



30/01/2014

The Hon Richard Dalla-Riva MLC  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House  
MELBOURNE VIC 3002

Dear Mr Dalla-Riva

### **Submission on the Children, Youth and Families Amendment (Security Measures) Bill 2013**

The Victorian Equal Opportunity and Human Rights Commission (**Commission**) seeks to contribute to the Scrutiny of Acts and Regulations Committee's (**Committee**) consideration of the *Children, Youth and Families Amendment (Security Measures) Bill 2013 (Bill)*. The Bill was introduced into the Legislative Assembly on 10 December 2013. It raises a number of human rights issues that the Commission has an interest in.

The Commission notes that the Committee has a role in considering and reporting on whether Bills introduced into Parliament are compatible with the *Charter of Human Rights and Responsibilities Act 2006 (Charter)*. The Commission has made the **attached** submission to assist the Committee in this process.

The Commission invites the Committee to make this submission available on its website.

### **Key issues**

The Commission welcomes the Victorian Government's commitment to improving the safety and security of secure welfare services in Victoria. However, the Commission:

- is concerned that the Statement of Compatibility for the Bill does not adequately explain whether the Bill limits the rights of children in secure welfare services, or whether any limitations on those rights are reasonable and justified;
- considers that the proposed 'unclothed search' power may not be compatible with the Charter and that there may be less rights-restrictive ways of achieving safety and security in secure welfare services;
- considers that the Bill should be amended to include more extensive procedural safeguards to protect the rights of children who may be subject to a frisk search, an unclothed search (if retained), seclusion and/or force;

- is concerned about the provisions of the Bill which authorise the seclusion of a child if the child's behaviour presents an immediate threat to 'property', or the use of force on a child if it is reasonable and necessary to prevent the child from 'damaging property'. The Commission considers that these provisions should be removed or amended to clarify the extent of those powers;
- refers the Committee to the provisions of the *Children and Young People Act 2008* (ACT) (**ACT Act**) which provide guidance on the types of safeguards that can apply to protect children who are subject to searches and force in secure welfare settings. A copy of the relevant provisions of the ACT Act has been **attached** to this letter for the Committee's reference; and
- considers that the Bill should be amended to include mechanisms for:
  - reporting and monitoring the use of searches, seclusion and force in secure welfare services;
  - making and reviewing complaints about the use of these practices; and
  - ensuring that staff at secure welfare services receive appropriate and ongoing training on the use of these practices.

The Commission's submission deals with these issues in more detail.

If the Committee would like further information regarding this submission, please feel free to contact me on 9032 3403 or [kate.jenkins@veohrc.vic.gov.au](mailto:kate.jenkins@veohrc.vic.gov.au).

Yours sincerely



Kate Jenkins  
Commissioner





Victorian Equal Opportunity  
& Human Rights Commission

# Submission on the Children, Youth and Families Amendment (Security Measures) Bill 2013

30 January 2014

## Introduction

1. The *Children, Youth and Families Amendment (Security Measures) Bill (Bill)* proposes to amend the *Children, Youth and Families Act 2005 (Principal Act)* to:
  - provide for security arrangements for secure welfare services;
  - prohibit certain actions in relation to children placed in an out of home care service (including a secure welfare service); and
  - make amendments to the searches that are permitted in youth justice facilities.<sup>1</sup>
2. The Statement of Compatibility for the Bill states that the following rights under the *Charter of Human Rights and Responsibilities Act 2006 (Charter)* may be engaged by the Bill:
  - protection of children (section 17(2));
  - liberty and security of person (section 21);
  - privacy (section 13);
  - property (section 20); and
  - humane treatment when deprived of liberty (section 22(1)).
3. The Commission considers that the following rights may also be engaged:
  - protection from torture and cruel, inhuman or degrading treatment (section 10) if a child is subject to a search, seclusion and/or force;<sup>2</sup>
  - right to equality (section 8) if children in secure welfare services are given less legal protection than adults who are subject to similar practices in other settings (such as disability services and mental health services); and
  - freedom of movement (section 12) if a child's liberty is further restricted by any of these practices.
4. The Bill was introduced in response to the Victorian Ombudsman's investigation into secure welfare services in 2013.<sup>3</sup> Although the Ombudsman's recommendations to the Department of Human Services are not publicly available, the Ombudsman identified concerns that children in secure welfare services are being subjected to strip searches, physical restraint and seclusion without a legislative basis.<sup>4</sup>
5. The Commission acknowledges that a statutory framework to regulate the use of searches, seclusion and force may be an effective way of protecting the safety and security of secure welfare services, and the rights and wellbeing of children who are subject to these practices. However, given the potentially significant consequences of subjecting a child to an unclothed search, a frisk search, seclusion and/or force, the Commission considers that the Bill does not include sufficient safeguards to ensure that these practices are conducted in a way that is compatible with the Charter.

