 ('SSDSE'); Department of Education and Communities (NSW), *Legal Issues Bulletin: Physical Restraint of Students* (June 2012) <https://education.nsw.gov.au/about-us/rights-and-accountability/media/documents/public-legal-issues-bulletins/number_09.pdf> 1 ('NSW Legal Issues Bulletin: Physical Restraint of Students'); Department of Education and Training (Vic), *Restraint of Students* (March 2018) <<http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx>> ('Restraint of Students (Vic)'); Education Directorate (ACT), *Safe and Supportive Schools Policy* (November 2016) <https://www.education.act.gov.au/publications_and_policies/School-and-Corporate-Policies/wellbeing/safety/safe-and-supportive-schools-policy> ('Safe and Supportive Schools Policy (ACT)'); Education Directorate (ACT), *Safe and Supportive Schools Procedure B* (2016) <https://www.education.act.gov.au/school_education/safe_supportive_schools> 3.8 ('Safe and Supportive Schools Procedure B (ACT)'); Department of Education (Tas), *Respectful Schools, Respectful Behaviour* (December 2016) <<https://respectfulrelationships.education.tas.gov.au/wp-content/uploads/2018/01/Respectful-Schools-Respectful-Behaviour.pdf>> 71 ('Respectful Schools, Respectful Behaviour (Tas)'); Department for Education and Child Development (SA), *Protective Practices for Staff in Their Interactions with Children and Young People: Guidelines for Staff Working or Volunteering in Education and Care Settings* (September 2017) <<https://www.education.sa.gov.au/doc/protective-practices-staff-their-interactions-children-and-young-people>> 17 ('Protective Practices for Staff (SA)'); Department of Education (WA), *Physical Contact with Students* (January 2017) <<http://det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/guidelines/physical-contact-with-students.en?cat-id=3457115>> ('Physical Contact with Students (WA)'); Teacher Registration Board of

physical restraint directly, including supine and prone restraints, which are prohibited.¹⁴⁵ Only one jurisdiction (Victoria) explicitly addresses the use of mechanical restraint, which is permitted in exceptional circumstances.¹⁴⁶

One jurisdiction (South Australia), while not directly referring to seclusion and only briefly to time out, ostensibly prohibits seclusion, as it prohibits ‘confining a child or young person in a locked room or limited space’.¹⁴⁷ Greater clarity could be provided to confirm the breadth of this prohibition, including whether it covers both seclusion and time out practices. No other jurisdiction prohibits the use of seclusion explicitly.¹⁴⁸ Only three jurisdictions (Victoria, the ACT, and Western Australia) provide specific guidance on the use of both seclusion and time out and effectively delineate these practices.¹⁴⁹ Western Australia’s framework regulates the use of protective isolation, which is defined in terms that align with accepted definitions of seclusion, and withdrawal, which replicates time out practices.¹⁵⁰ Two jurisdictions (Queensland and NSW) specifically regulate the use of time out practices, but do not refer specifically to, or provide any clear guidance on seclusion.¹⁵¹ No direct regulation of these practices was identified in two jurisdictions (Tasmania and Northern Territory).

the Northern Territory, *Protective Practices for Teachers in Their Interactions with Children and Young People: Guidelines for Teaching Staff Working in the Northern Territory* (September 2011) <http://www.trb.nt.gov.au/__data/assets/pdf_file/0020/40916/TRB-NT-Protective-Practices-.pdf> 14 (*‘Protective Practices for Teachers (NT)’*).

¹⁴⁵ *Restraint of Students (Vic)*, above n 144; *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60, 15; *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [3.8].

¹⁴⁶ Victoria’s policy on the use of mechanical restraint dictates that it must never be used in schools ‘unless the device is for a therapeutic purpose with written evidence of the prescription/recommendation, or if required to travel safely in a vehicle’: *Restraint of Students (Vic)*, above n 144. ACT’s framework acknowledges mechanical restraint as a type of restraint, but does not provide any guidance specific to its use: *Safe and Supportive Schools Policy (ACT)*, above n 144.

¹⁴⁷ *Protective Practices for Staff (SA)*, above n 144, 19.

¹⁴⁸ These jurisdictions may assert that seclusion is not permitted within government schools. However this analysis is strictly limited to explicit regulation through relevant policies and guidelines. Jurisdictions that purport to prohibit seclusion in school settings should do so explicitly through legislative or policy reform.

¹⁴⁹ *Restraint of Students (Vic)*, above n 144; *Safe and Supportive Schools Policy (ACT)*, above n 144; *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [3.9], [7.1]–[7.12].

¹⁵⁰ Notably, ‘protective isolation’ is not clearly defined in the publicly accessible definition provided on the Department of Education’s policy website: Department of Education (WA), *Policies: Protective Isolation* (2009) <<http://det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/definitions/protective-isolation.en>>. ‘Protective isolation’ is more clearly defined in the Department’s existing guidelines on the use of protective isolation: Department of Education (WA), *Requirements Related to the Student Behaviour Policy: Protective Isolation of a Student for Purposes of Managing Risk of Harm* (May 2016) (*‘Protective Isolation (WA)’*). However this policy is not currently publicly accessible. Steps should be taken to ensure greater community awareness of the use of ‘protective isolation’ by providing publicly accessible information about its use in WA schools.

¹⁵¹ Queensland: *SSDSE*, above n 144. NSW guidelines permit the use of ‘dedicated time-out rooms’ which must ‘not be locked, latched or secured in any way that would, in case of an emergency, prevent staff or the student from exiting the room’. This appears to prohibit seclusion in most circumstances, but the prohibition is limited in to forms of locking, latching or securing that prevent that specific circumstance of emergency exit, and does not acknowledge situations in which a student’s exit may not be physically blocked, but the student believes he/she is not free to exit: Department of Education and Communities (NSW), *Guidelines for the Use of Time-Out Strategies Including Dedicated Time-Out Rooms* (2011) <https://education.nsw.gov.au/policy-library/associated-documents/timeout_gui.pdf> (*‘Guidelines for the Use of Time-Out Strategies (NSW)’*).

