

# Submission:

## Select Committee on Autism

4 June 2020

# Support and life outcomes for autistic people

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## Introduction

- [1] The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including: information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with disability, and to generally promote equality for those with disability.
- [2] The Victorian Department of Education and Training (DET) is the single most common subject of complaints and requests for advice and assistance every year at the DDLS. The negative experiences of students in the education environment, particularly those with autism, have life-long impacts. The failure to provide a meaningful or safe education exacerbates existing disabilities and may create new ones. It also prevents a student from developing to their full individual capacity. We submit that providing a safer, more inclusive education experience, assisting autistic students to develop to their individual capacity, will not only improve their quality of life but potentially reduce the need for disability-related supports in the future.
- [3] In focusing on the experiences of autistic students it is important to initially note that disability is a diverse spectrum and the experience of particular disabilities is not homogenous. The DDLS do not suggest that students with other disabilities do not have negative experiences at school. In fact, the plethora of reports produced over an extended period of time, both in Victoria and throughout Australia, confirm that this is the case.<sup>1</sup> Nor do we suggest that the issues we have identified exclusively apply to autistic students. For instance, social exclusion and bullying applies broadly to all students with disability. Furthermore, we believe it is important to appreciate that students with other disabilities may have the propensity to demonstrate behaviours that manifest in similar ways to autistic students (for example, students

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<sup>1</sup> Victorian Equal Opportunity & Human Rights Commission, *Held back: The experiences of students with disabilities in Victorian schools* (Final Report, September 2012) <<https://www.humanrightscommission.vic.gov.au/our-resources-and-publications/reports/item/184-held-back-the-experiences-of-students-with-disabilities-in-victorian-schools-sep-2012>>; Victorian Equal Opportunity & Human Rights Commission, *Held back: The experiences of students with disabilities in Victorian schools: Analysis Paper* (Analysis Paper, July 2017) <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/1602-held-back-the-experiences-of-students-with-disabilities-in-victorian-schools-analysis-paper>>; UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, 118<sup>th</sup> meeting, UN Doc CRPD/C/AUS/1 (12 September 2013).; Australian Law Reform Commission, *Equality, Capacity, and Disability in Commonwealth Laws* (Discussion Paper No 81, May 2014); Victorian Equal Opportunity and Human Rights Commission, Submission to the Department of Education) *The Education and Training Reform Regulations Review* (2017) <<https://www.humanrightscommission.vic.gov.au/policy-submissions/item/1546-submission-to-the-education-and-training-reform-regulations-2017>>; Victorian Auditor-General's Office, *Programs for Students with Special Learning Needs* (Report, August 2012).; Department of Education and Training, *Review of the program for students with disabilities* (Report, April 2016) <<https://www.education.vic.gov.au/Documents/about/department/PSD-Review-Report.pdf>>; Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (Final Report, November 2015); PriceWaterhouseCooper, *Disability expectations: Investing in a better life, a stronger Australia* (Report, November 2011); Education and Employment References Committee, 'Access to real learning: the impact of policy, funding and culture on students with disability' (Final report, Parliamentary Library, Parliament of Australia, January 2016).

with ADHD, epilepsy and so on) when appropriate supports are withheld from them. These students face many of the same barriers to their education that autistic students experience. Rather we seek to confine our submission to autism for the purposes of the terms of reference. We believe autistic students are in need of urgent attention due to the strong link between the inadequate, and at times violent, practices of education providers<sup>2</sup>, and poor educational outcomes, physical and psychological trauma they suffer.

- [4] Ensuring that the Australian education system provides an effective and meaningful education for autistic Australians is a pressing issue. A diagnosis of autism is increasingly common in Australia. In 2018, the Australian Bureau of Statistics (ABS) recorded over 200,000 Australians reporting they had an autism diagnosis.<sup>3</sup> This is an increase of 25.1% on the previous data collection in 2015.<sup>4</sup> There is no strong reason to think that this number will not increase in the future as medical and community understanding of autism improves.
- [5] We note with great disappointment, that the Victorian Parliament undertook an inquiry into services for people with autism in 2016-2017.<sup>5</sup> As is often the case, regrettably, government response to that inquiry has been limited and we have seen no meaningful improvement in outcomes for autistic students.<sup>6</sup>
- [6] We make this submission in response to terms 'a', 'f(ii)', and 'g' as outlined in the Terms of Reference. The submission is designed to provide insight into the experiences of autistic students, an already vulnerable group in the Victorian education environment, and to provide recommendations to ameliorate the harm currently caused.
- [7] This submission will begin by providing a broad overview of how autistic students fit in to the current Victorian education system. This will particularly focus on the environment that they are educated in, and current educational and psychological outcomes.
- [8] It will then consider seven identified areas of concern: the maintenance of a segregated education system, the failure to provide reasonable adjustments, the inadequacy of current funding, violence and abuse through the unnecessary use of restraint and seclusion, the prevalence of bullying, the lack of legally required proactive intervention, and the inappropriate reliance on teachers as disability experts.
- [9] Within each of these topics we will, when relevant, consider:

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<sup>2</sup> We use the term 'education provider' as an umbrella term to cover the terms 'education authority,' 'education institution,' and 'education provider' as used in the *Disability Discrimination Act 1992* (Cth) and *Equal Opportunity Act 2010* (Vic).

<sup>3</sup> Australian Bureau of Statistics, 'Autism in Australia', *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Report 29 November 2019) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features102018?OpenDocument>>.

<sup>4</sup> Ibid.

<sup>5</sup> Family and Community Development Committee, Parliament of Victoria, *Inquiry into services for people with Autism Spectrum Disorder* (Final Report, 22 June 2017), <[https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/58th/Autism/FCDC\\_58-03\\_Autism\\_report.pdf](https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/58th/Autism/FCDC_58-03_Autism_report.pdf)>.

<sup>6</sup> Victorian Government, Parliament of Victoria, *Response to the Parliamentary Inquiry into Services for People with Autism Spectrum Disorder* (Response to Final Report, December 2017) <[https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/58th/Autism/Response\\_to\\_the\\_Parliamentary\\_Inquiry\\_into\\_Services\\_for\\_People\\_with\\_Autism\\_Spectrum\\_Disorder.pdf](https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/58th/Autism/Response_to_the_Parliamentary_Inquiry_into_Services_for_People_with_Autism_Spectrum_Disorder.pdf)>.

- a. the nature and prevalence of the problem we believe exists;
- b. the existing legal obligations on education providers and why these are currently failing to protect autistic students; and
- c. recommendations for how we submit autistic students can be provided with a meaningful and safe education without experiencing violence, abuse and neglect.

## **Executive Summary**

Unless Victoria (and Australia) urgently rethinks its approach and attitudes to autistic students, we may lose generations of such students to trauma from violence, lack of competence and low expectations. Many families of autistic students are voting with their feet and choosing home-based education options to avoid restrictive practices, mishandling and the broader mental health deterioration experienced by all family members, when one of their own is suffering.

Our laws do not protect autistic students.

The requirement for strong legislation would not be so vital if it were the case that there was good will from education departments towards autistic students. However, the evidence suggests there is not, due to the long-standing and obvious deleterious acts and omissions surrounding their school enrolments. These acts and omissions have been continuously unaddressed, despite numerous attempts by statutory authorities and parliamentary committees to shine a light on what is a highly critical situation.

We urge those who are receiving submissions on this vitally important subject, to use their influence to make strong, cogent findings and recommendations to ensure significant improvements in the lives of autistic people, ensuring their rights to be free from abuse, to an education, and to take part in public life on the same basis as others.

# Recommendations

## Segregated education system

**Recommendation 1 – Australian jurisdictions formulate and implement a plan for the dismantling of the segregated education system**

**Recommendation 2 – The Australian Curriculum is implemented in all ‘special schools,’ and this implementation is ensured through active oversight**

**Recommendation 3 – The legislative power to provide exceptions to a school’s obligation to provide the agreed upon curriculum be more stringently governed**

**Recommendation 4 – All ‘special schools’ that receive government funding are required to implement evidence-based teaching and behavioural approaches.**

## Reasonable Adjustments

**Recommendation 5 – The *Disability Discrimination Act* is amended to remove the requirement for a comparator**

**Recommendation 6 – The *Disability Discrimination Act* and *Equal Opportunity Act* are amended to provide a definition of reasonable adjustment that indicates that they are provided to ensure equal benefit or access**

**Recommendation 7 - The *Disability Discrimination Act* is amended to remove the requirement that the applicant must prove that denial of a reasonable adjustment is because of the applicant’s disability**

**Recommendation 8 - That the Disability Standards for Education, if they are retained, are reformed in relation to:**

- a) ensuring that the term “reasonable adjustment” is commensurate with the definition in the Disability Discrimination Act;
- b) ensuring that the term “adjustment” in Part 3.3 under sub paragraph (a)(iii) includes examples of the sorts of actions and measures that may more commonly assist students with cognitive disabilities such as Autism;
- c) ensuring that the definition of “consultation” in each Part is consistent with the Convention on the Rights of Persons with Disabilities General Comment 7 in relation to the participation of people with disabilities in decision-making.

## Funding

**Recommendation 9 – That the Department of Education and Training provides increased funding for schools to provide reasonable adjustments**

**Recommendation 10 - That the Commonwealth ties education funding to state departments of education, to them providing evidence that each school has sufficient funds to cater for reasonable adjustments required for all students with disability**

## Bullying

**Recommendation 11 – That the Commonwealth ties education funding to state departments of education to them adopting and implementing in all schools mandatory, specific and preventative programs targeting the bullying of students with disability**

**Recommendation 12 – That the Disability Standards for Education, if they are to be retained, are reformed to more adequately recognise the obligation on education providers to protect students from bullying, and strengthen the test for compliance.**

**Recommendation 13 - That the Disability Discrimination Act and state based disability discrimination/discrimination laws are amended to include a prohibition against vilification on the basis of disability, taking a similar approach adopted under the Federal Racial Discrimination Act 1975.**

## Restrictive practices

**Recommendation 14 – That the Commonwealth ties education funding to the states to the requirement for departments of education to implement data collection processes that would allow them to receive consistent, comprehensive and timely data on incidents involving the use of restraint or seclusion on students with disabilities, such data to be publicly released.**

**Recommendation 15 – The introduction of detailed and stringent legislative requirements regarding the use of restraint and seclusion to prevent their misuse and resultant violence against students.**

## Proactive measures

**Recommendation 16 – The introduction of legislation detailing the proactive steps that education providers must undertake when providing an education to a student with disability**

**Recommendation 17 – The Disability Standards for Education are rescinded**

## Staff training

**Recommendation 18 – That within the Disability Standards for Education, if they are retained, the decision-making process for reasonable adjustments is revised to emphasise the primacy of expert knowledge of disability and reduce the discretion given to education providers.**