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<sup>1</sup> *Children, Youth and Families Amendment (Secure Welfare) Bill 2013 (Vic)* cl 1.

<sup>2</sup> For example, in *Davies v State of Victoria* [2012] VSC 343, the Supreme Court of Victoria found that the treatment of a resident in a Community Residential Unit, who was dragged naked along a hallway, was cruel and degrading contrary to section 10(b) of the Charter.

<sup>3</sup> Second Reading Speech for the *Children, Youth and Families Amendment (Secure Welfare) Bill 2013 (Vic)*.

<sup>4</sup> Victorian Ombudsman, *2013 Annual Report (Part 1)*, 44.



## Secure welfare services

6. A child (aged 10 to 17 years) may be placed in a secure welfare service if the Secretary (or the Children's Court if the child is subject to an interim accommodation order) is satisfied that there is a 'substantial and immediate risk of harm to the child'.<sup>5</sup>
7. A secure welfare service is a community service with lock-up facilities that is designed to protect a child who is at extreme risk of harm.<sup>6</sup> Children who are placed in secure welfare services can be at risk of sexual exploitation, self-harm, mental health issues, and drug and alcohol use, amongst other things.<sup>7</sup>
8. As noted in the Department of Human Services Secure Welfare Services Advice:

Young people in Child Protection may place themselves at risk of such serious harm that they require a highly structured, secure and safe environment for a period of time. At these times, a Child Protection Manager or the Children's Court, depending on the legal status of the young person, may make a decision to place them at a Secure Welfare Service.<sup>8</sup>
9. A child may be placed in a secure welfare service for up to 21 days (and, in exceptional circumstances, for an additional period of up to 21 days).<sup>9</sup>
10. The main objective of placement in a secure welfare service is crisis stabilisation.<sup>10</sup> As explained in the Secure Welfare Services Advice:

Admission to a [secure welfare service] is likely to be precipitated by a significant crisis in a child or young person's life. The aim of the [secure welfare service] is to keep the child or young person safe whilst a suitable case plan is established to reduce the risk of harm and return the child or young person to the community as soon as possible in a safe and planned way.<sup>11</sup>
11. Unlike youth justice facilities,<sup>12</sup> which are also regulated by the Principal Act, children who are placed in secure welfare services have not committed a crime. Rather, they have a special need for protection due not only to their age but to the circumstances which have led to their placement in a temporary secure facility.

## Best interests of the child

12. Section 17(2) of the Charter provides 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. Section 17(2) therefore recognises that children are entitled to special protection due to their age and vulnerability.

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<sup>5</sup> *Children, Youth and Families Act 2005* (Vic) ss 173(b) and 263(1)(e).

<sup>6</sup> *Ibid* s 3.

<sup>7</sup> Victorian Ombudsman, above n 4.

<sup>8</sup> Department of Human Services, *Secure Welfare Services Advice No. 1069* (5 November 2012): [http://www.dhs.vic.gov.au/cpmanual/practice-context/statewide-specialist-child-protection-services/1069-secure-welfare-service-sws?SQ\\_PAINT\\_LAYOUT\\_NAME=print\\_entire](http://www.dhs.vic.gov.au/cpmanual/practice-context/statewide-specialist-child-protection-services/1069-secure-welfare-service-sws?SQ_PAINT_LAYOUT_NAME=print_entire)

<sup>9</sup> *Children, Youth and Families Act 2005* (Vic) ss 173 (2)(b) and 264(2) and (4).

<sup>10</sup> Department of Human Services, *Placement in Secure Welfare Services Advice No. 1459* (14 January 2013): [http://www.dhs.vic.gov.au/cpmanual/out-of-home-care/secure-welfare-placements/1459-placement-in-secure-welfare-services?SQ\\_PAINT\\_LAYOUT\\_NAME=print\\_entire](http://www.dhs.vic.gov.au/cpmanual/out-of-home-care/secure-welfare-placements/1459-placement-in-secure-welfare-services?SQ_PAINT_LAYOUT_NAME=print_entire)

<sup>11</sup> Department of Human Services, above n 8.

<sup>12</sup> Young people convicted of serious offences can be detained in a youth residential centre (10 to 14 year olds) or a youth justice centre (15-20 year olds): *Children, Youth and Families Act 2005* (Vic) ss 410(1) and 412(1).

