

Education and Training Reform Regulations Review
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To Whom It May Concern,

Submission to the Education and Training Reform Regulations Review

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to provide a submission towards the consultation draft of the *Education and Training Reform Regulations 2017* ('the Draft Regulations').

Executive summary

This submission is limited to comments about Regulation 25 (Regulation 25) which states:

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 is dangerous to the member of staff, the student or any other person.

A major issue with this Regulation is that key terms have not been adequately defined and this undermines clarity about provisions designed to protect students and staff. Further, it is questionable as to whether existing provisions in the *Education and Training Reform Act 2006* (Vic) (ETRA) may be used to justify a regulation permitting restraint of students.

The Commission has serious concerns about Regulation 25 given that it authorises the use of restraint against children. This engages a number of rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) including the right to equality before the law (section 8), protection from cruel, inhuman or degrading treatment (section 10(b)), protection of

families and children (section 17), liberty and security of person (section 21(a)), and freedom of movement (section 12).

It is important to acknowledge that whether these rights are limited depends to some extent on the circumstances of particular cases. However, the Commission is concerned that Regulation 25 creates an environment in which Charter rights are more likely to be limited as this provision is ambiguous in scope and operation. This is particularly concerning given it relates to students with a disability.

The Commission acknowledges legitimate concerns about the rights, health and safety of educators and other students. However, these concerns must be carefully balanced to ensure adequate consideration and protection of human rights of children. For the reasons outlined in this submission, the Commission is of the view that as currently formulated Regulation 25 fails to achieve this balance and should be reconsidered to strengthen compliance with human rights protected by the Charter and provide clarity to teachers and students.

Recommendation

That Regulation 25 be properly assessed for Charter compliance and preferably drafted to ensure:

- That the least restrictive means principle set out in section 7 (2) of the Charter is given primacy
- The terms ‘reasonable action’, ‘restraint’, and ‘behaviour dangerous to the member of staff...’ are well defined
- Seclusion should also be clearly excluded from the scope of what constitutes ‘reasonable action’
- That the human rights outlined in this submission be considered fully in the development of a human rights certificate under Section 12A (2) of the *Subordinate Legislation Act 1994* (Vic).

Background - the Commission’s Held Back report

In *Held Back: the experiences of students with disabilities in Victorian schools* (‘Held Back’), the Commission examined the issue of restraint and seclusion in schools.

In addition to recording the experiences of parents who reported the use of restraint on their child at school, Held Back also noted that over 500 educators reported having used restraint. The report also found no independent oversight or monitoring of the use of restraint in Victorian

schools and no official data on how frequently these practices occur in schools, why they are used or their impacts.

While this was a relatively small sample size,¹ the findings were sufficient to warrant scrutiny of the issue of restraint and seclusion, and the manner in which such practices are regulated. Further, since the release of *Held Back* there have been welcome improvements in regulation and reporting, including the establishment of the Principal Practice Leader – Education (which in part aligns with the Commission's recommendations in *Held Back*).

While the Commission has welcomed the establishment of this new role, success will depend on a number of factors including the need for confirmation about the future and form of this role as well as the content and status of revised policy guidance about restraint which is currently in development. In addition to training for educators and ongoing monitoring and evaluation, Regulation 25 is one important component of a holistic approach to ensuring there is strong regulatory protection in relation to restraint and seclusion in Victorian schools.

Ambiguity in relation to key terms

The terms 'reasonable action', 'restraint', and 'behaviour dangerous to the member of staff...' are not defined in the regulations, or in the ETRA. Further there is no clarity about these terms in the Explanatory Memorandum to the ETRA, nor was there discussion about restraint or seclusion during parliamentary debates in relation to that Act.

Accordingly it is unclear what constitutes 'reasonable action' and what conduct would amount to 'restraint' or would involve 'behaviour dangerous to a member of staff.' This ambiguity is of particular concern given that in our view Regulation 25 engages and limits a number of Charter rights and applies across the Victorian education system.