## Context

- [10] The purpose of this section is to provide contextual information for the Australian approach to the education of autistic students. This will include an overview of the segregated nature of the Australian education system, how autistic students are treated within this system, and relevant requirements under international law. It is not designed to be a definitive analysis, but rather an overview.
- [11] The exclusion of students with disability from mainstream education environments and their segregation in disability-specific education facilities is a global concern. It has been recognised as a key focus area amongst the international community for a number of years. This can clearly be seen from at least as early as the 1994 *Salamanca Statement and Framework for Action on Special Needs Education* through to the Committee on the Convention of Rights of Persons with Disabilities' (the Committee) 2016 *General Comment No.4 on the Right to Inclusive Education*.<sup>7</sup> The reasons young people with disability are often excluded from mainstream education are multitudinal and complex. The Committee has suggested that the reasons can be summarised as follows:<sup>8</sup>
- (a) *The failure to understand or implement the human rights model of disability, according to which barriers within the community and society, rather than personal impairments, exclude persons with disabilities;*
  - (b) *Persistent discrimination against persons with disabilities, compounded by the isolation of those still living in long-term residential institutions, and low expectations about those in mainstream settings, allowing prejudices and fear to escalate and remain unchallenged;*
  - (c) *Lack of knowledge about the nature and advantages of inclusive and quality education and diversity, including regarding competitiveness, in learning for all; lack of outreach to all parents; and lack of appropriate responses to support requirements, leading to misplaced fears and stereotypes that inclusion will cause a deterioration in the quality of education or otherwise have a negative impact on others;*
  - (d) *Lack of disaggregated data and research (both of which are necessary for accountability and programme development), which impedes the development of effective policies and interventions to promote inclusive and quality education;*
  - (e) *Lack of political will, technical knowledge and capacity in implementing the right to inclusive education, including insufficient education of all teaching staff;*
  - (f) *Inappropriate and inadequate funding mechanisms to provide incentives and reasonable accommodations for the*

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<sup>7</sup> UN Committee on the Rights of Persons with Disabilities, *General Comment 4: Article 24 – Right to Inclusive Education*, UN Doc CRPD/C/GC/4 (2 September 2016) ('General Comment 4'); World Conference on Special Needs Education: Access and Quality, *The Salamanca Statement and Framework for Action* UNES Doc ED.94/WS/18 (10 June 1994).

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*inclusion of students with disabilities, interministerial coordination, support and sustainability;*

(g) *Lack of legal remedies and mechanisms to claim redress for violations.*

[12] The evidence is that Australia's education system, and how it caters for autistic students, can be criticised using each of the above factors.

### The current Australian approach to the education of autistic students

[13] Australia currently operates a segregated education system, where young people with disability can be excluded from mainstream education facilities on the basis of the individual support needs connected with their disability. The exclusion is often implicit. While this is true, to some extent, for all young people with disability, it is particularly true for autistic students. This is demonstrated by the research of Kate de Bruin.<sup>9</sup>

[14] In 2015, in relation to students with disability generally:<sup>10</sup>

- a. approximately 50% were educated in mainstream classrooms;
- b. approximately 20% were not educated at any form of school;
- c. approximately 15% were educated in segregated classrooms within mainstream schools; and
- d. approximately 10% were educated at segregated schools that ostensibly provide disability-specific education.

[15] In comparison, for Australian autistic students:<sup>11</sup>

- a. approximately 50% receive an education at segregated schools that ostensibly provide disability-specific education;
- b. approximately 40% receive their education in segregated classrooms within mainstream schools;
- c. approximately 5% receive their education in mainstream classrooms; and
- d. approximately 5% do not receive their education at any form of school.

[16] These statistics paint a stark picture of the reality of education provided for students with disability in Australia; with roughly one in four being segregated on the basis of their disability or support needs, and another one in five unable to receive an education from an education service at all. It is a far more concerning situation for autistic students, with only one in twenty able to receive an education in a mainstream classroom.

[17] While there does appear to be some improvement for both students with disability and, more specifically, those with autism in the latest survey conducted by the ABS.<sup>12</sup> However, the statistics still indicate the maintenance and, possibly, the expansion of

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<sup>9</sup> Kate de Bruin, 'The impact of inclusive education reforms on students with disability; an international comparison' (2019) 23(7-8) *International Journal of Inclusive Education* 811.

<sup>10</sup> Ibid 814-815.

<sup>11</sup> Ibid,

<sup>12</sup> Australian Bureau of Statistics, 'Findings', *Survey of Disability, Ageing and Carers: Autism in Australia* (Survey Results 29 November 2019)

<[https://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/5C2149D4F6353996CA2584C0000C3B7F/\\$File/44300do060.xls](https://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/5C2149D4F6353996CA2584C0000C3B7F/$File/44300do060.xls)>; Australian Bureau of Statistics, 'Findings', *Survey of Disability, Ageing and Carers: Children with Disability S* (Survey Results 10 December 2019)

<[https://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/4816D52C629067E8CA2584CB00157E29/\\$File/44300do070.xls](https://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/4816D52C629067E8CA2584CB00157E29/$File/44300do070.xls)>.

the current segregated system.<sup>13</sup> The fact that the national total of disability-specific schools rose by 39 between 2013 and 2017 demonstrates this.<sup>14</sup>

### Australia's adoption of an inclusive education system

- [18] From a domestic perspective, it is difficult to continue to justify the maintenance of a segregated education system. This is primarily due to the introduction of the Australian national curriculum (Australian Curriculum), which all Australian states and territories have agreed to, and are required to, implement.<sup>15</sup>
- [19] The Australian Curriculum was formulated by the Australian Curriculum, Assessment and Reporting Authority. It received endorsement from Australian federal, state, and territory education ministers in September 2015.<sup>16</sup> Broadly speaking, the curriculum is designed around the following key areas: English, Mathematics, Science, Humanities and Social Sciences, The Arts, Technologies, Health and Physical Education, and Languages. Of relevance to this submission is not the content of the curriculum but how the curriculum responds to diversity in student ability and students with disability.
- [20] The Australian Curriculum notes that in compliance with the *Disability Standard for Education 2005* students with disability are entitled to “participate in the Australian Curriculum on the same basis as their peers through rigorous, meaningful and dignified learning programs.”<sup>17</sup> Students with disability are also entitled to access the “age-equivalent content” that their peers receive but that “the way in which they access it and the focus of their learning may vary according to their individual learning needs, strengths, goals and interests.”<sup>18</sup> This aspect of the curriculum clearly reflects fundamental principles of inclusive education. All children, regardless of ability, are entitled to receive an education based on the same content but that their individual goals and objectives are tailored to their abilities. If implemented appropriately and fully it facilitates the integration and inclusion of all students with disability in mainstream classrooms.

### The use of a segregated system under Australia's international obligations

- [21] The maintenance of a segregated system is not considered by the Committee to comply with Australia's obligations under the *Convention on the Rights of Persons with Disabilities (CRPD)*. Article 24 of the *CRPD* contains the obligation on States

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<sup>13</sup> Ibid.

<sup>14</sup> Australian Curriculum Assessment and Reporting Authority, *National Report on schooling in Australia – 2013* (Report, 2013), 43, <[https://www.acara.edu.au/docs/default-source/default-document-library/anr\\_2013\\_parts\\_1-8\\_and\\_10.pdf?sfvrsn=0](https://www.acara.edu.au/docs/default-source/default-document-library/anr_2013_parts_1-8_and_10.pdf?sfvrsn=0)>; Australian Curriculum Assessment and Reporting Authority, *National Report on schooling in Australia – 2017* (Report, 2017), 14, <<https://www.acara.edu.au/docs/default-source/default-document-library/national-report-on-schooling-in-australia-20170de312404c94637ead88ff00003e0139.pdf?sfvrsn=0>>.

<sup>15</sup> Ministerial Council on Education, Employment, Training and Youth Affairs, *A companion document for the Melbourne Declaration on Educational Goals for Young Australians* (Explanatory document, March 2009), 14-15, <[http://www.educationcouncil.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/National%20goals%20for%20schooling/MCEETYA\\_Four\\_Year\\_Plan\\_\(2009-2012\).pdf](http://www.educationcouncil.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/National%20goals%20for%20schooling/MCEETYA_Four_Year_Plan_(2009-2012).pdf)>.

<sup>16</sup> Australian Curriculum, Assessment and Reporting Authority, 'Curriculum', *acara* (Web Page, 2016), <<https://www.acara.edu.au/curriculum>>.

<sup>17</sup> Australian Curriculum, Assessment and Reporting Authority, *Student Diversity and the Australian Curriculum: Advice for principals, schools and teachers* (Guidance document, January 2013), 10, <<http://firstforlasts.weebly.com/uploads/2/8/1/8/28187041/studentdiversity.pdf>>.

<sup>18</sup> Ibid.

Parties to ensure the realisation of the right of inclusive education for people with disability. In interpreting what the inclusive education obligation requires, the Committee has stressed the importance of the distinction between integration and inclusion. Integration, which is the “process of placing persons with disability in existing mainstream educational institutions,” is insufficient for state compliance as the onus is upon the student with disability to assimilate to the existing requirements of mainstream education.<sup>19</sup> Rather states are required to implement an education system that achieves the inclusion of students with disability. This requires:<sup>20</sup>

*“systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences.”*

- [22] It is important to note that while the *CRPD* indicates that inclusive education for students with disability in mainstream environments should be the norm, there may be exceptions.<sup>21</sup> This exception is based upon the language needs for some students with disability. We submit this is an appropriate interpretation, and while we accept there will be exceptions to the general rule of inclusive education, we do not believe the Australian education system currently reflects this.

### Comparing Australia to the United States of America

- [23] While we do not believe that segregation should be the norm, disability-specific schools will be required in at least two situations. Firstly, as noted above, there are circumstances where the language needs of particular students will justify the use of a disability-specific school. Secondly, for some students with cognitive disabilities or disabilities that manifest with challenging behaviour, a disability-specific school may be justified. In this situation the school would provide targeted and intensive evidence based support with the objective of facilitating the student moving/returning to a mainstream education setting. The American approach to the education of students with disability more closely embodies this model of segregation. It is important to note, that unlike the United States of America, Australia's segregated schools for autistic students do not operate with any requirement to use established evidence-based interventions.
- [24] There are numerous segregated schools in the United States of America operating specifically to support autistic students, using Applied Behaviour Analysis approaches. Some of these schools accept students from mainstream schools in their district, work with them intensively in order to address any negative issues that may have developed due to inexperienced teachers working with the student, and then assist in the return of those students to their mainstream district schools, with intervention plans and training for staff in order that those staff can work successfully with students.<sup>22</sup>
- [25] Other schools, such as the Behaviour Analysis Centres for Autism in Indiana provide intensive evidence-based teaching through Applied Behaviour Analysis with an option for students to continue at the school for the entirety of their education. Almost all

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<sup>19</sup> General Comment 4 (n 6) 4.

<sup>20</sup> Ibid.