2 Terminology and Definitions

Most jurisdictions consistently refer to ‘restraint’, ‘seclusion’ and ‘time out’ practices, with the exception of Western Australia’s regulatory framework. However many jurisdictions do not define these practices clearly or consistently.

Table B: Definitions of physical restraint, seclusion and time out per jurisdiction¹⁵²

Jurisdiction	Definition		
	Restraint	Seclusion	Time out
Queensland	Partially defined ¹⁵³	NA	Partially defined ¹⁵⁴
NSW	NA	NA	Partially defined ¹⁵⁵
Victoria	Defined ¹⁵⁶	Defined ¹⁵⁷	NA
ACT	Partially defined ¹⁵⁸	Partially defined ¹⁵⁹	Defined ¹⁶⁰
Tasmania	NA	NA	NA
South Australia	NA	Partially defined ¹⁶¹	Partially defined ¹⁶²

¹⁵² ‘Defined’ is used where a jurisdiction’s framework has been identified as providing a definition that aligns with accepted definitions considered in Part 2.1 above. ‘Partially defined’ is used where a jurisdiction’s framework has been identified as providing a definition that provides some description of the practice, but does not closely align with all elements of accepted definitions considered in Part 2.1 above. ‘NA’ is used where no definition was identified.

¹⁵³ Not clearly defined, but described as including ‘the manual restriction of a student’s movement...’: *SSDSE*, above n 144, 1.

¹⁵⁴ Defined as ‘giving a student time away from their regular class program/routine to a separate area within the classroom or to another supervised room or setting’: *SSDSE*, above n 144, 1.

¹⁵⁵ Time out is described as ‘a proactive strategy to support self-calming’, which may be ‘teacher-directed or student selected’, that may be used ‘when a student is behaving inappropriately and a temporary separation from that particular environment may assist in supporting the student to demonstrate appropriate behaviour’: *Guidelines for the Use of Time-Out Strategies (NSW)*, above n 151.

¹⁵⁶ ‘[T]he use of physical force to prevent, restrict or subdue movement of a student’s body or part of their body. Students are not free to move away when they are being physically restrained’: *Restraint of Students (Vic)*, above n 144.

¹⁵⁷ Ibid: ‘the solitary confinement of a student in a room or area from which their exit is prevented by a barrier or another person ... [including] situations where a student is left alone and reasonably believes they cannot leave...’.

¹⁵⁸ ‘[T]he use of force to subdue or restrict a person’s movement. It can be mechanical or physical...’: *Safe and Supportive Schools Policy (ACT)*, above n 144.

¹⁵⁹ Ibid: ‘the sole confinement of a person in a room or place where the doors and window cannot be opened by the person’.

¹⁶⁰ ‘[T]ime away from a classroom activity in a calming area where doors are not locked and a student is not prevented from leaving. Withdrawal may be teacher or self-directed’: *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [3.8].

¹⁶¹ While the term ‘seclusion’ is not used, ‘restrictive practices that involve ... confining a child or young person in a locked room or limited space’ should not be used: *Protective Practices for Staff (SA)*, above n 144, 19.

¹⁶² While the term ‘time out’ is not used, ‘restrictive practices that involve ... placing children under school age in ‘time out’ or ‘time away’ should not be used: *Protective Practices for Staff (SA)*, above n 144, 19.

Western Australia	NA	Defined ¹⁶³	Defined ¹⁶⁴
Northern Territory	NA	NA	NA

While Queensland and ACT policies refer to restraint as restricting a student’s movement, only Victoria’s framework clearly identifies that a student is not free to move away from physical restraint, and effectively delineates the practice from other physical interventions such as physical redirection.¹⁶⁵ Victoria’s framework also defines mechanical,¹⁶⁶ supine¹⁶⁷ and prone restraint,¹⁶⁸ and the ACT’s framework defines prone restraint.¹⁶⁹ Other jurisdictions do not define forms of restraint clearly.

Only Victoria’s framework provides that seclusion may include situations where a student reasonably believes they are not free to exit.¹⁷⁰ Western Australia’s framework notes that protective isolation may include circumstances where a student’s exit is prevented by ‘physical, mechanical or implied means’, but provides no further guidance regarding what might constitute ‘implied means’.¹⁷¹ All other jurisdictions that define seclusion limit the definition to a form of solitary confinement in a space from which the student’s exit is *physically* prevented. No definition of seclusion was identified in four jurisdictions.¹⁷²

There is a lack of clarity and consistency across jurisdictions in the types of practices regulated, definitions of restraint and seclusion practices, and delineating these practices from other similar practices (such as physical redirection and time out). This should be rectified. Education personnel in many jurisdictions currently have limited guidance to draw upon to inform their interventions to protect students from harm.¹⁷³ Lack of clear guidance may increase the risk that behaviour

¹⁶³ As noted above, the only publicly accessible definition of ‘protective isolation’ provides that protective isolation is ‘a planned intervention that provides the chance for a student to be removed from their regular school environment and be placed into a location, on their own, that is safe for themselves and others’: Department of Education (WA), *Policies: Protective Isolation* (2009) <<http://det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/definitions/protective-isolation.en>>. Other guidelines, which are not publicly accessible, effectively define protective isolation as a form of involuntary isolation in an area from which the student’s exit is physically, mechanically or impliedly prevented: *Protective Isolation (WA)*, above n 150.

¹⁶⁴ Existing policy, which is not publicly accessible, effectively defines ‘withdrawal’ as being either voluntarily or involuntarily moved to an unlocked space which may or may not be isolated from other students: *Protective Isolation (WA)*, above n 150.

¹⁶⁵ *Restraint of Students (Vic)*, above n 144.

¹⁶⁶ Mechanical restraint is described as the use of ‘a mechanical device as a restraint to restrict a student’s freedom of movement’: *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60, 15.