Regulation 25 is a re-enactment of Regulation 15 in the 2007 Regulations.² Similar to regulation 25, we note the Regulatory Impact Statement (RIS) for the 2007 Regulations ('RIS 2007') failed to remove or address ambiguity around the definition of key terms in respect of regulation 15.³ The RIS 2007 suggested Regulation 15 would provide clarity for educators on how they may act in the face of immediate danger and that without the proposed Regulation 'there is no explicit

¹ Department of Education and Training, *Regulatory Impact Statement: Education and Training Reform Regulations 2017*, 112.

² Aside from the addition of the words 'that is' which do not appear to materially alter the provision.

³ The Department of Education, "Regulatory Impact Statement: Update to the Existing Education Regulations to Reflect the New Education and Training Reform Act 2006", February 2007 (the Minister for Education's Notice of Decision to recommend the 2007 Regulations under section 12 of the *Subordinate Legislation Act 1994* (Vic) was published in the Victorian Government Gazette, G25, on 21 June 2007).

definition of the action a member of staff is permitted to take to ensure the protection of students and staff'.⁴ Contrary to the RIS 2007, Regulation 15 (now Regulation 25) in fact offers very little clarity about the use of restraint. The Regulatory Impact Statement (RIS) for the 2017 Regulations ('RIS 2017') suggests sufficient clarity is provided through various DET policy materials.⁵ The Commission's view is that these policy materials are insufficient due to their status as guidance material and that definitional clarity and proper consideration of human rights must be reflected in the Regulations themselves.

Rights engaged

All Victorian public authorities are obliged to act compatibly with human rights. Further, government schools are public authorities and bound by the Charter.

Regulation 25, by authorising the use of physical restraint in schools against students engages a number of rights under the Charter including the right to equality before the law (section 8), protection from cruel, inhuman or degrading treatment (section 10(b)), liberty and security of person (section 21(a)), and freedom of movement (section 12).

The right to protection of families and children (section 17) applies across all of these rights. Section 17 (2) of the Charter states that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child. Unlike many rights in the Charter this right imposes a positive obligation on government to provide protection to children, rather than a negative obligation not to interfere with the right.

It is important to acknowledge that whether these rights are limited depends to some extent on the circumstances of particular cases. However, the Commission is concerned that Regulation 25 creates an environment in which Charter rights are more likely to be limited as this provision is ambiguous in scope and operation. This is particularly concerning given it relates to students with a disability.

Protection from cruel, inhuman or degrading treatment

Section 10(b) of the Charter states that a person must not be treated or punished in a cruel, inhuman or degrading way. Restraining a child, especially in front of their peers, may be a degrading and humiliating experience for the child. For a child who does not understand why restraint is being applied and when it will end, the restraint could arguably constitute cruel treatment.

⁴ Ibid 34-36.

⁵ Above n 1, 112.

International jurisprudence provides the following guidance on the specific meaning of ‘cruel, inhuman or degrading’:

- (a) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of the prohibition;⁶
- (b) The assessment of this minimum level of severity is relative, it has to be assessed with regard to the circumstances of any given case;⁷
- (c) The assessment of the minimum level of severity may consider the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim;⁸
- (d) Recourse to physical force against a person which has not been made strictly necessary by their conduct diminishes human dignity and is in principle an infringement of the right;⁹
- (e) The prohibition was held to have been breached in a case where the applicants were found to have experienced ‘a profound sense of vulnerability, powerlessness and affront which can reasonably be described as humiliating and therefore degrading’.¹⁰

In relation to regulation 25, the ambiguity surrounding key terms means that it is difficult to determine whether restraint or physical force has been necessary. In addition, ambiguity in relation to ‘reasonable action’ creates a risk that educators may undertake a range of action under the Regulation that may amount to ill treatment. Finally, when considered in the context of restraint being applied to students with a disability, issues of profound vulnerability and powerlessness have particular resonance.

Right to liberty and security of person.

Section 21 of the Charter states every person has the right to liberty and security and must not be arbitrarily deprived of his or her liberty. Subsection 21(1) expresses the general right of individual liberty and may be regarded as the statutory equivalent of the common law “right to be at liberty” referred to in *RJE v Secretary to the Department of Justice*.¹¹ The right to liberty is engaged by any form of detention, even if it is temporary.

⁶ *Rachwalski and Ferenc v Poland* (Judgment) (Application 4709/99) ECHR 28 July 2009 at [52].