<sup>21</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/RES/61/106 (entered into force 3 May 2008, art 24(3)(c)). ©

<sup>22</sup> Applied Behaviour Consultants, 'ABC School', *abcreal*, (Web Page) <<https://www.abcreal.com/services>>.

senior staff are Board Certified Behaviour Analysts. The teams of Speech Pathologist and Occupational Therapists often have additional qualifications, some also being Board-Certified Behaviour Analysts. More junior staff are often Registered Behaviour Technicians.<sup>23</sup>

- [26] These schools are examples of schools that attract the highest level of qualification and expertise, are data driven, and due to using teaching methods based on research, have high expectations of mitigation/elimination of behaviours of concern, and of academic outcomes.
- [27] Compare this to the Australian context of segregated schools for autistic students.
- a. Many of the teachers in segregated schools for autistic students do not hold special education qualifications.
  - b. To our knowledge, there is not one Board-Certified Behaviour Analyst working in a segregated school for autistic students.
  - c. Many of the therapists that work in these schools are new graduates.
  - d. In Victoria, the therapists that work in these schools do so in the main using the "consultative" approach, that is, rarely working directly with students, but rather providing teachers with general advice on how to work with students.
  - e. Schools rely heavily on the use of Education Support Officers/Integration Aides who may have nothing but a First Aid Certificate and Working with Children Check.
  - f. Many schools do not attempt the educational curriculum and focus on "life skills", regardless of a student's capacity (and their enshrined human right to education).
  - g. Schools rely heavily on violence, abuse, and restrictive practices rather than intensive assistance from accredited behaviour practitioners.
  - h. There is no attempt to measure outcomes for students.
  - i. There is no commitment that any student will leave school with a functional communication method.
  - j. There has never been, to our knowledge, any research undertaken into whether any of these segregated schools are effective, or provide a superior educational experience to students in mainstream education.
- [28] It is important to note that generally speaking the standard of Australian teaching has been open to question on numerous occasions over the years with our international standing below par.<sup>24</sup>
- [29] Therefore, as can be seen, segregated schooling in North America may easily be preferred by families of autistic students. This is due firstly, to many of those schools providing the highest level of expertise and intervention. Secondly, there is a genuine commitment amongst the staff of these schools to provide a meaningful education rather than just a babysitting service. Finally, there is, for many students, an ultimate goal of facilitating the student to transition to a mainstream school. The high standard exhibited by the schools mentioned above is generally not replicated amongst Australia's segregated schools for autistic students. There are, however, two exceptions to this general rule which we would like to highlight.

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<sup>23</sup> Behaviour Analysis Center for Autism, 'Staff', *thebaca*, (Web Page, 2015), <<https://thebaca.com/departments/administration/>>.

<sup>24</sup> Conor Duffy and Brooke Wylie, 'Australian students behind in maths, reading and science, PISA education study shows', *ABCnews* (online, 3 December 2019) <<https://www.abc.net.au/news/2019-12-03/australia-education-results-maths-reading-science-getting-worse/11760880>>. ('Australian students behind in maths, reading and science')

- [30] Firstly, the Woodbury School in New South Wales is an independent school for autistic students, where the Clinical Director is a Board-Certified Behaviour Analyst and a number of staff are either Board-Certified Behaviour Analysts or currently studying to become same. Due to Woodbury being a school with an Applied Behaviour Analysis approach, it is expected it would have the same data and evidence driven requirements as the North American schools mentioned above.
- [31] Secondly, Irabina Autism Services, (an independent not-for-profit organisation), is not a school per se, but accepts students who have been forced out of their respective schools due to a lack of required resources and expertise, and provides full-time placements including educational and behavioural programs. In 2016, Irabina Autism Services adopted an Applied Behaviour Analysis approach. It employs Board Certified Behaviour Analysts and a number of its staff are currently studying to become same.
- [32] To our knowledge there are no state departments of education that are adopting any approach other than the same formulaic autism education as has been provided to date: comprising staff with teaching degrees or no formal training at all to address the complex needs of their students.
- [33] We discuss segregated settings below, in the context of the above information, being that Australia currently to our knowledge has no government schools for autistic students that provide evidence-based behaviour/education approaches with highly trained staff.<sup>25</sup>

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<sup>25</sup> It should be noted that terms such as ABA Therapist, Behaviour Analyst and Behaviour Therapist can be adopted by any person, without the rigorous training/qualifications required to be registered with the Behaviour Analyst Certification Board.

## Segregated education settings and how to ensure a meaningful education

- [34] The purpose of this section of our submission is to highlight, in our view, the inherently poor educational outcomes for students who are segregated and receiving their education in disability-specific schools, as compared to their peers without disability. The reason we use the term "in our view" is because state governments have not collected data on the outcomes for students with disability, particularly those in segregated settings. Therefore our views are provided based on the complaints that the DDLS receives and has received for the last 15 years, the reports and reviews mentioned above in paragraph 2, and research and data from other countries. In addition, it stands to reason that if a school does not offer any "end of school" qualifications/certificates, then students who attend will not be attaining those qualifications.
- [35] As discussed above, the evidence suggests that poor academic outcomes and traumatic educational experiences disproportionately affect the Australian autistic student community. This has been confirmed by Federal and State government committees which have described Australia's education services for students with disability as glorified "babysitting services".<sup>26</sup> We submit that until Australia can offer government schools that provide the same quality as those American and Australian schools mentioned above,<sup>27</sup> ultimately the most effective method in positively addressing these issues is that more autistic students receive an education in mainstream settings. The exception being autistic students who are deaf, blind, or deafblind and therefore need specific linguistic services for teaching and socialise with peers.
- [36] It is recognised that transferring the population of autistic students to mainstream schools is not something that could happen immediately. However in the meantime, we submit that there is no reason that these students should not be getting the highest level of expert assistance in order that they gain an education, and have any behaviours of concern mitigated.

### Benefits of mainstream education over segregated education

- [37] Research strongly indicates that students with disability achieve better outcomes when receiving an education in inclusive mainstream settings rather than segregated disability-specific settings.<sup>28</sup> The benefits can be broadly grouped under academic benefits and social benefits. An example of research demonstrating the academic benefits is a 2012 study of 68,000 American students with disability.<sup>29</sup> It was found that those students who spent between 80-100% of their time in mainstream settings

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<sup>26</sup> Education and Employment References Committee, Parliament of Australia, *Access to real learning: the impact of policy, funding and culture on students with disability* (Final report, January 2016) 22-26 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/students\\_with\\_disability/Report/c02](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Report/c02)>; Portfolio Committee No. 3 – Education, Parliament of New South Wales, *Education of students with a disability or special needs in New South Wales* (Final Report, 21 September 2017), 100, 105, 165-166 <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2416/170921%20-%20Final%20report.pdf>>.

<sup>27</sup> [22]-[23], [28]-[29] above.

<sup>28</sup> Dr Thomas Hehir et al., 'A Summary of the Evidence on Inclusive Education' (Final report, Alana Institute, August 2016), 17 <[https://alana.org.br/wp-content/uploads/2016/12/A\\_Summary\\_of\\_the\\_evidence\\_on\\_inclusive\\_education.pdf](https://alana.org.br/wp-content/uploads/2016/12/A_Summary_of_the_evidence_on_inclusive_education.pdf)>. ('A Summary of the Evidence on Inclusive Education')

<sup>29</sup> Dr Thomas Hehir et al., 'Review of special education in the Commonwealth of Massachusetts. Boston, MA: Massachusetts Department of Elementary and Secondary Education.' (Final Report, Massachusetts Department of Elementary and Secondary Education, August 2014).

outperformed those who spent 40-79% of their time in such settings, who in turn outperformed those who spent less than 40% of their time in such settings.<sup>30</sup> This is an important study to consider as improved academic results and outcomes are an important indicator for improved quality of later life including tertiary education, job prospects, and community involvement. An increased quality of life may also help to reduce the extent of the support needs that states are obliged to provide to their citizens in later life.

- [38] The research also reflects that the inclusion of students with disability also appears to have academic benefits for students without disability. This is important to appreciate as it is often the primary reason cited for refusing to adopt truly inclusive education.<sup>31</sup> Research suggests that there is little risk of the inclusion of students with disability having a detrimental impact on students without disability who have been found to receive the same amount of teacher attention and similar academic results.<sup>32</sup>
- [39] The social benefits for students with disability are equally clear and logically self-evident. The primary social benefit for students with disability of an inclusive education is the ability to form relationships with a diverse range of other students.<sup>33</sup> By placing students with disability in segregated education environments they only develop the social skills to develop and maintain relationships with other students with disability. This inherently limits the future options for these student as they only have the social skills to function in segregated environments. These social benefits apply equally for students without disability as they can develop the social skills necessary to interact with people who may look, act, or behave differently to them.<sup>34</sup> Put simply, once inclusion becomes the norm for students in schools, they carry this through their lives and inclusion becomes the norm in all aspects of society.

### Lack of legal protections to ensure quality and meaningful education

- [40] As noted above, it is impractical and likely impossible to achieve an inclusive education system in the short-term. While we strongly believe there need to be stronger efforts from both the federal and state governments to achieve this, we appreciate this is a medium term goal. However, in the interim we submit there needs to be stronger legal protections to ensure that those students with disability in segregated educational environments receive a quality and meaningful education.
- [41] Under the *Australian Constitution*, education is considered an exclusive responsibility of the states.<sup>35</sup> Superficially, this means that the Victorian state government is solely responsible for formulating a curriculum and providing this to all Victorian students including those with disability. However, due to the federal government's provision of funding to be used for the education of Victorian students, Victoria has both

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<sup>30</sup> Ibid, 8-9.

<sup>31</sup> Timna Jacks, 'Children with autism are 'holding our kids back': Senator Pauline Hanson', *The Age* (online, 21 June 2017) <<https://www.smh.com.au/politics/federal/autistic-children-are-holding-our-kids-back-senator-pauline-hanson-20170621-gwvoap.html>>.

<sup>32</sup> A Summary of the Evidence on Inclusive Education' (n 27) 7-10.

<sup>33</sup> Susanne Schwab, 'Social dimensions of inclusion in education of 4<sup>th</sup> and 7<sup>th</sup> grade pupils in inclusive and regular classes: Outcomes from Austria' (2015) 43-44 *Research in Developmental Disabilities* 72; Judith Wiener and Christine Tardif-Williams, 'Social and Emotional Functioning of Children with Learning Disabilities: Does Special Education Placement Make a Difference?' (2004) 19(1) *Learning Disabilities Research and Practice*, 20.

<sup>34</sup> Nienke Ruijs and Thea Peetsma 'Effects of inclusion on students with and without special educational needs reviewed' (2009) 4(2) *Educational Research Review*, 67.

<sup>35</sup> *Australian Constitution*, s 51-52.

committed to, and is required to, implement the Australian Curriculum.<sup>36</sup> This is important as the Australian Curriculum, as discussed more fully above, clearly incorporates inclusive education principles and envisages that it should be used for students with disability and of diverse abilities.