¹⁶⁷ *Ibid* 6: Supine restraint: ‘holding a student face up’.

¹⁶⁸ *Ibid*: Prone restraint: ‘holding a student face down’.

¹⁶⁹ Prone restraint is described as involving ‘an individual being placed face-down on the ground and being held in place by at least one other individual’. It is described as a ‘highly dangerous manoeuvre’ and is prohibited: *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [3.8].

¹⁷⁰ *Restraint of Students (Vic)*, above n 144.

¹⁷¹ *Protective Isolation (WA)*, above n 150.

¹⁷² Queensland, NSW, Tasmania, and the NT.

¹⁷³ This was recently noted in NSW, where the Ombudsman recommended that ‘there is a need to ensure that clear guidance is provided to staff and the school community about the use of time-out rooms, and to distinguish between seclusion and the use of safe places/voluntary withdrawal’: New South Wales Ombudsman, above n 14, 31.

management interventions are used inappropriately — whether intentionally or unknowingly¹⁷⁴ — or with limited regard to, or understanding of the rights implications of their use. Lack of clarity and consistency in terminology and definitions may also result in inaccurate reporting of these practices, and limit the jurisdiction's capacity to collect and analyse reliable data on their use.

3 *Criteria for Use*

(a) *Protective Purpose*

As noted above, there is significant concern that restraint and seclusion are used in schools for purposes other than to protect the student or others from harm. Seven jurisdictions clearly permit the use of restraint for the purpose of protecting the student or others from harm.¹⁷⁵ Of these, only Victoria,¹⁷⁶ the ACT,¹⁷⁷ South Australia¹⁷⁸ and the Northern Territory¹⁷⁹ explicitly permit its use *only* for a protective purpose.¹⁸⁰ Victoria specifically prohibits the use of restraint for other non-protective purposes, such as punishment, discipline, coercion, retaliation, or as a convenience.¹⁸¹ ACT, South Australian and Northern Territory frameworks provide that restraint must not be used in response to certain types of behaviours such as property damage, non-compliance, and verbal threats.¹⁸² Only three jurisdictions specifically prohibit the use of restraint to prevent damage to

¹⁷⁴ Eg, the use of time out may amount to a form of seclusion even if this is not intended: Bon and Zirkel, above n 33, 35.

¹⁷⁵ Queensland, Victoria, ACT, Tasmania, SA, NT, and WA.

¹⁷⁶ In Victoria, physical restraint 'should not be used unless immediately required to protect the safety of the student or any other person': *Restraint of Students (Vic)*, above n 144. See also *Education and Training Reform Regulations 2017 (Vic)* reg 25.

¹⁷⁷ In the ACT, physical restraint 'must only ever be used as a last resort option to prevent harm to the individual or others': *Safe and Supportive Schools Policy (ACT)*, above n 144.

¹⁷⁸ In SA, current guidelines provide that restraint may be used where a child or young person is 'attacking another child or young person or adult,' or is 'posing an immediate danger to themselves or others': *Protective Practices for Staff (SA)*, above n 144, 17. See also *Education Regulations 2012 (SA)* reg 12(a).

¹⁷⁹ In the NT, current guidelines provide that restraint may be used where a child or young person is 'attacking another child or young person or adult,' or is 'posing an immediate danger to themselves or others', and further provides that 'unless someone's safety is clearly threatened teachers are not to use physical restraint': *Protective Practices for Teachers (NT)*, above n 144, 14.

¹⁸⁰ In other jurisdictions, current guidelines do not explicitly limit the use of physical restraint to protective purposes, or specifically permit its use for other non-protective purposes. NSW's framework notes that 'staff have an obligation to take positive action in situations where students' behaviour threatens the safety of other persons...', but provides no further guidance on whether restraint is permissible in other circumstances, including where the student's behaviour poses a risk to self: *NSW Legal Issues Bulletin: Physical Restraint of Students*, above n 144. In Tasmania, guidelines stipulate that physical restraint should be avoided 'unless this is a pre-planned strategy ... or is absolutely necessary to protect self or others', but provides little other guidance: *Respectful Schools, Respectful Behaviour (Tas)*, above n 144, 71. In WA, physical restraint 'must not be used to provoke, punish or humiliate a student, or inflict pain', but may be used to 'maintain or re-establish order': *Physical Contact with Students (WA)*, above n 144. See also *School Education Regulations 2000 (WA)* reg 38.

¹⁸¹ In Victoria, 'physical restraint or seclusion should never be used as punishment or discipline; as a means of coercion or retaliation; or as a convenience': *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60, 5.

¹⁸² In ACT, physical restraint 'must not be used to maintain good order, in response to non-compliance, in response to verbal threats, or to prevent property damage': *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [7.9]. In SA and the NT, restraint must not be used as a response to property damage, disruption to the education or care activity, refusal to comply, verbal threats, leaving a classroom or the school, or to maintain good order: *Protective Practices for Staff (SA)*, above n 144, 17; *Protective Practices for Teachers (NT)*, above n 144, 14.

property.¹⁸³ Queensland and Western Australian frameworks specifically permit the use of restraint to prevent property damage.¹⁸⁴ Western Australia’s framework also permits the use of restraint specifically to ‘maintain or re-establish order’.¹⁸⁵ Victoria, the ACT and Western Australia permit the use of seclusion (or protective isolation) only for a protective purpose, and explicitly exclude its use for other non-protective purposes.¹⁸⁶ As noted above, South Australia has ostensibly prohibited the use of seclusion, while other jurisdictions do not provide clear guidance on its use.

International human rights norms require that restraint and seclusion only be used for protective purposes. Further guidance should be provided in most jurisdictions to ensure these practices are only permitted for a protective purpose.