⁷ *Ireland v United Kingdom* judgment of 25 March 1993, Series A no 247-C, at [30].

⁸ *Cobzaru v Romania* (Judgment) (Application 48254/99) 26 July 2007 at [61].

⁹ *Rachwalski and Ferenc v Poland* (Judgment) (Application 4709/99) ECHR 28 July 2009 at [59]; *Matko v Slovenia* (Judgment) (Application 43393/98) 2 November 2006 at [98].

¹⁰ *Rachwalski and Ferenc v Poland* (Judgment) (Application 4709/99) ECHR 28 July 2009 at [61].

¹¹ (2008) 21 VR 526 [37] (Maxwell P and Weinberg JA).

Subsection 21(2) and (3) provide protection against arbitrary or unlawful interferences with individual liberty. These are separate requirements: an otherwise lawful deprivation of liberty may nevertheless be arbitrary.

- A lawful interference is one that is authorised by a positive law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it.¹²
- Further, even if “lawful” in this sense, an interference may nevertheless be “arbitrary”. What amounts to an “arbitrary” interference with the right to privacy was considered by the Court of Appeal in *WBM v Chief Commissioner of Police*.¹³ In that case, Warren CJ (Hansen J agreeing) preferred the “human rights meaning” of the concept of arbitrariness in s 13(a) to the narrower “dictionary meaning”.¹⁴ The “human rights meaning” is that reflected in the international jurisprudence: “concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.”¹⁵ The ‘human rights meaning’ of arbitrariness was described in the same terms in *Victoria Police Toll Enforcement & Ors v Taha & Anor*.¹⁶

If regulation 25 is relied upon as the “law” authorising the deprivation of liberty the Commission considers it may be considered arbitrary according to these standards as the regulation is vague, lacking in predictability and procedural safeguards.

Right to recognition and equality before the law.

Section 8 of the Charter states that every person has the right to recognition as a person before the law, has the right to enjoy his or her human rights without discrimination and has the right to equal and effective protection against discrimination. It is unlawful to discriminate on the basis of an attribute, including on the basis of disability, age and physical features. In the context of Regulation 25, this has particular relevance for students with behavioural manifestations associated with a disability as defined in Section 4 of the Equal Opportunity Act 2010 (Vic).

¹² *Sunday Times v UK* (1979) 2 EHRR 245, cited in *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [173]-[174] in relation to the words “under law” in s 7(2) of the Charter.

¹³ [2012] VSCA 159.

¹⁴ The “dictionary meaning” was described as being a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim”: *WBM v Chief Commissioner of Police* [2012] VSCA 159 [99], referring to the decision of the trial judge at [2010] VSC 219 [51]-[57].

¹⁵ *WBM v Chief Commissioner of Police* [2012] VSCA 159 [117]. See also *PJB v Melbourne Health* [2011] VSC 327 at [84]; *Patrick’s Case* [2011] VSC 327 at [80]-[84]; *ZZ v Secretary to the Department of Justice* [2013] VSC 267 at [85].

¹⁶ *Victoria Police Toll Enforcement & Ors v Taha & Anor* [2013] VSCA 37 198] – [199] (Tate JA), referring to the earlier decision of *WBM v Chief Commissioner of Police* [2012] VSCA 159 in which the definition of arbitrary in s 21 was also discussed.

Section 8 (b) of the Charter also states that every person has the right to recognition and equality before the law including *the right to equal protection of the law without discrimination*. This aspect of the right to equality is concerned with being protected by the law in an equal way with others, ‘without discrimination’. There may be unequal legal protection that involves direct discrimination where children are treated unfavourably under the law because they are children. For example:

- (a) if children with disabilities are able to be subject to restraint more readily than adults with disabilities rather than using less invasive alternatives;
- (b) if children with disabilities in Victorian State schools are able to be subjected to restraint or seclusion without the legislative protection or safeguards that have been put in place for the use of restraint and seclusion upon adults in Victorian State institutions (for example in the disability context under the *Disability Act 2006* (Vic)).

Ambiguity surrounding the broader regulation of restrictive interventions in schools is concerning particularly when compared to how such practices are regulated in other settings, such as adult disability residential and service settings.