- [42] This would indicate that Victorian students with disability in segregated education settings should be receiving the same basic curriculum as their peers without disability in mainstream classrooms. However, under Victorian law this is not necessarily the case. To be registered as a school in Victoria, the institution must comply with the minimum standards laid out in the *Education and Training Reform Regulations 2017*.<sup>37</sup> Relevantly, one of the minimum requirements is that the school must have a curriculum in place that ensures “that, taken as a whole the learning areas... are substantially addressed.”<sup>38</sup> These learning areas are laid out in the *Education and Training Reform Act 2006* and broadly reflect those learning areas in the Australian Curriculum.<sup>39</sup> This is a minimum requirement that we expect all schools in Victoria to comply with. There are however exceptions and, relevantly, one of those is for “special schools”.<sup>40</sup> The term ‘special school’ is one of the euphemistic terms used for disability-specific schools. The Victorian Curriculum and Assessment Authority is responsible for approving these exceptions and they do not provide information for how they assess these exception applications nor how many exceptions exist.<sup>41</sup>
- [43] It could be argued that the purpose or function of this provision is benevolent. It would be unfair to rigidly apply a curriculum to a student’s education if they do not presently have the necessary knowledge or ability for it to be beneficial. The problem with this is it should no longer be necessary under the Australian Curriculum.
- [44] While it is not the purpose of this submission to provide an analysis of the approaches taken in other states and territories, the more prescriptive approach taken under Northern Territorial law is worth noting. The *Education Act 2015* provides wide powers for the Education Minister to “make any provision” for the education of children with disability that the Minister considers “necessary or desirable”.<sup>42</sup> The Act requires that before a decision is made to provide a student with a reasonable adjustment, including altering their curriculum, the decision maker must consult with the child’s parents.<sup>43</sup> This is one of the matters identified within the act that must be considered by the decision-maker before the decision is made.<sup>44</sup> On top of this, the act clearly envisages that before a decision is made advice is sought from someone with “specialist knowledge of children with special learning needs”.<sup>45</sup> While this is permissive rather than obligatory, it is a strong indication of an expectation that any change made should be driven by expert or evidence-based knowledge.

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<sup>36</sup> *Australian Education Act 2013* (Cth), s 22.

<sup>37</sup> *Education and Training Reform Act 2006* (Vic), s.4.3.1; *Education and Training Regulations 2017* (Vic), reg 60.

<sup>38</sup> *Education and Training Regulations 2017*, sch 4, cl 6(b).

<sup>39</sup> *Education and Training Reform Act 2006* (Vic) sch 1.

<sup>40</sup> *Education and Training Regulations 2017* (Vic), reg 61.

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

<sup>42</sup> *Education Act 2015* (NT), s 51.

<sup>43</sup> *Ibid.*, s 54(4).

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

<sup>45</sup> *Ibid.*, s 53(3)(a).

## Recommendations

### **Recommendation 1 – Australian jurisdictions formulate and implement a plan for the dismantling of the segregated education system**

- [45] We submit that all Australian jurisdictions should formulate and implement a clear plan for the dismantling of the current education system where students with disability, particularly autistic students, are often segregated on the basis of their disability.
- [46] Evidence shows that receiving an education in mainstream facilities provides clear academic and social benefits for students with disability. Importantly, evidence also indicates that the inclusion of students with disability does not have a detrimental impact on the education of students without disability.
- [47] We note that segregated education systems have been criticised by the Committee as failing to comply with state-parties' obligations under the CRPD.
- [48] Such a plan is of particular current importance because it appears that Australian governments are not only maintaining the current system but are expanding it.
- [49] We believe such a plan must be clear, obligatory, and time-mandated. Without this, any such plan will be treated as aspirational and unlikely to prompt Australian governments to make meaningful steps to achieving it.
- [50] We appreciate and support that there may be narrow circumstances when a disability-specific school is justifiably in the best interests of a student with disability. However, this should be considered a limited exception and not the general rule as is currently the case.

### **Recommendation 2 – The Australian Curriculum is implemented in all 'special schools,' and this implementation is ensured through active oversight**

- [51] We note that students that receive their education in disability-specific schools generally receive poorer educational outcomes. While there may be a variety of reasons for this, it seems an important factor is a lack of genuine effort from education providers to provide and implement a meaningful curriculum. This can be seen in the criticism of these schools, during federal state inquiries, that they are 'babysitting' services.
- [52] We submit that an important step in correcting this situation is ensuring that the Australian Curriculum is used in all segregated schools. This should not be a difficult or onerous exercise as the Australian Curriculum was developed around the principles of inclusive education and is specifically designed to be capable of flexibly catering for students with a diverse range of abilities.

### **Recommendation 3 – The legislative power to provide exceptions to a school's obligation to provide the agreed upon curriculum be more stringently governed**

- [53] With the creation of the Australian Curriculum, designed around inclusive education principles, the need for widespread alteration of student's individual curriculums was greatly reduced. As such, we believe the legislative powers granted to education departments should be more tightly governed.
- [54] Any change that is required for a student should be, firstly, based on clear medical evidence. This would require both that the need for change and any appropriate adjustment identified involves the use of disability experts. This would ensure that any deviations from the Australia Curriculum are actually necessary and not convenient for the education provider. Secondly, any change made should actively involve the parents/guardian of the student to again ensure that the interests and needs of the student is paramount.
- [55] We appreciate that there will be exceptional circumstances where changes to the Australian Curriculum will be necessary for individual students. However, this should be truly exceptional. Disability-specific schools should not receive blanket exemptions from their obligation to provide the Australian Curriculum. We believe the active involvement of both disability experts and the individual student's parents/guardian in any change would ensure that this was the case.

**Recommendation 4 – All segregated schools that receive government funding are required to implement evidence-based teaching and behavioural approaches.**

- [56] The only established evidence based intervention for Autism Spectrum Disorder is Applied Behaviour Analysis.<sup>46</sup>
- [57] We believe that ensuring that if all disability-specific schools that cater primarily for autistic students are required to use evidenced-based approaches, that is Applied Behaviour Analysis, this will effectively mitigate behaviours of concern, reduce violence in schools by teachers against students, and allow students to more seamlessly transfer to mainstream schools.

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<sup>46</sup> Margot Prior et al. 'A Review of the Research to Identify the Most Effective Models of Practice in Early Intervention for Children with Autism Spectrum Disorders' (Final Report, Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, 2011); The National Autism Center, 'National Standards Report – Addressing the need for evidence-based practice guidelines for Autism Spectrum Disorder' (Final Report, 2009).

## Reasonable adjustments

- [58] 'Reasonable adjustments' is the legal term used to cover the concept of adjustments and supports made to mitigate the impact of disability in equal opportunity and discrimination legislation.<sup>47</sup> A reasonable adjustment can essentially be understood as an adjustment made to enable an individual with disability to fully access particular areas of public life. The failure to provide reasonable adjustments is discriminatory. Importantly, under both the *Disability Discrimination Act 1992 (DDA)*<sup>48</sup> and *Equal Opportunity Act 2010 (EOA)*<sup>49</sup>, education is a designated area of public life and thus the obligation to provide reasonable adjustments applies to education providers.
- [59] The provision of reasonable adjustments for autistic students is a crucial tool in ensuring they are able to access the education they are entitled to. Supports and adjustments are needed as a recognition that educational environments and programs are not currently designed to be universally accessible and for many students alterations will be needed to ensure their access. Examples of supports and adjustments for autistic students could be the implementation of a specifically tailored curriculum, the provision of a one-to-one assistance, the provision of a speech pathologist to provide speech therapy or a communication plan for an Augmented and Alternative Communication method.

### Existing framework

- [60] An obligation on education service providers to provide reasonable adjustments for students with disability exists under both Victorian and federal law.

#### Equal Opportunity Act 2010

- [61] The *EOA* is binding on the Victorian Department of Education and Training and Victoria's public schools. The *EOA* requires education providers to make adjustments for students with disability.<sup>50</sup> The reasonable adjustment section in the *EOA* is a standalone one and therefore does not have the same barriers in application as the *DDA*.<sup>51</sup> However, VCAT has interpreted the obligations under the *EOA* similarly to the interpretation of the equivalent provision in the *DDA*, giving schools and education providers a considerable amount of discretion in deciding what is 'reasonable'.<sup>52</sup>
- [62] In particular, pursuant to the *EOA*, schools are allowed to consider and balance a range of different factors including: the nature of the adjustment, the effect of the adjustment on the student with disability, the effect of failing to make the adjustment, and the effect on the school (including financial and other resources).<sup>53</sup> This is particularly disturbing given the lack of expertise teachers have in relation to disability, and the lack of their general abilities to effectively teach students without disability as set out in international reviews.<sup>54</sup> By providing education providers a

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<sup>47</sup> *Disability Discrimination Act 1992* (Cth), ss 4 (definition of 'reasonable adjustment'), 5-6 ('DDA'); *Equal Opportunity Act 2010* (Vic), ss 20, 33, 40, 45 ('EOA')

<sup>48</sup> *DDA* (n 46), s 22.

<sup>49</sup> *EOA* (n 46), div 3.

<sup>50</sup> *EOA* (n 46), s 40.

<sup>51</sup> Discussed below in relation to *Sklavos*

<sup>52</sup> *AB v Ballarat Christian College* [2013] VCAT 1790.

<sup>53</sup> *Ibid.*

<sup>54</sup> Australian students behind in maths, reading and science (n 23).

large discretion in determining whether a requested adjustment is reasonable or not, tribunals have dramatically limited the practical usefulness of the *EOA* for students with disability.

- [63] S 40(4) of the *EOA* also expressly states that an education provider is not required to make an adjustment if they have complied with, or have been exempted from complying with, the *DDA*.<sup>55</sup> Thus, if an education provider complies with the *Disability Standard for Education* then this can operate as a defence against any claim brought against their failure to provide an adjustment. Because of the problems with the *Disability Standard for Education*, discussed below, this also dramatically reduces the practical utility of the *EOA* for students with disability.

#### Disability Discrimination Act 1992

- [64] The *DDA* is binding on the Victorian Department of Education and Training and Victoria's public schools. S 22 makes it illegal to discriminate against students with disability in the provision of education.<sup>56</sup> Importantly, the definition of discrimination includes the provision of reasonable adjustments.<sup>57</sup> Theoretically, the *DDA* appears to offer a key route for students with disability to ensure that education providers make adjustments to enable them to access their education fully. However, in practice this has not been the case.
- [65] The first problem with the *DDA*, in our view, is the *Disability Standards for Education*. Under the *DDA*, an education provider breaches their obligations under the act if they contravene the *Disability Standards for Education*, but the act also provides that compliance with a standard constitutes a defence to any alleged breach.<sup>58</sup> This is important in considering reasonable adjustments because the *Disability Standards For Education* requires education providers to consult with the student with disability and their family in making a decision as to whether to provide a reasonable adjustment or not.<sup>59</sup> However, it does not stipulate how much weight should be given to that consultation nor how that consultation should be conducted. The decision in *Walker v the State of Victoria*, has in effect enabled education providers to give very little consideration to the consultation with students with disability and their families.<sup>60</sup> This has dramatically weakened the power of the *DDA* for students with disability attempting to ensure they get the adjustments they require.
- [66] Secondly, the decision in *Sklavos v Australasian College of Dermatologists* has also significantly weakened the power of the *DDA* in ensuring individuals are provided with reasonable accommodations. In *Sklavos*, it was ruled that the decision to deny a reasonable accommodation must be because of the individual's disability.<sup>61</sup> The mere detrimental effect of the failure to provide the reasonable accommodation is not enough on its own to establish discrimination. Practically, no education provider ever would admit that it denies a reasonable accommodation because of the individual's disability itself. They may do so for financial reasons, or practical implementation reasons. While, it may be possible to prove that there is a system or practice of denying students with disability reasonable adjustments, this is an onerous task and may not always be evidentially possible. In any event, the effect of the *Sklavos*

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<sup>55</sup> *EOA* (n 46), s 40(3)

<sup>56</sup> *DDA* (n 46), s 22.