(b) Degree of Risk

Significant variation was identified in the degree of risk required before restraint or seclusion is permitted.¹⁸⁷ No clear guidance was identified in Western Australia or NSW. Queensland’s framework permits the use of restraint in response to ‘potentially injurious’ behaviour.¹⁸⁸ In Tasmania, restraint is permitted only if ‘absolutely necessary’ to protect self or others.¹⁸⁹ Northern Territory and South Australia permit restraint in response to ‘immediate danger’.¹⁹⁰

Victorian and ACT frameworks do not provide consistent guidance. Victoria’s framework stipulates both that restraint and seclusion should not be used unless ‘*immediately* required to protect the safety of the student or any other person’, and that such practices may only be used ‘where there is *imminent* threat of physical harm or danger’.¹⁹¹ ACT’s framework refers to ‘immediate risk of serious harm’, ‘extreme risk of imminent danger’, and ‘imminent risk of injury’.¹⁹² Inconsistency in terminology describing the quantum of risk may result in confusion or different interpretations about when restraint or seclusion is permissible, and variance in actual implementation of these practices. Regulatory frameworks should be reviewed to ensure they consistently describe the circumstances in which restraint and seclusion are permissible.¹⁹³

¹⁸³ SA: *Protective Practices for Staff (SA)*, above n 144, 17; the NT: *Protective Practices for Teachers (NT)*, above n 144, 14; and the ACT: *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [7.9].

¹⁸⁴ SSDSE, above n 144, 1; *Physical Contact with Students (WA)*, above n 144; see also *School Education Regulations 2000 (WA)* reg 38.

¹⁸⁵ *Physical Contact with Students (WA)*, above n 144; also *School Education Regulations 2000 (WA)* reg 38.

¹⁸⁶ Victoria: *Restraint of Students (Vic)*, above n 144; ACT: *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [7.9]; WA: *Protective Isolation (WA)*, above n 150; *School Education Regulations 2000 (WA)* reg 38(c).

¹⁸⁷ This element is limited to a quantification of the risk of harm to self or others, and does not relate to other purposes (such as risk to property) for which restraint and seclusion may be used.

¹⁸⁸ SSDSE, above n 144, 1.

¹⁸⁹ *Respectful Schools, Respectful Behaviour (Tas)*, above n 144, 71.

¹⁹⁰ NT: *Protective Practices for Teachers (NT)*, above n 144, 14; SA: *Protective Practices for Staff (SA)*, above n 144, 17; *Education Regulations 2012 (SA)* reg 12(a).

¹⁹¹ *Restraint of Students (Vic)*, above n 144 (emphasis added). Notably, Victoria’s *Education and Training Reform Regulations 2017 (Vic)* stipulate that restraint may be used if immediately required in response to behaviours ‘*that are dangerous*’ to the student or others: s 25 (emphasis added).

¹⁹² *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [7.4], [7.5], [8.3].

¹⁹³ As noted above at Part 3.2(ii), it may be most appropriate that regulation of restraint and seclusion limit their use to circumstances of either imminent or immediate risk of harm to self or others, as this reinforces other human rights demands such as the least restrictive principle, and use only as a last resort. However this analysis does not propose

(c) *Safe, Proportionate and Least Restrictive*

As noted above, international human rights norms require that restraint and seclusion only be used:

- (i) in a manner that is safe and proportionate to the risk posed by the student's behaviours;
- (ii) if it is the least restrictive option available, or as a last resort;
- (iii) with the minimum necessary use of force for the shortest necessary period of time.

Victoria¹⁹⁴ and the ACT¹⁹⁵ both set out these principles clearly to guide the use of restraint and seclusion. Guidelines in the Northern Territory also consider each of these principles in relation to physical restraint, but in less clear terms than the Victorian and ACT guidelines.¹⁹⁶ Queensland's framework does not align with these principles in the regulation of restraint, as it permits 'reasonable' force (not the minimum force necessary),¹⁹⁷ and while it requires consideration of other, less restrictive interventions, it does not dictate clearly that restraint must be a last resort or the least restrictive option available.¹⁹⁸ Existing policy does provide some guidance with respect to the steps teaching staff should follow, however it is otherwise somewhat imprecise and open to interpretation.¹⁹⁹ NSW policy dictates that restraint may only be used if it is reasonably necessary having regard to the specific circumstances, and is an 'absolute last resort'.²⁰⁰ It does not clearly encourage minimal use of force for the shortest period. NSW policy provides some guidance in line with these principles with respect to the use of time out practices, but provides no similar guidance regarding seclusion.²⁰¹ South Australia's policy requires restraint to be reasonable and proportionate, and the minimum amount of force for the shortest duration,²⁰² but does not dictate that restraint must be the least restrictive option or last resort.²⁰³ Western Australia's policy

that any one description of the level of risk is more appropriate than others, as there is insufficient theoretical or empirical evidence to support such a claim.

¹⁹⁴ In Victoria, school staff may only use physical restraint where such action 'would be considered reasonable in all the circumstances and there is no less restrictive means of responding to the circumstances', and during restraint they must 'use the minimum force required' and 'only restrain the student for the minimum duration required', and should 'ensure the type of restraint used is consistent with the student's individual needs and circumstances...': *Restraint of Students (Vic)*, above n 144.

¹⁹⁵ In the ACT, existing policy and guidelines set out clear principles for the use of any form of restraint or seclusion, including that they 'only be used as a last resort', 'involve the least restrictive practice possible, as evidenced by input from appropriate professionals including a psychologist', 'be employed for the minimal amount of time required', and 'only involve force that is reasonable, proportionate and necessary to the level of perceived risk': *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [8.3]. Guidelines further note that 'only staff trained in the correct use of the planned intervention are to apply it': *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [8.4].

¹⁹⁶ In the NT, existing guidance provides that physical restraint must be 'reasonable in the circumstances', 'in proportion to the circumstances', involve 'the minimum force needed to achieve the desired result, and take into account the age, stature, disability, understanding and gender of the child or young person', and must be used 'only as a last resort': *Protective Practices for Teachers (NT)*, above n 144, 14.