13. Section 17(2) of the Charter is strengthened by the Principal Act which requires that the 'best interests of the child must always be *paramount*' (emphasis added).<sup>13</sup>
14. The Principal Act sets out the relevant considerations when determining whether a decision or action is in the best interests of a child, including the need to protect the child from harm, to protect the child's rights, and to promote the child's development (taking into account his or her age and stage of development).<sup>14</sup>
15. The best interests principle is derived from international law, which is relevant in determining the nature and scope of the human rights protected in the Charter.<sup>15</sup>
16. In particular, section 17(2) of the Charter is based on Article 24(1) of the International Covenant on Civil and Political Rights.<sup>16</sup> The best interests principle is also enshrined in the primary international instrument on children's rights, the Convention on the Rights of the Child (**CROC**).<sup>17</sup> Article 3(1) of the CROC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

17. The best interests principle requires the best interests of a child to be taken into account for all decisions and actions which affect that child. The UN Committee on the Rights of the Child has commented that:

where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.<sup>18</sup>

18. What 'best interests' means for a particular child will depend on the individual circumstances of each case. In that way, the best interests principle turns the focus to the child in matters that affect them, and must be informed by all other human rights that are relevant in the circumstances. Relevantly, the UN Committee on the Rights of the Child has stated that:

every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.<sup>19</sup>

19. A child's particular vulnerability (such as a history of abuse) is important in assessing and determining the child's best interests. The UN Committee on the Rights of the Child notes that:

The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account

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<sup>13</sup> *Children, Youth and Families Act 2005* (Vic) s 10(1).

<sup>14</sup> *Ibid* s 10(2).

<sup>15</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, 18 (French CJ).

<sup>16</sup> Explanatory Memorandum for the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>17</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia is a signatory to the CROC.

<sup>18</sup> UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, [20].

<sup>19</sup> UN Committee on the Rights of the Child, *General Comment No. 5: general measures of implementation of the CROC* (2003), [12].

the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness.<sup>20</sup>

### **Are the limitations reasonable and justified?**

20. Under section 7(2) of the Charter, any limitation on rights must be reasonable and justified taking into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

21. The Commission is concerned that the Statement of Compatibility:

- fails to recognise all of the rights that the Bill may engage including the protection from torture and cruel, inhuman or degrading treatment, freedom of movement and the right to equality. As a result, it does not consider whether any limitation on these rights is reasonable and justified;
- does not adequately consider whether the Bill limits the rights of children who may be subject to these practices (rather, it focuses predominantly on the primary purpose of the Bill to protect the safety and security of secure welfare services);
- does not adequately address whether any limitation on rights is reasonable and justified, as required by section 7(2) of the Charter; and
- does not consider whether there are less restrictive ways of achieving safety and security in secure welfare services, particularly in relation to unclothed searches.

22. The protection from cruel, inhuman or degrading treatment is engaged by the proposed powers which have the potential to adversely affect the physical or mental wellbeing of a child (for example, by humiliating or debasing the child). This is particularly relevant if a search, seclusion or force is inappropriate or disproportionate in the circumstances, or if there are insufficient safeguards in place to protect the best interests of a child who is subject to these practices.

23. Given that the right to protection from cruel, inhuman or degrading treatment is clearly engaged by the Bill, the Minister should provide information on whether any limitation on the right is reasonable and justified.

24. The right to freedom of movement is also relevant when a child's ability to move freely is restricted by a period of seclusion or a search (for example, if a child is secluded for prolonged periods of time). However, in this context, an adequate analysis of the right to liberty can effectively cover the same issues.

25. The Statement of Compatibility takes a limited view of section 17(2) of the Charter by only recognising that the search, seclusion and force powers under the Bill *protect* the best interests of children in a broad sense:

An examination of the search and seizure powers established by the bill indicates that they *operate* to ensure the security of secure welfare services as a facility for the protection and development of children at substantial risk of immediate harm, by empowering staff members of a secure welfare services to identify and deal with dangerous and unauthorised items in prescribed circumstances. Similarly, the seclusion and reasonable force powers under the bill may only be exercised where necessary to protect child residents, other persons

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<sup>20</sup> UN Committee on the Rights of the Child, above n 18.

and property in a secure welfare service from an immediate threat of harm.<sup>21</sup>

26. However, the Commission considers that the proposed powers may also *limit* the protection of children who are subject to these practices. As a result, the Committee may want to ask the Minister whether any limitation on the best interests of a child under section 17(2) of the Charter and other relevant rights in the Charter is reasonable and justified.
27. As required by the Principal Act (and supported by the Charter and international law), the best interests of the particular child who is subject to a search, seclusion and/or force must be the paramount consideration. Other important considerations, including the security of the service and the safety of others, are then relevant to determining whether any limitation on the child's rights is reasonable and justified under section 7(2) of the Charter.