<sup>57</sup> *Ibid*, s 5 and s 6.

<sup>58</sup> *Ibid*, s 32 and s 34.

<sup>59</sup> *Disability Standards for Education 2005* (Cth), pt 3. ('Standards for Education')

<sup>60</sup> *Walker v State of Victoria* [2011] 279 ALR 284.

<sup>61</sup> *Sklavos v Australasian College of Dermatologists* [2017] 347 ALR 78.

decision means that the denial of the adjustment request for any reason other than the disability, regardless of how unreasonable, would not be a contravention of the *DDA*. This further weakens the nature of the obligation to provide reasonable adjustments. The recent decision in *Connor*<sup>62</sup>, following this understanding of the *DDA*, suggests this is a live and entrenched issue.

- [67] Thirdly, the continuing reliance on the construction of the ‘comparator test’ from *Purvis*<sup>63</sup>, fundamentally denies autistic students protection under the *DDA*. *Purvis* involved the expulsion of a student with a visual impairment and brain injury. The brain injury partly manifested itself through disinhibited behaviours which included severe behaviours of concern such as striking out at other students and the student’s aide. In the High Court decision it was decided that the prohibition against direct discrimination in s5(1) of the *Disability Discrimination Act 2010* expressly included a ‘comparator test’, which required a comparison between the student with disability and student without disability “in circumstances that are not materially different.”<sup>64</sup> In applying this test it was held that the appropriate comparator, taking account of all the objective features surrounding the intended treatment, was a student without disability displaying the same behaviours.<sup>65</sup> As the court decided the school would have expelled a student without disability if they displayed the same severe behaviours, they found that the school had not acted in a discriminatory fashion.
- [68] The decision in *Purvis* has proven problematic for two reasons. Firstly, in many situations it becomes incredibly difficult or artificial to construct an individual without disability in the same circumstances. This is demonstrated in the case of *Trindall*, where the appropriate comparator for an individual with a sickle cell condition was an individual who didn’t have a sickle cell condition but had a “risk of injury of a similar nature to that of a person with the sickle cell trait.”<sup>66</sup> Such a person does not exist. Therefore, alleged discriminators defending their actions on the basis they would treat anyone similarly is artificial, as they will not be in a position to treat anyone else in a similar fashion. This understanding of the comparator test undermines the value of the protection provided by the *Disability Discrimination Act*.
- [69] Secondly, by disconnecting the behaviour from the disability, the nature of the disability is misunderstood. Although the minority in *Purvis* expressly noted that detaching the manifestations of a disability from the underlying disability was dangerous and undermined the protections provided by the *Disability Discrimination Act*, the ultimate formulation of the ‘comparator test’ has in effect done just that.<sup>67</sup> The continued reliance on the *Purvis* ‘comparator test’ and its understanding that circumstances not materially different include the behaviours of the student is particularly odd because it appears to directly contradict the legislation. Under the legislation, the correct comparator is an individual “without the disability.”<sup>68</sup> The definition of disability since 2009 explicitly includes “behaviour that is a symptom or manifestation of the disability.”<sup>69</sup> Conceptually, this should mean that, for a student whose disability includes behaviours of concern, the correct comparator would be a student without those behaviours of concern. The continued reliance on *Purvis*

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<sup>62</sup> *Purvis v New South Wales (Department of Education and Training)* [2003] 217 CLR 92.

<sup>63</sup> *Connor v State of Queensland (Department of Education and Training (No 3))* [2020] FCA 455.

<sup>64</sup> *DDA* (n 46), s5(1).

<sup>65</sup> *Purvis* (n 61), [225] (Gummow, Hayne, and Heydon JJ).

<sup>66</sup> *Trindall v NSW Commissioner for Police* [2005] FMCA 2, [145] (Driver FM).

<sup>67</sup> *Purvis* (n 61), [212] (Gummow, Hayne and Heydon JJ).

<sup>68</sup> *DDA* (n 46) ss 5(2), 6(2).

<sup>69</sup> *Ibid*, s 4 (definition of ‘disability’)

indicates courts have not understood the legislation in this way and thus perpetuate a misunderstanding of cognitive and behavioural disabilities.

### Effect for autistic students

- [70] How does this affect autistic students? In particular, for many students with Level 3 Autism, if they are going to achieve full access to the curriculum and an opportunity to have a meaningful life as an adult, they are often going to require significant interventions.
- a. Communication. These students, will have high communication needs. At the very least they may need intensive direct speech pathology and support in accessing the curriculum when it is not presented in an accessible manner. At the highest, the students will need an Augmentative and Alternative Communication method, including the purchase of a communication device, the provision of a Communication Partner, and a Speech Pathologist expert in this type of communication in order that the child and the staff around them, can receive intensive training to expand their vocabulary every week and use their device for communicating and learning.
  - b. Sensory dysregulation. Many students may need an occupational therapist to assist in developing and monitoring an Individual Education Plan to ensure their sensory issues are accommodated.
  - c. Fine and gross motor skills. Many students will need an occupational therapist to provide direct therapy or oversee a therapy plan as part of an Individual Education Plan in order that motor skills are addressed and form no barrier to learning.
  - d. Behaviour Intervention. Some of these students will have behaviours of concern, and require intensive behaviour support from credentialled professionals, who would undertake a Functional Behaviour Assessment, a Behaviour Intervention Plan, training of staff, monitoring, evaluation and so on.
- [71] Even those with a diagnosis of Autism Level 1, that child may have sensory dysregulation, behaviours of concern, and motor skill issues that will require attention to a certain degree. Therefore, for autistic students it is vital that our laws support their full inclusion. The current formulation of Australia's discrimination laws and how they have been interpreted to apply to education providers, fails to adequately provide this support

### Recommendations

#### **Recommendation 5 – The *Disability Discrimination Act* is amended to remove the requirement for a comparator**

- [72] We submit that the *DDA* should be amended to remove the requirement for a comparator.
- [73] As the *Trindall* decision demonstrates, the requirement to construct a hypothetical comparator often leads to nonsensical outcomes where courts have identified the appropriate comparator as a person with all the intricacies and characteristics of the person with a disability but without the official status of a disability.

- [74] As *Purvis* demonstrates, the comparator requirement and how it has been interpreted by the Courts has fundamentally denied students with disabilities that can manifest themselves in behaviours of concern, any protection from the *DDA*.
- [75] We believe removing the comparator requirement would dramatically improve the protection provided by the *DDA*. Moreover, there is no evidence from jurisdictions that have removed the comparator requirement, that doing so will lead to an inundation of unmeritorious claims.

**Recommendation 6 – The *Disability Discrimination Act* and *Equal Opportunity Act* are amended to provide a definition of reasonable adjustment that indicates that they are provided to ensure equal benefit or access**

- [1] We submit that both the *DDA* and the *EOA* should be amended to provide a more explicit definition of the term ‘reasonable adjustment’. In particular, any such definition should note that the purpose of the adjustment is to facilitate equal access or benefit for the recipient.
- [2] We believe this is necessary as there is some suggestion in case law that it is unnecessary for the court or tribunal to consider how effective the reasonable adjustment is in providing the access/benefit.<sup>70</sup> This is problematic as without some consideration of the effectiveness of the adjustment, an education provider can satisfy their obligations by providing an adjustment that has little to no practical benefit for the recipient.
- [3] We do not believe that such a consideration would provide too onerous an obligation. Education providers would still have the defense of ‘reasonableness’ and ‘unjustifiable hardship’, under the *EOA*, and ‘unjustifiable hardship’, under the *DDA*. Education providers must be required to justify why the provision of an adjustment that provides equal access or benefit should not be provided rather than merely satisfying their obligation by providing a less effective adjustment.

**Recommendation 7 - The *Disability Discrimination Act* is amended to remove the requirement that the applicant must prove that denial of a reasonable adjustment is because of the applicant’s disability**

- [4] This could be achieved by creating stand-alone reasonable adjustment provisions without this requirement, as is done in the *EOA*.
- [5] This requirement was found to be present in the decision in *Skavos* and has been followed in later decisions like *Connor*.
- [6] The requirement fundamentally weakens the reasonable adjustment obligation under the *DDA*. It is unusual for an education provider to deny a reasonable adjustment on the basis of the applicant’s disability. Rather, it is more likely to be refused for more practical reasons such as the financial cost or the ease of implementing the adjustment.
- [7] As stated above, there is no evidence that removing the comparator requirement will lead to an inundation of unmeritorious claims.

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<sup>70</sup> *AB v Ballarat Christian College (Human Rights)* [2013] VCAT 1790, [170].

**Recommendation 8 - That the *Disability Standards for Education*, if they are retained, are reformed in relation to:**

- a) ensuring that the term “reasonable adjustment” is commensurate with the definition in the *Disability Discrimination Act*;**
- b) ensuring that the term “adjustment” in Part 3.3 under sub paragraph (a)(iii) includes examples of the sorts of actions and measures that may more commonly assist students with cognitive disabilities such as Autism;**
- c) ensuring that the definition of “consultation” in each Part is consistent with the Committee’s General Comment 7 in relation to the participation of people with disabilities in decision-making.<sup>71</sup>**

[8] In relation to a) and b), currently there is a lack of certainty around whether assessments and other necessary preparatory steps in identifying the ultimate adjustment needed can, in and of themselves, be considered a reasonable adjustment. Without assessments and evaluations being considered reasonable adjustments, students with complex support needs are likely to be denied the support they need. This is because it is often impossible for a student or their parent/guardian to be able to succinctly identify the appropriate support needed without evaluations.

[9] We believe that the manner in which the *Disability Standards for Education* are written may reflect a period where other disabilities were more “high profile”. By including more examples of adjustments that are needed for students with Autism, the legislation will reflect a more contemporary definition of “adjustments”.

[10] In relation to c), current judicial interpretation of the requirement for consultation provides a large degree of discretion to education providers. This is concerning as potential discriminators with little to no knowledge of disability make decisions in relation to reasonable adjustments, without the requirement for any genuine regard for the views of people with disabilities and their medical practitioners. This is unacceptable and fails to comply with Australia’s obligations under the *CRPD*. The primary consideration is the support and access needs of the student with a disability, as expressed by them and/or their family and their healthcare providers.