¹⁹⁷ *SSDSE*, above n 144, 3.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Deloitte*, above n 14, 109.

²⁰⁰ *NSW Legal Issues Bulletin: Physical Restraint of Students*, above n 144, 3.

²⁰¹ Existing guidelines in NSW provide that time out 'should be used only for the minimum period of time necessary', and 'must take into account factors such as the age, cultural background, individual needs, any disability and the developmental level of the student': *Guidelines for the Use of Time-Out Strategies (NSW)*, above n 151 [3.3], [3.5].

²⁰² *Protective Practices for Staff (SA)*, above n 144, 17–18.

²⁰³ *Ibid* 17, where notably, the SA policy also notes that 'under no circumstances should staff engage in any form of conduct which might cause physical or emotional harm to children or young people'. However the policy permits the

framework encourages the use of the least restrictive alternative that is reasonable in the circumstances, but only stipulates clearly that teaching staff should use the minimum force needed with respect to restraint as a planned intervention.²⁰⁴ The same guidance is not clearly provided for the use of restraint as an unplanned or emergency intervention.²⁰⁵ Policy guidance on the use of protective isolation effectively aligns with the above principles.²⁰⁶

It should be noted that each jurisdiction has a behaviour management policy that encourages the use of positive behaviour support interventions. Policies directly addressing the use of restraint and seclusion must be considered in this context.²⁰⁷ Still, existing regulatory frameworks in most jurisdictions should be reviewed to ensure guidance on the use of restraint and seclusion clearly align with these minimum standards. Guidance may be drawn from Victorian and ACT frameworks in this regard.

4 *Monitoring and Reporting*

(a) Planned and Unplanned Use

The use of restraint or seclusion may be permitted as a planned (in an individual behaviour plan)²⁰⁸ or unplanned (or emergency) response to student behaviours. Significant variations exist between jurisdictions.

Table C: Planned and unplanned use of restraint and seclusion per jurisdiction

Jurisdiction	Planned and unplanned use of restraint and seclusion	
	Restraint	Seclusion
Queensland	Planned and unplanned ²⁰⁹	NA
NSW	Planned and unplanned ²¹⁰	NA

use of physical restraint, which in its very nature poses risks to students’ physical and emotional wellbeing. Most jurisdictions do not comment on the potential risks to wellbeing and rights.

²⁰⁴ *Physical Contact with Students (WA)*, above n 144, 1.

²⁰⁵ *Ibid.*

²⁰⁶ *Protective Isolation (WA)*, above n 150.

²⁰⁷ While a general positive behaviour framework may be encouraged, existing research indicates that many schools have not yet fully adopted a positive behaviour support approach: see Part 2.3 above.

²⁰⁸ It should be noted that different terminology is used between jurisdictions, regions and individual schools to describe an individual behaviour plan, including ‘behaviour support plan’ and ‘behaviour management plan’. Such plans are intended to promote positive student behaviours, eg by providing specialised guidance around appropriate behaviour management strategies tailored to the student’s individual needs. Individual behaviour plans are widely used throughout Australia and are well-recognised as good practice in behaviour management and student support: see, for eg, Ian Dempsey, ‘The Use of Individual Education Programs for Children in Australian Schools’ (2012) 36 *Australasian Journal of Special Education* 21. Restraint or seclusion may be included in an individual behaviour plan, eg where it has been identified that the student’s challenging behaviours are ongoing, and that there is a need to develop formalised behaviour management procedures that are agreed to by staff and carers (and in some cases the student).

²⁰⁹ In Queensland, physical restraint is explicitly permitted as both an ‘immediate or emergency response or as part of a student’s individual plan’: *SSDSE*, above n 144, 1.

²¹⁰ Existing guidance in NSW does not indicate whether it is appropriate or not to include restraint as a planned intervention in a student’s behaviour support plan. In the absence of any guidance to the contrary, it appears that restraint may be used as a planned intervention.

Victoria	Unplanned only	Unplanned only
ACT	Planned and unplanned	Planned and unplanned
Tasmania	Planned and unplanned ²¹¹	NA
South Australia	Planned and unplanned	NA ²¹²
Western Australia	Planned and unplanned	Planned only ²¹³
Northern Territory	Planned and unplanned	NA

In Victoria, restraint and seclusion must not be included in a Behaviour Support Plan.²¹⁴ This is a unique position in Australia. All other jurisdictions either specifically require²¹⁵ or encourage²¹⁶ the use of restraint or seclusion as a planned intervention, or do not provide any guidance that explicitly prohibits their use as a planned intervention.²¹⁷

Additional safeguards and monitoring requirements are generally imposed where restraint and seclusion are used as a planned intervention. For example in Queensland, where physical restraint is included in an individual plan, strategies for reducing and eliminating the need for physical restraint must also be included, the school must establish a regular review process to monitor the effectiveness of strategies included in the plan, and the individual plan must be monitored by the principal’s supervisor.²¹⁸ A more robust framework is provided in the ACT, where the planned use of restraint or seclusion must be preceded by a risk assessment, documented in a Protective Action Plan that is supported by a Positive Behaviour Support Plan, be informed by appropriate professionals as to why the practice is necessary and least restrictive, be prepared together with the student and the student’s parents,²¹⁹ incorporate a plan for reducing and eliminating the need

²¹¹ In Tasmania, the limited guidance identified on the use of physical restraint in schools recommends that physical restraint should be avoided ‘unless there is a pre-planned strategy which has been signed off by family and Learning Services or is absolutely necessary to protect self or others’: *Respectful Schools, Respectful Behaviour (Tas)*, above n 144, 71.

²¹² As noted above, seclusion is prohibited under SA’s regulatory framework.

²¹³ As noted above, WA’s framework regulates the use of ‘protective isolation’, which is permitted only as a planned intervention: *Protective Isolation (WA)*, above n 150.