### **Unclothed searches**

28. The Statement of Compatibility states that the unclothed search powers in the Bill are also compatible with the right to privacy having regard to the 'circumstances in which searches may be conducted, the safeguards imposed, and the obligations of the secretary and staff members to act compatibility with rights and in the best interests of child residents'. However, the Commission considers that the proposed unclothed search powers are capable of constituting a significant invasion of privacy and may not be proportionate in all of the circumstances envisaged by the Bill.
29. The previous government introduced similar strip search powers in the *Summary Offences and Control of Weapons Act Amendment Bill 2009 (SOCWA Bill)*. The SOCWA Bill provided police with the power to strip search individuals (including children) to combat the carrying and use of weapons in public places. In that context, the Statement of Compatibility acknowledged that the new search power was incompatible with the best interests of children under section 17(2) of the Charter.<sup>22</sup> Although the SOCWA Bill was ultimately enacted without amendment, it included safeguards that are more comprehensive than the proposed protections in the current Bill.<sup>23</sup>
30. The new unclothed search powers clearly limit sections 10, 12, 13, 17, 21 and 22 of the Charter. However, based on the information provided in the Statement of Compatibility, the Commission considers that these powers may not be reasonable or justified in accordance with section 7(2) of the Charter (which requires any limitation on rights to be proportionate and the least restrictive way of achieving the desired purpose of the limitation).
31. While the Commission recognises that the safety and security of secure welfare services is an important policy goal, it considers that unclothed searches may not be the least restrictive way of achieving this goal and that less invasive searches (such as a screening search or frisk search) may achieve the same result.
32. In 2006, Lord Carlisle of Berriew QC undertook an independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and secure children's homes in the United

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<sup>21</sup> Statement of Compatibility for the *Children, Youth and Families Amendment (Secure Welfare) Bill 2013* (Vic).

<sup>22</sup> Statement of Compatibility for the *Summary Offences and Control of Weapons Acts Amendment Bill 2009* (Vic).

<sup>23</sup> See *Control of Weapons Act 1990* (Vic) ss 10G and 10H, and Schedule 1 (Conduct of searches).



Kingdom.<sup>24</sup> The inquiry found that 'strip searching is not necessary for good order and safety' in these settings<sup>25</sup>, noting that:

Within the custodial context a strip search is more than just the removal of clothes for a visual inspection. It is a manifestation of power relations. A strip search involves adult staff forcing a child to undress in front of them. Forcing a person to strip takes all control away and can be demeaning and de-humanising. This power is compounded by the threat, or actual use of, force to those showing any reluctance to strip.<sup>26</sup>

33. The Commission also considers that the amendments relating to unclothed searches (if retained), frisk searches, seclusion and force contain insufficient safeguards to protect the rights of a child who is subject to these practices. The Commission has set out examples of additional safeguards that are used in comparative jurisdictions for the Committee's benefit (see following sections).

### **Unclothed searches**

34. Clause 72D of the Bill allows the Secretary to cause an 'unclothed search' of a child resident if in his or her opinion it is necessary to do so in the interests of the security or good order of the secure welfare service, or in the interests of the safety or security of the child resident or any other person in the secure welfare service.<sup>27</sup>
35. An unclothed search is defined to mean 'a search of a person or of things in the person's possession or control which may include requiring the person to remove all of his or her clothes, and an examination of the person's body and clothes'.<sup>28</sup> It does not involve a search of a child's body cavities.
36. The Bill provides that reasonable force may be used to carry out an unclothed search on a child resident.<sup>29</sup>
37. The Bill includes the following safeguards in relation to unclothed searches:
- Clause 72E provides that an unclothed search must be conducted by a staff member of the same sex as the child being searched, and that the search must be conducted in the presence of another staff member (who must be positioned so that the child being searched is not in the view of the other staff member). The other staff member must be of the same sex as the child unless the search is urgently required and a staff member of the same sex is not available.
  - Clause 72F(2) provides that the staff member who will conduct the search of a child resident must ask the child if they have in their possession 'any article or thing which jeopardises or is likely to jeopardise the security of the secure welfare service or the safety of persons in the service', such as a weapon, alcohol or money.

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<sup>24</sup> Lord Carlile of Berriew QC, *Independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes* (2006).

<sup>25</sup> Ibid, 59.

<sup>26</sup> Ibid, 58.

<sup>27</sup> Nb: Under s 17(1) of the Principal Act, the Secretary may delegate any function or power of the Secretary to any employee or class of employees with limited exceptions.

<sup>28</sup> *Children, Youth and Families Amendment (Secure Welfare) Bill* (Vic) cl 7.