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<sup>71</sup> UN Committee on the Rights of Persons with Disabilities, *General Comment 7 on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention*, UN Doc CRPD/C/GC/7 (9 November 2018).

## Funding

- [11] We submit that there is a considerable shortfall in Victoria in relation to the funding that individual schools receive for supports and accommodations for students with disability. While the funding is obviously inherently connected with the legal right to reasonable accommodations, we believe that it deserves consideration in its own right. This is due to the fact that it underpins the effectiveness of the legal right rather than being an aspect of the legal right itself.
- [12] As stated above, the provision of reasonable accommodations is a legal right for Victorian students with disability. This is ensured under both the *Equal Opportunity Act 2010* and the *Disability Discrimination Act 1992*.<sup>72</sup> While the obligation to provide these adjustments ultimately rests with the education provider, the Victorian government does provide some funding support to some students with disabilities. The funding scheme for this is known as the Program for Students with Disabilities. For those who do not fall within the scheme, the financial cost of providing adjustments/accommodations is born by the individual school.
- [13] Currently, the Program for Students with Disabilities provides supplementary funding for schools to fund adjustments for eligible students with disability. However, the criteria of eligibility is currently framed so that it only covers about 4 per cent of the population.<sup>73</sup> Approximately 20 per cent of the student population has a disability. Students with no additional funding are expected to be covered through the global school budget. This is ineffective because of the severe financial constraints schools already operate under. This is demonstrated by the 2018 *State of Our Schools* survey.<sup>74</sup> This situation is exacerbated in schools in rural and regional areas as they cannot take advantage of large numbers of students and therefore significant global funding.
- [14] The Department of Education and Training itself has recognised the limitations in the Program for Students with Disabilities in its own review in 2015<sup>75</sup>. Despite this, there have been no substantial improvements made.

### Current experiences of the provision and cost of reasonable adjustments

- [15] According to data published by the Nationally Consistent Collection of Data on School Students with a Disability, 19% of the student population received an adjustment due to their disability in 2017.<sup>76</sup> Of this approximately 9.6% received an adjustment due to a cognitive disability.<sup>77</sup> While this appears promising and roughly correlative with the expected number of students with disability it is harder to ascertain whether the adjustments provided are truly appropriate, as the informants to the data collection are teachers.

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<sup>72</sup> DDA (n 46), ss 5, 6, 22; EOA (n 46) s 40.

<sup>73</sup> *Review of the program for students with disabilities* (n 1), 61.

<sup>74</sup> Fergus Hunter, 'Public schools lack resources to meet needs of 'invisible' students with disabilities', *Sydney Morning Herald* (online, 17 February 2019), < <https://www.smh.com.au/politics/federal/public-schools-lack-resources-to-meet-needs-of-invisible-students-with-disabilities-20190215-p50y0f.html>>.

<sup>75</sup> *Review of the Program for Students with Disabilities 2016* (n 1).

<sup>76</sup> Nationally Consistent Collection of Data, *2017 data on students in Australian schools receiving adjustments for disability* (Report, 2018), 3,

<<http://www.educationcouncil.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Publications/Glossy%202017%20NCCD%20Public%20Report%20FINAL.pdf>>.

<sup>77</sup> *Ibid*.

- [16] The evidence suggests the adjustments are not appropriate. In Children and Young People with Disability Australia (CYDA's) education survey from 2017, which surveyed 771 families of students with disability, it was found that 68% of respondents believed that the level of support the student received at school is inadequate.<sup>78</sup> This broadly corresponds with the survey of families of students with disability conducted for the 2012 *Held Back* report. In that report it was found that only 32% of respondents believed that the requested adjustment was made in full, with 58% answering it was partially made and 10% answering no adjustment was made at all.<sup>79</sup>
- [17] While both these surveys cannot claim to be comprehensive, CYDA's having 771 respondents nationally and the *Held Back* report having 1,800 respondents or participants in Victoria, they do establish a trend which suggests that the supports and adjustments being provided are not adequate for the student's needs.<sup>80</sup>
- [18] There may be a number of factors as to why the adjustments being provided by education providers are currently failing to adequately meet the needs of students with disability. One factor clearly is funding. Government schools in Victoria operate under financial restraint which severely limits their ability to provide the supports needed. This is clear in the latest Australian Education Union *State of our Schools* survey which found that 81 per cent of principals believed they had insufficient resources to properly educate students with disability and 88 per cent stated they had to redirect funds from other areas of the school budget to help cater for students with disability.<sup>81</sup> This has clearly created an environment where schools, looking for the lowest-cost alternative, provide cheaper supports and adjustments that fail to meet the needs of the child.
- [19] Given the rise in the numbers of autistic students in the last decade, the practice of "gatekeeping", schools turning parents away and directing them to segregated settings, is encouraged. Schools begin to see the prospective autistic student as a student that is going to drain their budget. Worse, autistic students have unfairly gained a reputation for exhibiting behaviours of concern which are uncontrollable, which is another reason for schools to reject their enrolment. The "Catch-22" of the situation is, that without appropriate evidence-based supports and adjustments, autistic students very well may develop behaviours of concern due to the inappropriate environment, and maintain those behaviours when credentialled behavioural experts are not engaged. Thus, the situation spirals out of control, an unhappy situation for all involved. This should not be considered to be the fault of the autistic student but rather the inadequacy of the system that is supposed to support them.

## Recommendations

### **Recommendation 9 – That the Victorian Department of Education and Training provides increased funding for schools to provide reasonable adjustments**

- [20] This should primarily be done by increasing funding through the Program for Students with Disabilities and altering the eligibility criteria in order that instead of

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<sup>79</sup> *Held back* (n 1), 39.

<sup>80</sup> *CYDA Education Survey 2017* (n 76); *Held back* (above no 1).

<sup>81</sup> 'Public schools lack resources to meet needs of 'invisible' students with disabilities' (n 72).

providing funding due to disability criteria, the funding is provided on the basis of educational need.

**Recommendation 10 - That the Commonwealth ties education funding to state departments of education, to them providing evidence that each school has sufficient funds to cater for reasonable adjustments required for all students with disability**

- [21] We submit that the most effective way to improve the current funding shortfall is to adopt the funding model identified by the Review into the Program for Students with Disabilities in 2015, which was commissioned by the DET.<sup>82</sup>
- [22] It is worth noting that tying education funding from a federal government to evidence that state governments are providing an education for students with disability is approach taken under the North American *Individuals with Disabilities Education Act* and has proven effective.

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<sup>82</sup> *Review of the program for students with disabilities (n 1)*, 119-134.

# Bullying

- [23] Bullying constitutes “aggressive, intentional acts carried out, by a group or an individual, repeatedly and over time against a victim who cannot easily defend” themselves.<sup>83</sup> Bullying includes overtly aggressive acts, such as physical assault, verbal and physical harassment, and intimidation. However, it is important to appreciate that it also incorporates less overt acts such as belittling, social rejection and isolation, and relational/reputational damage. Bullying can occur both online and offline.
- [24] The heightened risk of being bullied is, in the current community and education environment, an inherent aspect of having autism. It is well-researched and accepted that autistic students are far more likely to suffer bullying.<sup>84</sup> It is less well-researched why autistic students are particularly vulnerable to being targeted. The likely reason is that they, due to the inherent nature of their disability, simply present as “easy targets.”<sup>85</sup> For instance, author Nick Dubin, suggests that the low tolerance of frustration, problems with reading social cues, odd use of language, monotropism, gullibility and poor academic results makes autistic young people stand out from their peers as unusual and thus vulnerable.<sup>86</sup>
- [25] Research has consistently pointed to the strong connection between bullying and mental illness. In a 2010 report produced by the United States Department of Education, it was found that bullying led to:

*“lowered academic achievement and aspirations... Increased anxiety... Loss of self-esteem and confidence... depression and post-traumatic stress... self-harm and suicidal thinking... [and] feelings of alienation in the school environment, such as fear of other children”<sup>87</sup>*

Importantly, many of these consequences have long-lasting effects on the bullied student and have a continuing effect on their quality of life into adulthood.<sup>88</sup> It is important to note that this report was produced to provide general information on the nature and impact of bullying not specifically focusing on autistic students. However, there is no strong reason to believe that the consequences for these students would be remarkably different.

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<sup>83</sup> Ersilia Menesini and Christina Salmivalli, ‘Bullying in schools: the state of knowledge and effective interventions’ (2016) 22(1) *Psychology, Health & Medicine* (above no 2), 240, 241.

<sup>84</sup> Rebekah Heinrichs *Perfect Targets: Asperger Syndrome and Bullying: Practical solutions for surviving the social world* (AAPC Publishing 2003), 7; Mary Konstantareas, ‘Anxiety and Depression in Children and adolescents with Asperger Syndrome in Kevin Stoddart (ed.), *Children, Youth and Adults with Asperger Syndrome: Integrating Multiple Perspectives* (Jessica Kingsley Publishing 2005) 51; Liza Little, ‘Middle-class mothers’ perceptions of peer and sibling victimization among children with Asperger Syndrome and nonverbal learning disorders’ (2002) 25(1) *Issues Comprehensive Paediatric Nursing* 47, 50; Melissa Sreckovic, Nelson Brunsting and Harriet Able ‘Victimization of students with autism spectrum disorder: A review of prevalence and risk factors’ (2014) 8(9) *Research in Autism Spectrum Disorders*, 1155, 1169; Robert Kowalski and Cristin Fedina ‘Cyber bullying in ADHD and Asperger Syndrome populations’ (2011) 5(3) *Research in Autism Spectrum Disorders*, 1201, 1205.

<sup>85</sup> Nick Dubin, *Asperger Syndrome and Bullying: Strategies and Solutions* (Jessica Kingsley Publishers, 2007) 30.

<sup>86</sup> *Ibid*, 30-42.

<sup>87</sup> U.S. Department of Education ‘Dear Colleague Letter Harassment and Bullying (October 26, 2010) Background, Summary, and Fast Facts’ *Office for Civil Rights: Reading Room* (Discussion Paper 25<sup>th</sup> September 2018) <<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.html>>.

<sup>88</sup> Judith Wiener and Meghan Mak ‘Peer Victimization in children with Attention-Deficit/Hyperactivity Disorder’ (2008) 46(2) *Psychology in the Schools*, 116, 116-117.

- [26] The results of Australian surveys suggest bullying remains a pressing concern. In the *Held Back Report* conducted by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in 2012, it was found that 62% of student respondents with disability reported being harassed or bullied at school.<sup>89</sup> The results of recent *National Education Surveys* conducted by Children and Young People with Disability Australia in 2017 and 2019 support the findings of the *Held Back Report*. In those respective surveys 55% and 46% of respondents reported being bullied.<sup>90</sup> This again suggests bullying remains a prevalent issue and current anti-bullying initiatives are ineffective.
- [27] The Victorian Department of Education and Training's current anti-bullying policy provides an insight into the low expectations and requirements imposed upon Victorian schools. The Department's 'School Policy: Bullying' only requires schools to have "a statement about bullying and cyberbullying behaviours in the Rights and Responsibilities section of their Student Engagement Policy."<sup>91</sup> The Department further provides under its 'Bully Stoppers' program that schools "should" develop a bullying prevention policy.<sup>92</sup> While this program provides clearer guidance on what an adequate prevention program should include it is not a mandatory requirement of Victorian education providers to implement such a policy, nor is there a requirement that the policy implemented complies with the 'Bully Stoppers' program.
- [28] It is worth noting that both these policies have been explicitly criticised as being inadequate and ineffective in protecting students with disability.<sup>93</sup> In the *Held Back Report*, it was expressly recommended that the Victorian Department of Education and Training should "implement specialised programs to target and address bullying on the basis of disability" if it wanted to provide an inclusive and bully-free environment for students with disability.<sup>94</sup> Despite these findings and recommendations, there has been no change.