²¹⁴ *Restraint of Students (Vic)*, above n 144. The implementation of behaviour management plans is intended to focus on the use of strategies ‘to address the underlying cause or purpose of the behaviour’ (eg focus on implementing positive behaviour support, prevention and de-escalation strategies), which restraint and seclusion practices do not achieve effectively: *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60, 12.

²¹⁵ Such as WA’s policy framework, which requires protective isolation to be used only as a planned intervention: *Protective Isolation (WA)*, above n 150.

²¹⁶ In Queensland, if physical restraint is used as an unplanned or emergency intervention, principals and school staff are encouraged to develop an individual plan, particularly ‘if physical restraint is necessary as an ongoing strategy’: *SSDSE*, above n 144, 12. In the ACT, if physical restraint or seclusion is used as an unplanned or emergency intervention, consideration must be given to the development of a Positive Behaviour Support Plan, as well as a Protective Action Plan ‘if the behaviour is part of a pattern of behaviour’: *Safe and Supportive Schools Procedure B (ACT)*, above n 144, [7.11].

²¹⁷ As is the case in NSW: see fn 210. As a result, no additional safeguards or monitoring requirements are explicitly imposed where restraint or seclusion is included in a student’s individual behaviour plan.

²¹⁸ *SSDSE*, above n 144, 13. In Queensland, principals may seek advice from specialised advisers in a regional office: Department of Education (Qld), *Support Services and Resources* (February 2018) <<http://education.qld.gov.au/schools/disability/support-services-resources.html>>.

²¹⁹ This paper does not consider children’s rights to participate in decision-making on the use of restraint and seclusion. Further research regarding children’s participation rights, particularly in relation to behaviour support planning may

for the restrictive practice, and be reviewed regularly.²²⁰ Similar requirements are imposed on the use of protective isolation in Western Australia, where it must only be used as a planned intervention.²²¹ Unplanned use of restraint or seclusion may not be subject to the same degree of monitoring and reporting. A degree of oversight and support may also be provided from a regional or centralised body in many jurisdictions.²²² However such support and oversight may not be individualised, is not compelled in existing frameworks, and may only operate on an ad hoc basis.²²³

Notably, a recent national inquiry recommended that ‘the Australian Government work with state and territory governments to implement a zero-tolerance approach to restrictive practice in a schools context, which should include ... the principle that restrictive practice must *not* form a part of a behaviour management plan’.²²⁴ As noted above, only Victoria has adopted this recommendation. A recent review of Queensland’s regulatory framework also questioned whether restraint or seclusion should be permitted as a planned intervention.²²⁵ It has been claimed that restraint and seclusion are not ‘a program, treatment, therapy, or service’ that should be planned or anticipated, as their use reflects ‘a failure in the treatment process’,²²⁶ and permitting their inclusion into individual behaviour plans may legitimise or encourage reliance on these procedures on a more regular basis.²²⁷

However others have argued that incorporating restraint and seclusion into individual behaviour plans is appropriate, as this ensures the student’s support network is able to plan proactively for these interventions to ensure they are implemented in a manner that is least restrictive and meets the student’s individual needs.²²⁸ This may also ensure more appropriate monitoring and safeguards are imposed on their use, consistent with recent reform in other service settings.²²⁹ It has also been recommended that individual jurisdictions should develop a whole-of-government

be warranted in light of growing recognition of the importance of encouraging a child’s participation in decisions that affect them: *CRC* art 12.

²²⁰ *Safe and Supportive Schools Procedure B (ACT)*, above n 144, [8.1]–[8.4], [10.1]–[10.5]; School principals are also encouraged to seek advice from a regional office, through a School Network Leader and the Network Student Engagement team: [5.3].

²²¹ *Protective Isolation (WA)*, above n 150.

²²² For example, in Victoria, a Principal Practice Leader (Education) is responsible for identifying possible improvements ‘to professional learning and training, and current legislation, policies and guidelines’ relating to the use of restraint and seclusion ‘under the direction and guidance of the Senior Practitioner (Disability)’: *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 107.

²²³ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 107–8.

²²⁴ *Ibid* 279 (emphasis added).

²²⁵ Deloitte, above n 14, 110.

²²⁶ LeBel et al, above n 11, 80.

²²⁷ Gust and Sianko, above n 76, 92.

²²⁸ Bon and Zirkel, above n 33, 36. See also for discussion of recent consideration of planned versus unplanned use of restraint and seclusion, New South Wales Ombudsman, above n 14, 33.

²²⁹ As noted above, in other settings, several jurisdictions have specifically legislated the need for restraint and seclusion practices to be implemented in accordance with a positive behaviour support plan, such that unplanned use will be lawful only in very limited circumstances: *Carter Report*, above n 13. For a summary of legislation and policies relevant to the use of restraint and seclusion in other service settings in each Australian jurisdiction, see *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 93–8. See also Chandler, Willmott and White, above n 81.

legislative framework that regulates the use of restraint and seclusion through behaviour support plans to ensure consistent and robust monitoring in all service settings, including schools.²³⁰

It is conceivable that the use of restraint and seclusion may be improved if their use was dependent on external approval of an appropriate positive behaviour support plan developed by a multi-disciplinary decision-making team, that focuses on early intervention and the provision of least intrusive behaviour management interventions, and permits restraint or seclusion only as a last resort and in accordance with the abovementioned human rights norms. Ideally, a robust monitoring and approval framework would be implemented to ensure restraint and seclusion are minimised under such plans, not increased. Such rigour in planning for behaviour management interventions, including the use of restraint and seclusion, may result in these practices being used in a manner that is more transparent, therapeutically informed, collaborative, and rights-focused.²³¹

Further research should consider existing planned and unplanned decision-making about the use of restraint and seclusion, how such a planning framework would fit into existing education practices and systems, where responsibilities such as approval and monitoring would best be placed within existing systems, and resourcing and training implications.