<sup>29</sup> Ibid cl 72D(3).

- Clause 72F(3) provides that a staff member carrying out an unclothed search must do so expeditiously, with regard to the decency and self-respect of the person searched, and in compliance with any other prescribed requirement.

38. The Commission has the following concerns with the new unclothed search powers included in the Bill:

- The Commission considers that strip searching children in secure welfare services may be incompatible with the best interests of the child under the Charter. Strip searching a child constitutes a significant invasion of privacy, is inherently degrading and is potentially harmful to children who are in need of special protection. The Commission notes that there may be less restrictive ways of achieving the safety and security of secure welfare services, including the use of less invasive searches (such as a screening search or a frisk search).
- If the government decides to proceed with the new unclothed search powers, the Commission considers that the Bill should be amended to include further procedural safeguards (see examples below). In this respect, the Office of the High Commissioner for Human Rights has noted in relation to personal or body searches that 'effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched'.<sup>30</sup>
- The Commission considers that 'money' should be removed from the list of items in clause 72F(2). This is because it is difficult to contemplate a situation in which money could jeopardise the security of a secure welfare service or the safety of persons in the service. While searching for money on a child may uncover the commission of an offence, it should not be masked as a protective measure.

39. The Commission also considers that the Bill contains insufficient safeguards in relation to frisk searches.<sup>31</sup> In particular, there is no requirement for a frisk search to be conducted in the presence of another person. The Commission refers the Committee to subdivision 16.3.5.3 of the *Children and Young People Act 2008* (ACT) (**ACT Act**) for an example of the types of safeguards that apply to frisk searches in the ACT.

#### **Additional safeguards (unclothed searches)**

40. The ACT Act provides useful guidance on the types of statutory safeguards that can be put in place to protect the rights of children who are subject to strip searches in secure welfare services.

41. In particular, the ACT Act contains the following safeguards for strip searching a child:

- The operating entity for a 'therapeutic protection place' may only direct a person to strip search a child if the service suspects on reasonable grounds that the child has a 'dangerous thing' (a thing that, if used by, or allowed to remain with, a child may cause serious damage to, or threaten the life of, or

<sup>30</sup> Office of the High Commissioner for Human Rights, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, [8].

<sup>31</sup> See clauses 72E(1) and 72F of the *Children, Youth and Families Amendment (Secure Welfare) Bill 2013* (Vic).

the health of the child or young person or someone else) concealed on the child, and a less intrusive search has failed to find the thing.<sup>32</sup>

- In making this decision, the operating entity must have regard to the child's age, maturity, development capacity and any known history.<sup>33</sup>
- The search must be the least intrusive kind of search, and be conducted in the least intrusive way, that is necessary and reasonable in the circumstances.<sup>34</sup>
- A person may only use the force that is reasonable and necessary to conduct the search (discussed below).<sup>35</sup>
- Before a search is conducted, the child must be told about the search, the reasons for the search, whether the child will be required to remove clothing, and if so, why the removal of clothing is necessary. The person conducting the search must also ask for the child's cooperation.<sup>36</sup>
- The search must be conducted by someone who is the same sex as the child, and in the presence of one or more other people, who must also be the same sex as the child (unless the operating entity believes on reasonable grounds that there is an imminent and serious threat to the personal safety of the child, and compliance with the requirement would exacerbate the threat).<sup>37</sup>
- The number of people present during the search must be no more than is necessary and reasonable to ensure the search is conducted as safely and effectively as possible.<sup>38</sup>
- The search must be carried out in the presence of a person who can support and represent the interests of the child, and whose presence is agreed to by the child.<sup>39</sup> The operating entity can direct the support person to leave if they are preventing or hindering the search.<sup>40</sup>
- The search must be conducted in a way that is appropriate, having regard to the child's sexuality, and any known impairment, condition or history, and must be conducted as quickly as practicable.<sup>41</sup>
- The search must be carried out in a private area, or in an area that provides reasonable privacy, and must be conducted in a way that provides reasonable privacy for the child.<sup>42</sup>
- The search must not be conducted in the presence of anyone of the opposite sex (except for certain listed people), or in the presence or sight of someone whose presence is not necessary for the search or for the safety of anyone present.<sup>43</sup>
- The search must not involve touching the child's body.<sup>44</sup>

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<sup>32</sup> *Children and Young People Act 2008* (ACT) s 598(1). Nb: Depending on the circumstances, the 'operating entity' may be either the director-general or the entity that operates the service.

<sup>33</sup> *Ibid* s 598(2).

<sup>34</sup> *Ibid* s 591.

<sup>35</sup> *Ibid* s 593.

<sup>36</sup> *Ibid* s 599.