### Existing legal framework

- [29] Currently there is no reliable way for the law to deal with the bullying of students with disability. The purpose of this section is to briefly discuss the different legislation that may be potentially applicable and why such legislation is inadequate. Finally, it will examine the approach taken for racial vilification as a possible solution.

#### Disability Discrimination Act 1992

- [30] As a piece of federal legislation the *DDA* is binding on the Victorian Department of Education and Training and Victoria's schools and teachers.<sup>95</sup> Relevantly for considering the issue of bullying, under the *DDA* it is unlawful to contravene a disability standard.<sup>96</sup> *The Disability Standards for Education* include an obligation to implement strategies to prevent harassment which is framed in such a way as to

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<sup>89</sup> *Held Back Report*, 72.

<sup>90</sup> Children and Young People with Disability Australia, *Time for change: The state of play for inclusion of students with disability* (Survey Results, October 2019), 14 <<https://www.cyda.org.au/education-survey-results-2017>>. ('CYDA Education Survey 2017'); *CYDA Education Survey 2017* (n 76).

<sup>91</sup> Department of Education and Training, *School Policy: Bullying* (Web Page, 24 January 2019) <<https://www.education.vic.gov.au/school/principals/spag/safety/Pages/bullying.aspx>>.

<sup>92</sup> Department of Education and Training, *Bully Stoppers: Bullying Prevention Policy* (Web Page, 28 November 2018) <<https://www.education.vic.gov.au/about/programs/bullystoppers/Pages/prinprevent.aspx>>.

<sup>93</sup> *Held back* (above no 1), 79-80; *Held back: Analysis Paper* (Above no 1) 8.

<sup>94</sup> *Held back* (above no 1), 80.

<sup>95</sup> *DDA* (n 46).

<sup>96</sup> *Ibid* s 32.

include bullying.<sup>97</sup> The problem with *The Disability Standards for Education* is that they have set a low requirement and fail in practice to provide substantive protection for students with disability.

- [31] It is worth noting that s 37 of the *DDA* does create a prohibition against “harassment in education”.<sup>98</sup> However, this provision is framed to prohibit staff members of education facilities from engaging in harassment of students with disability on the basis of their disability. While teachers bullying students is a recognised phenomenon, it is far less common than bullying between students. The *DDA* provides no adequate response to the situation involving bullying between students.
- [32] It is conceivable that the requirement for reasonable adjustments in the *DDA* could be used to require schools to put in place measures to protect students inherently vulnerable to bullying on the basis of their disability.<sup>99</sup> However, this argument was rejected by the Federal Court in 2018.<sup>100</sup>

#### Equal Opportunity Act 2010

- [33] The *EOA* is binding on the Victorian Department of Education and Training and Victoria’s public schools. Practically, it operates in a similar way to the *DDA*. As such, it also requires education providers to make adjustments for students with disability. However, the similarities in intention and framework between the *EOA* and *DDA* suggest that the *EOA* would likely be interpreted similarly. If this was the case the decision in *Varasdi v State of Victoria* suggests the *EOA* would also not provide a route for students with disability to force schools to provide safe bully-free environments.

#### Prohibitions against racial vilification

- [34] All states and territories have implemented legislative prohibitions against racial vilification except the Northern Territory.<sup>101</sup> Both Tasmania and the Australian Capital Territory have implemented similar measures which do cover disability.<sup>102</sup>
- [35] Broadly speaking there have been two approaches as to how to frame such a prohibition. The first, adopted by the Commonwealth for the *Racial Discrimination Act 1975*, focuses on whether a reasonable person viewing the vilification would, in all the circumstances, consider that it would offend, insult, humiliate or intimidate another person or a group of people.<sup>103</sup> The second approach, adopted generally by the states and territories, focuses on whether a person observing the offending conduct, is reasonably likely to consider that the conduct is likely to incite hatred towards a person or group of persons of the relevant race or religion.<sup>104</sup> Put simply, the federal approach can be summarised as the ‘reasonable victim’ approach, as it focuses on the impact of the conduct on the victim, while the states and territories’ approach can be summarised as the ‘reasonable observer’ approach, as it focuses

<sup>97</sup> *Standards for Education* (n 58), pts 8.1(a), 8.3(1).

<sup>98</sup> *DDA* (n 46) s 37.

<sup>99</sup> *Ibid* s 5(2).

<sup>100</sup> *Varasdi v State of Victoria* [2018] FCA 1655.

<sup>101</sup> *Racial and Religious Tolerance Act 2001* (Vic), s 7; *Wrongs Act 1936* (SA), s 37; *Criminal Code 1913* (WA), ss 76-80J; *Anti-Discrimination Act 1977* (NSW), s 20C; *Anti-Discrimination Act 1991* (Qld), s124A; *Discrimination Act 1991* (ACT), s 67A; *Anti-Discrimination Act 1998* (Tas), s19.

<sup>102</sup> *Discrimination Act 1991* (ACT), s 67A; *Anti-Discrimination Act 1998* (Tas), s19.

<sup>103</sup> *Racial Discrimination Act 1975* (Cth), s 18C.veohrc

<sup>104</sup> For Example *Racial and Religious Tolerance Act 2001* (Vic), s 7 or *Anti-Discrimination Act 1977* (NSW), s 20C.

on the impact of the conduct on the wider community. We submit that the former approach is most appropriate as the ultimate purpose of this kind of legislation is an inclusive society based on equality; to achieve this, individuals with protected attributes must feel protected and included rather than society feeling that they are.

- [36] We believe extending current vilification laws to cover further attributes is more than justified. Vilification of an individual on the basis of a protected attribute should never be justifiable and it is illogical to extend the current protection only on the basis of race. Why is an individual's race more deserving of protection than their gender, sex, disability, sexual orientation, or religion amongst other protected attributes? Moreover, we believe disability is in particular need of protection. In Victoria, disability related complaints formed 65% of total discrimination complaints that were received by the VEOHRC in 2018.<sup>105</sup> In Tasmania, where vilification-type laws cover disability, in 2018, 34% of all discrimination claims concerned disability and 49% of all claims relating to offensive, insulting, intimidating, humiliating or ridiculing conduct concerned disability.<sup>106</sup> This suggests that not only does disability remain a prevalent basis of discrimination but also that it is a prevalent basis for insulting, humiliating, offensive or ridiculing conduct justifying the extension of vilification laws.

### Recommendations

**Recommendation 11 - That the Commonwealth ties education funding to state departments of education, to them adopting and implementing in all schools mandatory, specific and preventative programs targeting the bullying of students with disability.**

- [37] Students with disability, particular those with Autism, are particularly vulnerable to being bullied. This has a dramatic detrimental effect on their quality of life and development, in the short and long term. This more than justifies putting in place programs designed specifically to tackle the issue of disability specific bullying, to protect these students.
- [38] This program should both target bullying, and establish a more inclusive school environment by raising awareness around disability with an approach aimed at the whole school. It is crucial to appreciate that a 'whole school' approach requires not just educating and setting standards for students, but also for faculty. This is necessary for faculty not only so they can recognise bullying on the basis of disability when it occurs, but also to ensure they do not participate intentionally or unintentionally.

**Recommendation 12 – That the Disability Standards for Education, if they are to be retained, are reformed to more adequately recognise the obligation on education providers to protect students from bullying, and strengthen the test for compliance.**

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<sup>105</sup> Victorian Equal Opportunity & Human Rights Commission, *Annual Report 2018-19* (Annual Report, October 2019), 10.

<sup>106</sup> Equal Opportunity Tasmania, *Annual Report 2018-2019*, (Annual Report, 30 September 2019), 22, <[https://equalopportunity.tas.gov.au/data/assets/pdf\\_file/0008/548792/19.09.30-EOT-Annual-Report-2018-19-Accessible.pdf](https://equalopportunity.tas.gov.au/data/assets/pdf_file/0008/548792/19.09.30-EOT-Annual-Report-2018-19-Accessible.pdf)>.

- [39] It is important to note that the *Disability Standards for Education* do not prohibit harassment or vilification, they simply require educational facilities to have policies and procedures in relation to the subject. There is no requirement for any particular quality of policy or procedure content. For example there is no requirement to use programs that have any type of evidence base. In addition, given, for example, the Victorian Department of Education and Training does not require its policies, procedures and guidelines to be read or followed, in that situation the Disability Standards for Education become redundant. The term “bullying” is not currently included in Part 8, and ought to be.
- [40] Compliance with the *Disability Standards for Education* is a complete defence to a claim under the Disability Discrimination Act 1992. Therefore the *Disability Standards for Education* in their current form should be seen as weakening the Disability Discrimination Act, a piece of legislation which already has significant flaws.

**Recommendation 13 - That the Disability Discrimination Act and state based disability discrimination/discrimination laws are amended to include a prohibition against vilification on the basis of disability, taking a similar approach adopted under the Federal Racial Discrimination Act 1975.<sup>107</sup>**

- [41] There is no convincing reason for promoting the protection of one community from vilification and not another. Indeed such an approach could be viewed as discriminatory in and of itself. The evidence suggests that the disability community is particularly vulnerable to discrimination and vilification. The experiences of Tasmania, as a rare example of a state to adopt anti-vilification laws on the basis of disability, demonstrate leadership in this area.

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<sup>107</sup> *Racial Discrimination Act 1977* (Cth), s 18C.

## Violence, Abuse, and Neglect through the Misuse of Restrictive Practices

[42] Broadly speaking, restrictive practices are used as a tool to respond to ‘behaviours of concern’ when exhibited by people with disability.<sup>108</sup> ‘Behaviours of concern’ are behaviours which are perceived as posing a threat to either the individual or those interacting with them.<sup>109</sup> However, evidence suggests that restrictive practices are often used outside this narrow situation and instead as a “*means of coercion, discipline, convenience, or retaliation.*”<sup>110</sup> This is particularly problematic given that there is no evidence that restraint or seclusion are effective in responding to behaviours of concern. It is concerning given the fact restrictive practices have resulted in the injury or death of students with disability.<sup>111</sup> We submit that the inappropriate use of restrictive practices should be recognised for what it often is: assault and false imprisonment.