*(b) Reporting Systems*²³²

Reporting and monitoring of restraint and seclusion are regulated in most jurisdictions through general incident reporting mechanisms, which require reporting of particular classes of incidents, or any incident that meets a certain reporting threshold. Many jurisdictions do not address restraint and seclusion specifically within existing incident reporting frameworks.²³³ Other jurisdictions do, and require that these practices be documented internally, and typically require the preparation of an incident report to record the use of restraint or seclusion, but do not require data on all applications of restraint or seclusion to be collected and analysed centrally.²³⁴

²³⁰ In a recent review of the ACT's education system, it was recommended that 'the ACT Government should work towards a legislative requirement for all ACT schools and residential services to register behaviour support plans with an independent agency, to seek authorisation to use restrictive practices..., and to report occasions of use of physical restraint to an independent regulatory agency, to enable accurate data collection, monitoring and analysis of use of restraint across ACT services'. As noted in this review however, any such whole of government framework would need to be designed and implemented 'in a way that does not impose an unnecessary administrative burden on teachers and school leaders...': Shaddock, Packer and Roy, above n 5, 161.

²³¹ This may also be a means to address significant concerns recently exposed over the lack of monitoring of restraint and seclusion in schools: see, for eg, Victorian Equal Opportunity and Human Rights Commission, above n 7, 105; New South Wales Ombudsman, above n 14, 34; Deloitte, above n 14, 52.

²³² Reporting and monitoring systems in each jurisdiction are varied and complex, and typically involve several layers of legislative or policy-based reporting requirements beyond direct education-based policies. Reporting and monitoring mechanisms may, for example, be informed by mandatory reporting and workplace health and safety requirements specific to each individual jurisdiction, and through general oversight mechanisms of, for example, ombudsman offices, or human rights and anti-discrimination bodies (such as the Victorian Equal Opportunity and Human Rights Commission). However there is a general absence of independent oversight bodies with specific and regular inspection over public schools to monitor the use of restrictive practices and rights of students: *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, 69. This paper does not provide a holistic analysis of each jurisdiction's reporting and monitoring mechanisms. It is limited to education policies that relate directly to the reporting and monitoring of school-based incidents.

²³³ Tasmania, SA, WA, NT.

²³⁴ Queensland: *SSDSE*, above n 145, 12; Deloitte, above n 14, 109. NSW: Department of Education (NSW), *Student Discipline in Government Schools Policy* (2016) <<https://education.nsw.gov.au/policy-library/policies/student>

As noted above, some jurisdictions, such as the ACT, impose higher reporting and monitoring standards on the planned use of restraint or seclusion.²³⁵ However, throughout Australia, there is a general need for greater clarity and specificity in reporting requirements, and more robust and rigorous monitoring and analysis of restraint and seclusion, both planned or unplanned. This is necessary to facilitate the identification of trends or patterns in the use of restraint and seclusion, where further resources and training should be directed to improve behaviour management strategies, and to ensure schools' compliance with human rights norms.

(c) Reduction and Elimination

To ensure compliance with human rights norms, each jurisdiction should implement targets for the elimination of all restraint and seclusion practices in schools. While only aspirational, a reduction and elimination plan may encourage whole-of-school, inclusive practices by setting clear benchmarks against which individual jurisdictions, regions and schools may measure their progress.²³⁶ Currently, only Victoria has implemented such a plan.²³⁷ While other jurisdictions impose principles requiring that restraint or seclusion only be used as a last resort, and all jurisdictions have taken steps to implement positive behaviour support programs, they do not set clear overarching goals to reduce and eliminate their use.

V CONCLUDING REMARKS AND RECOMMENDATIONS

While some jurisdictions, particularly Victoria and the ACT have recently implemented significant improvements in the regulation of restraint and seclusion in government schools, and significant progress has reportedly been made in improving behaviour management strategies in schools throughout Australia,²³⁸ all jurisdictions fail to uphold human rights norms in some way. Each jurisdiction should review existing policies and guidelines to ensure clear guidance is provided for all forms of restraint and seclusion. Each intervention should be defined clearly, and delineated from other adjoining interventions, and minimum standards should be mandated. Each jurisdiction should examine existing methods of data collection, and consider how best to reform existing methods to ensure a more accurate understanding of the use of these practices. This is necessary to facilitate more robust measuring and monitoring of their use (both planned and unplanned), and to inform future resourcing, training and regulatory reform.²³⁹

Critically, this analysis also adds impetus to recent recommendations that the Australian government work to reduce and eliminate restraint and seclusion in school settings, consistent with

discipline-in-government-schools-policy> 5. Victoria: *Restraint of Students (Vic)*, above n 144; *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60, 5. ACT: *Safe and Supportive Schools Policy (ACT)*, above n 144 [5.3]–[5.4]; *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [3.8].

²³⁵ *Safe and Supportive Schools Procedure B (ACT)*, above n 144 [8.1]–[8.4], [10.1]–[10.5].

²³⁶ This recommendation was recently made in an independent review of Queensland's education services: Deloitte, above n 14, xiii.

²³⁷ *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60.

²³⁸ *Australian Government Response to Senate Committee Report on Violence, Abuse and Neglect*, above n 68, 31.

²³⁹ Very little is known, also, about how these practices are used and regulated in non-government schools. This should be the subject of further inquiry in each jurisdiction.

its obligations under the CRC and CRPD.²⁴⁰ The Australian government should work with state and territory governments to implement robust guidelines and minimum standards at a national level, to encourage clear and consistent terminology, inform future reform on the acceptable use of these practices, and mandate minimum standards for data collection and monitoring.²⁴¹ A similar approach has been taken in the United States, where the *Restraint and Seclusion: Resource Document* guides individual states' regulation of these practices through the implementation of principles that reflect best practice.²⁴² Consideration should also be given to expanding the existing *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*²⁴³ to apply to education services, or adopting a similar framework specific to education settings,²⁴⁴ to set aspirational targets for reducing and eliminating restraint and seclusion, and to encourage schools to implement whole of school systems that are geared towards eliminating their use.²⁴⁵

Further consideration should be given to whether restraint and seclusion practices would be regulated more effectively through a legislative model, which is being adopted in other

²⁴⁰ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, above n 9, 5; *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, xxi–xxii.