<sup>37</sup> *Ibid* s 600.

<sup>38</sup> *Ibid* s 600(2).

<sup>39</sup> *Ibid* s 601.

<sup>40</sup> *Ibid* s 602-603.

<sup>41</sup> *Ibid* s 604.

<sup>42</sup> *Ibid* s 605(1)-(2).

<sup>43</sup> *Ibid* s 605(3).

<sup>44</sup> *Ibid* s 606.



- The person conducting the search must not visually inspect a child's genital area or breasts unless they suspect on reasonable grounds that it is necessary to do so for the search.<sup>45</sup> The search must not involve more visual inspection of the child's body than is necessary and reasonable for the search.<sup>46</sup> Any visual inspection of the genital area, anal area, buttocks or breasts must be kept to a minimum.<sup>47</sup>
- The search must not involve the removal of more clothes, or the removal of more clothes at any one time, than is necessary and reasonable for the search. The upper and lower parts of the child's body must not be uncovered at the same time.<sup>48</sup>
- After the search, the child must be allowed to dress in private.<sup>49</sup>
- If clothing is seized from a child during the search, the child must be given reasonably appropriate clothing to wear.<sup>50</sup>
- Specific safeguards apply to a transgender or intersex child who will be searched.<sup>51</sup>

42. In the event that Parliament decides to enact the Bill in its current form, the Commission considers that the statutory regime for conducting searches on children in secure welfare in the ACT provides a more effective model to protect against unlawful and arbitrary interferences with the rights of children.

## Seclusion

43. Clause 72P of the Bill provides that the Secretary may authorise the seclusion of a child resident of a secure welfare service if all other reasonable steps have been taken to prevent the child resident from harming himself or herself or any other person or from damaging property, and the child's behaviour presents an immediate threat to his or her safety or the safety of any other person or to property.

44. Seclusion is defined to mean 'the placing of a child resident in a locked room separate from others and from the normal routine of the secure welfare service'.<sup>52</sup>

45. Reasonable force may be used to place a child resident in seclusion.<sup>53</sup>

46. The Bill includes the following safeguards in relation to seclusion:

- Clause 72O prohibits the use of seclusion as a punishment in relation to a child resident placed in a secure welfare service.
- Clause 72P(2) provides that seclusion may only be authorised if all other reasonable steps have been taken to prevent the child resident from harming themselves or any other person or from damaging property, and the child's behaviour presents an immediate threat to his or her safety or the safety of any other person or to property.
- Clause 72(3) provides that the period of seclusion must be approved by the Secretary.

<sup>45</sup> Ibid s 607(1).

<sup>46</sup> Ibid s 607(2).

<sup>47</sup> Ibid s 607(3).

<sup>48</sup> Ibid s 608.

<sup>49</sup> Ibid s 608(2).

<sup>50</sup> Ibid s 608(3).

<sup>51</sup> Ibid ss 573(2) and 592.

<sup>52</sup> *Children, Youth and Families Amendment (Secure Welfare) Bill 2013* (Vic) cl 7.

<sup>53</sup> Ibid cl 72P(4).

- Clause 72P(5) provides that a child placed in seclusion must be closely supervised and observed at intervals of not longer than 15 minutes.
  - Clause 72P(6) provides that the prescribed particulars of every use of seclusion must be recorded in a register.
47. The Commission is not aware of legislation in any other state or territory in Australia that allows seclusion of children in secure welfare services.
48. The Statement of Compatibility for the Bill notes that seclusion may engage the right to protection of the child, the right to liberty, and the right to humane treatment when deprived of liberty.
49. The Commission has serious concerns that, in practice, the use of seclusion on a child can amount to cruel, inhuman or degrading treatment under section 10(b) of the Charter. This is particularly the case if there are insufficient safeguards in place to protect the rights of the child who is subject to seclusion. The right to freedom of movement may also be engaged (for example, by prolonged periods of seclusion).
50. The Commission is concerned that clause 72P authorises the seclusion of a child if the child's behaviour presents an immediate threat to 'property'. Similarly, clause 161B of the Bill prohibits the use of force in secure welfare services unless it is reasonable and necessary to prevent the child from 'damaging property'. Given the potentially significant consequences of subjecting a child to seclusion or force, the Commission considers that the inclusion of threats or damage to 'property' is too broad.
51. If the references to property are retained in the Bill, the Commission considers that the Bill should be amended to include 'serious' threats or damage to property. In addition, seclusion or force should only be authorised where the threat or damage to property presents a risk to the safety of the child or others.
52. As an example, section 140(a)(ii) of the *Disability Act 2006* only allows the use of restraint or seclusion in disability services to prevent a person 'from destroying property where to do so could involve the risk of harm to themselves or any other person'. The Commission considers that children must not be given less protection than adults in similar contexts. Rather, under section 17(2) of the Charter, children are entitled to special protection because of their age and vulnerability (discussed above).