The *Disability Act 2006* (‘Disability Act’) contains detailed provisions and safeguards dealing with the use of restraint and seclusion in disability service settings. Under the Disability Act, restraint and seclusion must be included in a person’s behaviour support plan, which in turn is subject to review and oversight by the Senior Practitioner and VCAT. Further, under the *Mental Health Act 2014* (‘MHA’) bodily restraint is only authorised where necessary to prevent imminent and serious harm to the person or another person, or to administer treatment. The MHA provides a comprehensive authorisation process and requires that people subject to bodily restraint be monitored and under continuous observation.

The use of restrictive interventions in disability service settings has also been a subject of robust national legal and policy reform informed by proper evidence, such as the Australian Law Reform Commission’s discussion paper *Equality, Capacity and Disability in Commonwealth Laws* and the *National Framework for Reducing and Eliminating the Use of restrictive Practices in the Disability Services Sector* (the National Framework).

Noting that the use of restrictive interventions in those settings has its own shortcomings and challenges requiring ongoing work and reform – and noting that there have been some recent improvements in regulation in schools as noted earlier – it is concerning that such practices in our schools are not currently subjected to the same levels of scrutiny and regulatory protection. The National Framework provides detail on Australia’s relevant human rights obligations in the

context of the use of restrictive interventions. These should be considered in this review and in efforts to address the use of restraint in schools more broadly.

Query the validity of regulations authorising restraint

The 2007 Regulations were made under sections 5.10.1 and 5.10.2 of, and schedules 5 and 8 to, the ETRA. The Act states that regulations may be made with respect to “safeguarding health and maintaining order and discipline in Government schools”.¹⁷

The Explanatory Memorandum to the ERTA does not include any mention of restraint, nor is the issue of restraint discussed during the parliamentary debates for the Act in either the Legislative Assembly or the Legislative Council. The Commission is of the view that this has significant implications for Charter compatibility, as subordinate legislation that is incompatible with a human right in the Charter may only be valid if the ERTA, being the enactment under which the regulation is made, authorises the regulation to be incompatible with human rights.¹⁸

Occupational health and safety, duty of care and balancing rights

The Commission acknowledges legitimate concerns about the rights, health and safety of educators and other students. However, these concerns must be carefully balanced to ensure adequate consideration of human rights. For the reasons outlined in this submission, the Commission suggests Regulation 25 fails to achieve this balance.

The RIS 2007 noted surrounding legislative, regulatory and policy requirements including Acts and regulations administered by the Victorian WorkCover Authority and went on to note the significant occupational health and safety and duty of care obligations for teachers, and lack of clarity about how to meet them.¹⁹

The RIS 2017 includes a similar focus on occupational health and safety considerations as a rationale for allowing restraint.²⁰ The attempt to address occupational health and safety considerations and this apparent gap by enacting Regulation 15 (now re-enacted in Regulation 25) as a solution should be reconsidered.

¹⁷ *Education and Training Reform Act 2006* (Vic), s 10.5.1 (2); Schedule 5, [1.2]

¹⁸ Section s32(3)(B) of the Charter provides that s32 does not affect the validity of a subordinate instrument or part thereof that is incompatible with a human right *and is empowered to be so by the Act under which it is made*. The Explanatory Memorandum states that the effect of this is, if a subordinate instrument is incompatible and the authorising enactment does not enable the incompatibility, then the relevant provision will not be valid.

¹⁹ Above n 3, 35.

²⁰ Above n 1, 112.

More generally, in relation to the rationale suggested in the RIS 2017, the Commission suggests that a stated aim of 'reducing the risk that schools could be legally challenged when staff restrain students'²¹ is highly problematic and suggests a failure to give proper consideration to the rights of the child and the complexities associated with the use of restraint outlined in this submission.

If Regulation 25 is retained, the Commission is of the view that it must be accompanied by robust regulatory and reporting requirements that comply with the Charter.

Once again, the Commission welcomes the opportunity to provide input on the Draft Regulations and we look forward to the results of the review. If you have any questions about this submission, please contact Chris Povey, Head of Policy and Research, on (03) 9032 3477 or chris.povey@veohrc.vic.gov.au

Yours Sincerely



**Kristen Hilton
Commissioner**

²¹ Above n 1, 118.