²⁴¹ *Senate Committee Report on Violence, Abuse and Neglect*, above n 7, xxi, 105. While the Australian Government has noted that 'reducing the use of restrictive practices is consistent with Australia's obligations under the CRPD', and that it is 'committed to continuing to improve support for students with disability in schools', there currently remains no robust guidance or minimum standards at a national level on the use of these practices in school settings: *Australian Government Response to Senate Committee Report on Violence, Abuse and Neglect*, above n 68, 31. Given the constitutional division of powers relating to the provision of education in Australia, and the significant fragmentation of statutory, common law and policy guidance on the use of restraint and seclusion in school settings, guidance at a national level should be a priority.

²⁴² Department of Education (US), above n 124. For discussion, see, for eg, Marx and Baker, above n 70, 24. In the US, the number of state laws specifically addressing the use of seclusion and restraint in schools has increased significantly since the release of the Resource Document: Bon and Zirkel, above n 33, 36.

²⁴³ *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, above n 15.

²⁴⁴ A national framework could draw upon the example in Victoria: *Principles for the Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools*, above n 60.

²⁴⁵ See, for eg, Deloitte, above n 14, 110. This recommendation was also made by advocacy organisations, eg: Children and Young People with Disability Australia, Submission to Legislative Council Portfolio Committee No 3 — Education, Parliament of New South Wales, *Education of Students with a Disability or Special Needs in New South Wales*, February 2017, 32.

jurisdictions such as New Zealand²⁴⁶ and the United States,²⁴⁷ or a policy-based model.²⁴⁸ Each jurisdiction should also consider whether it is viable or appropriate to unify the regulation of restrictive practices in all service settings under a single comprehensive legislative framework.²⁴⁹ As noted above, significant further research is needed to explore these options.

Systemic legislative or policy reform will not address all concerns about the use of restraint and seclusion in schools.²⁵⁰ Resourcing and educational programs are also critical.²⁵¹ Further research should seek to understand the variability and general trends in the use of restraint and seclusion across jurisdictions and regions, and identify whether particular policies, practices or other underlying factors may be perpetuating the use of restraint and seclusion.²⁵² Understanding where restraint and seclusion occur most often, and why, ‘can lead to more impactful policy solutions’.²⁵³

Further research and significant policy and legislative reform are necessary to ensure greater clarity and consistency in the implementation and monitoring of these practices in Australian government schools, and to bring existing regulatory frameworks into alignment with Australia’s international human rights obligations. At a minimum, the implementation of a national framework that

²⁴⁶ In New Zealand, the Ministry of Education noted in a Regulatory Impact Statement regarding the use of seclusion and restraint in schools, that while issuing guidance to schools on the acceptable use of restraint and discouraging the use of seclusion may minimise their use, it would continue ‘to be voluntary for schools to follow all or some aspects of the guidance’, meaning seclusion could continue to be used, and restraint could continue to be used inappropriately: Ministry of Education (NZ), *Regulatory Impact Statement: Eliminating Seclusion in Schools, Early Childhood Education Services and Nga Kohanga Reo, and Ensuring Appropriate Use of Physical Restraint in Schools* (November 2016) <<https://education.govt.nz/assets/Documents/Ministry/Regulatory-Impact-Statements/Seclusion-and-Physical-Restraint-RIS-Final-29-11-16.pdf>>. As a result, a recommendation was made that these practices be regulated through legislation. Restraint and seclusion are now defined and regulated through the *Education Act 1989* (NZ) ss 139AB–139AE. Guidance is also provided to distinguish seclusion, which is prohibited, from time out, which is permitted: Ministry of Education (NZ), *Banning Seclusion and Creating a Legal Framework for Physical Restraint* (2018) <<https://education.govt.nz/ministry-of-education/legislation/the-education-update-amendment-act/banning-seclusion-and-creating-a-legal-framework-for-physical-restraint/>>.

²⁴⁷ In the US, significant concerns about the use of restrictive practices in school settings has resulted in increasing amounts of legislative intervention, eg, ‘the number of state laws specifically addressing the use of seclusion and restraint in schools increased from 23 in 2010 to at least 30 in 2012’: Bon and Zirkel, above n 34, 36. Despite several Bills having been introduced in the US Congress, there remains no federal legislation governing the use of restrictive practices in US schools. For discussion, see, for eg, Nelson, above n 9, 99.

²⁴⁸ There may be benefits and limitations to both types of regulation. For discussion, see, for eg, Kumble and McSherry, above n 71.

²⁴⁹ A review of the ACT’s regulatory framework recently recommended the government implement a legislative framework ‘to regulate the use and independent oversight of restrictive practices in all ACT schools, and other relevant settings’: Shaddock, Packer and Roy, above n 5, 25.

²⁵⁰ Alice Keski-Valkama et al, ‘A 15-Year National Follow-Up: Legislation is Not Enough to Reduce the Use of Seclusion and Restraint’ (2007) 42 *Social Psychiatry and Psychiatric Epidemiology* 747, 752. Research from the US suggests that increased regulation has not reduced the use of restraint and seclusion significantly in some states: Gust and Sianko, above n 76, 93.

²⁵¹ This is necessary to ensure teaching staff are equipped with adequate skills, resources and time to understand students’ individual needs, backgrounds and behaviours, as well as to understand and implement appropriate, individualised responses to student behaviour: Keski-Valkama et al, above n 250, 752.

²⁵² Research from the US has suggested, eg, that ‘it appears that the use of these practices [is] likely driven to a meaningful degree by local policy and school culture more generally’: Gagnon, Mattingly and Connelly, above n 11, 72.

²⁵³ Gagnon, Mattingly and Connelly, above n 11, 67.

provides clear and consistent guidance to all jurisdictions in line with the human rights norms considered in this paper is critical and should not be delayed.