#### **Additional safeguards (seclusion)**

53. The Commission considers that the Bill should include additional safeguards to protect the rights of children who are subject to seclusion, such as:
- Children who are kept in seclusion must be supplied with appropriate bedding and clothing, food and drink at appropriate times, adequate toilet arrangements, and access to adequate heating and cooling.
  - The period of seclusion must not be longer than the shorter of the period of time that has been authorised by the Secretary or the period of time during which the seclusion is necessary.
  - The secure welfare service should be required to report any incidents involving the use of seclusion to an appropriate oversight body (see below). The report should specify the reason why seclusion was used, the period during which seclusion was used, the effect on the child's behaviour, the name of the person who approved the use of seclusion, and the name of the person who kept the child in seclusion.

- The register that records the use of seclusion must be subject to independent review and oversight.

54. The Committee may want to refer to section 140 of the *Disability Act 2006* and section 82 of the *Mental Health Act 1986* for guidance on the types of safeguards that are used to protect the rights of people who are subject to seclusion in comparative jurisdictions.

## The use of force

55. The Bill allows the use of reasonable force in secure welfare services to conduct an unclothed search<sup>54</sup> or to place a child in seclusion.<sup>55</sup>

56. Clause 161B of the Bill sets out prohibited actions in out of home care services (including secure welfare services) including the use of physical force unless it is reasonable and is necessary to prevent the child from harming themselves or anyone else or from damaging property, or is necessary for the security of the service.

57. The *United Nations Rules for the Protection of Juveniles Deprived of Liberty (JDL Rules)*<sup>56</sup> provide useful guidance on the types of safeguards that can be put in place to protect children who are subject to force. The JDL Rules are relevant to the interpretation of Charter rights such as the right to humane treatment when deprived of liberty.<sup>57</sup>

58. The JDL Rules provide that restraint and force:

- can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law;
- should not cause humiliation or degradation;
- should be used restrictively and only for the shortest possible period of time;
- should only be used to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property; and
- if used, medical and other relevant personnel should be consulted and the use should be reported to a higher administrative authority.

59. The UN Committee on the Rights of the Child recognises that there may be exceptional circumstances in which the use of reasonable restraint may be used to control dangerous behaviour in children. In these circumstances, the UN Committee has commented that:

The principle of the minimum necessary use of force for the shortest necessary period of time must always apply. Detailed guidance and training is also required, both to minimize the necessity to use restraint and to ensure that any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control.<sup>58</sup>

<sup>54</sup> Ibid cl 72D(3).

<sup>55</sup> Ibid cl 72P(4).

<sup>56</sup> United Nations General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN GAOR, 68<sup>th</sup> plen mtg (14 December 1990), Part K.

<sup>57</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2). The JDL Rules were also referred to in the Explanatory Memorandum for the 'use of force' provisions in the ACT Act (discussed below).

<sup>58</sup> UN 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*, [15].



### **Additional safeguards (force)**

60. The Commission considers that the Bill should be amended by Parliament to include further procedural safeguards for the use of force. The Commission notes that the ACT Act provides useful guidance on the types of safeguards that can be put in place to further protect the rights of children who are subject to the use of force in secure welfare services.
61. In particular, the ACT Act includes the following safeguards for the use of force on a child in a 'therapeutic protection place':
- The operating entity must make arrangements to ensure that force is always used as a last resort, for a purpose that cannot be achieved in any other way, and in accordance with the therapeutic protection standards (if any).<sup>59</sup>
  - The operating entity must also ensure (except in urgent circumstances) that:
    - A person does not use force without first considering the child's age, sex, physical and mental health and any history of abuse [the person should also consider whether the child has a disability or is an Aboriginal or Torres Strait Islander].
    - If the proposed force involves restraint, the person must consider the physical and developmental capacity of the child.
    - The use of force must not be observed by any other child or young person.<sup>60</sup>
  - A person may only use the force that is necessary and reasonable to prevent a child from inflicting self-harm or harming someone else, or to prevent unlawful damage, destruction or interference with property.<sup>61</sup>
  - A person may only use force if they give a clear warning of the intended use of force, if they allow enough time for the warning to be observed, and if they use force in a way that reduces the risk of causing injury (except in urgent circumstances).<sup>62</sup>
  - The operating entity must ensure that any child injured by the use of force is examined as soon as practicable by a doctor and that appropriate health care is available to the child. The operating entity must also give a child the opportunity to be examined by a doctor or nurse after the use of force on the child.<sup>63</sup>
  - The operating entity must give the director-general a report at the end of each month summarising any incidents involving the use of force on a child.<sup>64</sup>

### **Monitoring and reporting**

62. Given the potentially significant limitation on the rights of a child who has been subjected to an unclothed search, seclusion and/or force, the Commission considers that the Bill should include the requirements:
- to maintain a register for every use of an unclothed search or seclusion (and the use of force associated with these powers). To this extent, the Commission acknowledges the inclusion of a register for the use of seclusion

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<sup>59</sup> *Children and Young People Act 2008* (ACT) s 579(1). Nb: The Minister may make therapeutic protection standards under s 887.

<sup>60</sup> *Ibid* s 579(2).

<sup>61</sup> *Ibid* s 580.

<sup>62</sup> *Ibid* s 581.

<sup>63</sup> *Ibid* s 582.

<sup>64</sup> *Ibid* s 583.

in clause 72P(6) of the Bill. The register should be independently reviewed and monitored at least once every three months; and

- for an independent body (such as the Commission for Children and Young People) to undertake a review of the operation and impact of the new law on an annual basis.

63. As an example, the ACT Act requires operating entities to keep a register that includes details for each child or young person in a therapeutic protection place.<sup>65</sup> The public advocate must inspect the register at least once every three months.<sup>66</sup> If a child is strip searched, the register must include the reason for the search, when and where the search was conducted, the name of each person present at any time during the search, details of anything seized during the search, and details of any force used for conducting the search, and why force was used.<sup>67</sup> If a person present at the search was not the same sex as the child, the register must also include the operating entity's reasons for believing the requirement did not apply.<sup>68</sup> Finally, if force was used on the child, the register must include the reason why force was used.<sup>69</sup>
64. Another example is the Senior Practitioner Physical Restraint Direction Paper which provides guidance on the use of physical restraint in disability services.<sup>70</sup> The direction paper includes the requirement to report all episodes of physical restraint to the Senior Practitioner via the Restrictive Interventions Data System within seven days after the end of the month following the episode.<sup>71</sup>
65. Children who are subject to restraint and seclusion should be given at least the same level of protection as adults in disability services. Therefore, the Senior Practitioner should also be given jurisdiction over the use of restraint and seclusion in secure welfare services. In particular, every use of force or seclusion should be reported to the Senior Practitioner via the Restrictive Interventions Data System. The Senior Practitioner, who is part of the Department of Human Services, has significant expertise in the use of restrictive interventions and could provide useful guidance to secure welfare services on the use of restraint and seclusion.

## Additional considerations

66. The Commission considers that the Bill should include a mechanism for making a complaint about the use of the search, seclusion and/or force powers. The outcome of the complaint should be reviewable by an independent body.
67. The UN Committee on the Rights of the Child considers that to ensure the best interests of the child is a primary consideration, State parties should establish:
- mechanisms and procedures for complaints, remedy or redress in order to fully realize the right of the child to have his or her best interests appropriately integrated and consistently applied in all implementation measures, administrative and judicial proceedings relevant to and with an impact on him or her.<sup>72</sup>

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<sup>65</sup> Ibid s 633(1).

<sup>66</sup> Ibid s 635.

<sup>67</sup> Ibid s 633(2)(e).

<sup>68</sup> Ibid s 633(2)(e).

<sup>69</sup> Ibid s 633(2)(f).

<sup>70</sup> Department of Human Services, *Senior Practitioner Physical Restraint Direction Paper* (May 2011).

<sup>71</sup> Ibid s 3.

<sup>72</sup> UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, [15(c)].

68. Finally, the Commission considers that the human rights issues raised in this submission should also inform the implementation of the Bill. In particular, as public authorities, secure welfare services and their staff will have the obligation to take relevant Charter rights into consideration when making decisions about the use of the proposed powers in particular circumstances.<sup>73</sup>
69. To this extent, staff of secure welfare services must receive appropriate and ongoing training on the use of searches, seclusion and force. This will help to ensure that the use of these practices protects the best interests and wellbeing of a child and is compatible with the Charter. In particular, it is important that training on searches, seclusion and force does not increase the use of these practices.<sup>74</sup> Rather, staff should be trained to use the least rights-restrictive method of achieving safety and security in the circumstances.

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<sup>73</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

<sup>74</sup> See Victorian Equal Opportunity and Human Rights Commission, *Held Back – The experiences of students with disabilities in Victorian schools* (2013), 119. In this report, the Commission notes that evidence suggests that when people are trained in restraint they will generally use that approach, while those trained in positive behaviour techniques will use that approach as the basis of their interactions.





Victorian Equal Opportunity  
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