### The harm caused by restrictive practices

[43] It is well-established that the use of restrictive practices poses a range of physical and psychological harms to those involved. Research makes clear that physically restraining a student poses a physical threat both to the student and the intervening adult.<sup>112</sup> Data on the physical injuries and deaths caused by the use of restraints is collected on an ad hoc basis in Australia and overseas. However, a Harvard Center for Risk Analysis report in 2009 suggested that the use of restraint or seclusion leads to approximately 150 deaths per annum in the United States of America.<sup>113</sup>

[44] In addition to physical injury and death, reports have linked the use of restraint and seclusion to an increase in self-harming behaviour, the creation of distrust of the person restraining the student who would otherwise be an important member of their support network, post-traumatic stress disorder, anxiety, and feelings of loss of dignity.<sup>114</sup>

[45] While the impact on the physical and mental health of students with disability may be argued by some to be justifiable if the use of restrictive practices was an effective tool, the evidence is that this is not the case. The introduction of various other strategies to understand the behaviours of concern and build strategies around avoiding possible triggers has proven to dramatically reduce the need for restrictive

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<sup>108</sup> *Equality, Capacity, and Disability in Commonwealth Laws* (n 1).

<sup>109</sup> Education Rights, *Behaviours of Concern* (Web site, 2019)

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

<sup>110</sup> *Equality, Capacity, and Disability in Commonwealth Laws* (n 1).

<sup>111</sup> Harvard Centre for Risk Analysis quoted in National Disability Rights Network, *School is Not Supposed to Hurt: Investigate Report on Abusive Restraint and Seclusion in Schools* (January 2009), 7.

<sup>112</sup> Glen Dunlap, Cheryl Ostryn and Lise Fox, ‘Preventing the Use of Restraint and Seclusion with Young Children: The Role of Effective, Positive Practices’ (2011) *Technical Assistance Center on Social Emotional Intervention*, 1, 2.

<sup>113</sup> *School is Not Supposed to Hurt: Investigate Report on Abusive Restraint and Seclusion in Schools* (above no 68), 7.

<sup>114</sup> Wilfred Beaudoin and Adam Moore, ‘Living Without Restraint: One Parent’s Reflections and Recommendations for Supporting At-Risk Individuals With Developmental Disabilities’ (2018) 56(3) *Intellectual and Developmental Disabilities* 155, 156; Barbara Trader et al, ‘Promoting Inclusion Through Evidence-Based Alternatives to Restraint and Seclusion’ (2017) 42(2) *Research and Practice for Persons with Severe Disabilities*, 75, 78; Nancy M Fitzsimons *Combating Violence & Abuse of People with Disabilities: A Call to Action* (Paul H. Brookes Publishing, 2009), 44. 4

practices.<sup>115</sup> Implementing a Positive Behaviour Support (PBS) program may be one way to do this. A PBS program is designed to positively reinforce good behaviour, identify problematic behaviour, understand the purpose of the student when exhibiting the problematic behaviour, and then proactively prevent those triggers from occurring.<sup>116</sup>

### The need for established evidence-based interventions

- [46] The only established evidence based intervention for Autism Spectrum Disorder is Applied Behaviour Analysis.
- [47] It is not appropriate for school staff to time after time claim that restrictive practices are a “last resort” when intensive evidence-based assistance from a credentialed behaviouralist has not been provided.
- [48] Given the refusal by Victorian schools (and we believe schools in other States) to:
- a. fund supports for autistic students adequately, such withholding of support thereby causing or increasing behaviours of concern;
  - b. to provide intensive evidence-based behavioural assistance;
  - c. to have any type of mandated directives for the addressing of behaviours of concern;
- then apart from the very first time a severe behaviour of concern manifests, how can it ever be that violence can be categorised as a “last resort”?
- [49] Given the lack of staff expertise that autistic students are subjected to as described above in the section on segregation, why should autistic students ever be made to suffer violence when the problem lies with the quality of the services they are receiving?
- [50] If there were no research base on effective responses to behaviours of concern, and there were genuinely no other options, then the violence against autistic students may be more tolerable (to some). However this is not the case. We submit that it is discriminatory to suggest that the behaviours of concern that some autistic students demonstrate can only effectively be responded to through violence.

### Existing legal framework

- [51] The *Education and Training Reform Regulations 2017* is the key document that governs the ‘legal’ use of restraint and seclusion in the Victorian education system. It is binding on all public schools in Victoria and details key rights and obligations of education providers. Regulation 25 provides that:
- “A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour that are dangerous to the member of staff, the student, or any other person.”<sup>117</sup>*

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<sup>115</sup> Cadeyrm Gaskin, Keith McVilly and Jane McGillivray, ‘Initiatives to reduce the use of seclusion and restraints on people with developmental disabilities: a systematic review and quantitative synthesis’ (2013) 34(11) *Research in developmental disabilities* 3946,3958-3959.

<sup>116</sup> Autism Spectrum Australia, ‘What is Positive Behaviour Support?’ (Information sheet, December 2015) <<https://www.autismspectrum.org.au/uploads/documents/Aspect%20Practice/PBS/Aspect-Practice-What-is-Positive-Behaviour-Support.pdf>>.

<sup>117</sup> *Education and Training Regulations 2017* (Vic), reg 25.

- [52] The right to use restraint and seclusion in Regulation 25 is framed in broad, ambiguous language that relies upon the subjective judgment of the member of staff in question. As such, the Victorian Department of Education provides some further guidance in a range of different documents including the ‘restraint of students’ school policy. However, these documents are guides only and provide no mandatory rules on how restrictive practices are to be used or prevented.<sup>118</sup>
- [53] It is worth noting that the lack of mandatory rules on how restrictive practices are to be used in Victoria has been raised as an issue before. A number of submissions that were made to the Department of Education and Training for the 2017 *Review of the Education and Training Reform Act* highlighted this issue. The failure of the Department of Education and Training to make appropriate reforms evinces a clear rejection of the concerns raised.<sup>119</sup>
- [54] It is worth noting that the existence of the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Services Sector* provides a clear indication of the federal Government’s view that restrictive practices should not be used on persons with disability and there is no reason that this should not extend to students in educational facilities.<sup>120</sup> Moreover, the Committee has repeatedly criticised State Parties, including Australia, for the continued use of restraint and seclusion in educational and medical settings.<sup>121</sup>

### Oregon – an alternative approach

- [55] The approach taken in Oregon is worth considering because of the level of detail that the provision goes into.<sup>122</sup> There are blanket bans on the use of chemical and mechanical restraints.<sup>123</sup> The provision also bans the use of certain types of physical restraint that the legislature has deemed to pose an unacceptable risk to the student involved.<sup>124</sup> While some Australian policy documents do discuss chemical and mechanical restraints none go into the detail that Oregon’s statute book does. Moreover, even if, for example Victorian policy and guideline documents did go into this level of detail none are required to be read let alone followed. This indicates that it is not only practical but highly desirable to have detailed laws rather than simple laws with detailed guidelines.
- [56] The Oregon approach for when restrictive practices may be used is similar to that espoused in Australia and focuses on the concepts of reasonable risk of injury and there being no less restrictive alternatives.<sup>125</sup> The major difference is that this is legally enshrined, protected and enforceable rather than left to departmental guidelines and policies.

<sup>118</sup> *Submission to The Education and Training Reform Regulations Review* (above no 1) 2-3.

<sup>119</sup> Victorian Equal Opportunity and Human Rights Commission’s submission to The Education and Training Reform Regulations Review (above no 1); Law Institute of Victoria, Submission to Department of Education and Training, *Education and Training Reform Regulations Review* (9 August 2017); Disability Advocacy Victoria, Submission to Department of Education and Training, *Education and Training Reform Regulations Review* (24 June 2017).

<sup>120</sup> Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (Policy Document, 1<sup>st</sup> May 2013)

<[https://www.dss.gov.au/sites/default/files/documents/04\\_2014/national\\_framework\\_restrictive\\_practices\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf)>

<sup>121</sup> UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of New Zealand*, 163<sup>rd</sup> meeting, UN Doc CRPD/C/NZL/CO/1, 31; *Concluding observations on the initial report of Australia* (above no 1), 35; General Comment 4 (n 6).

<sup>122</sup> Or Rev Stat § 339.285-339.308 (2020); Or Admin Rules § 581.081.0550-581.021.0570 (2020).

<sup>123</sup> Or Rev Stat § 339.288 (2020)

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, § 339.291 (1)-(2).

- [57] Another notable element of the Oregon law is the different protections against misuse or excessive use of restrictive practices.<sup>126</sup> Firstly, the restraint or seclusion is only lawful while the student poses a threat. Secondly, the restraint or seclusion can only be administered by personnel who have received identified training. Thirdly, while restrictive practices are being used the student must be continuously monitored. Finally, if the use of the restrictive practice continues for over 30 minutes the parent or guardian must be notified and the relevant administrative body must provide written authorisation for it to continue. While some of these protective measures are discussed in policy documents or guidelines in Australia, no law provides any such protection.
- [58] The Oregon statute also records specific requirements regarding procedures following the incident including notification and updating of records, requirements regarding the provision of an annual report of the use of restraint and seclusion to the department of education, training programs for teachers for the use of restrictive practices, and a prohibition against the use of freestanding, self-contained units used to isolate students from others.<sup>127</sup> Again, this indicates it is preferable to have detailed legislative protection regarding the use of restrictive practices.
- [59] The Oregon Department of Education has also published regulations that provide further nuance to the relevant provisions in the state law.<sup>128</sup> These regulations have the force of law and thus can be distinguished from Australian policy documents and guidelines. Of particular note is the list of minimum requirements that must be complied with for any room to be used to seclude a student.<sup>129</sup> Again, there is no equivalent under Australian legislation
- [60] The above is relevant particularly to autistic students due to the high proportion that are subjected to violence and abuse in schools through the misuse or unnecessary use of restrictive practices.

### Recommendations

**Recommendation 14 – That the Commonwealth ties education funding to the states to the requirement for departments of education to implement data collection process that would allow them to receive consistent, comprehensive and timely data on incidents involving the use of restraint or seclusion on students with disabilities, such data to be publicly released.**

- [61] Accurate and representative data is the starting point for professional comprehension and analysis of the problem.<sup>130</sup>
- [62] This would then allow for the development of a more effective and targeted approach on reducing the use of these restrictive practices and introducing more effective and evidence-based strategies.

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<sup>126</sup> Ibid, § 339.291 (3)-(4).

<sup>127</sup> Ibid , § 339.308.

<sup>128</sup> Or Admin Rules § 581.081.0550-581.021.0570 (2020)

<sup>129</sup> Ibid, § 581.021.0568(2020)

<sup>130</sup> UNICEF, *Data for Children* (Strategic Framework, April 2017), 1.

**Recommendation 15 – The introduction of detailed and stringent legislative requirements regarding the use of restraint and seclusion to prevent their misuse and resultant violence against student.**

- [63] We recommend the immediate implementation of legislation that governs the use of restraint and seclusion in a detailed and prescriptive manner. Such legislation should be modelled on legislation such as that in Oregon.
- [64] The use of restraint and seclusion poses a serious threat to the mental and physical wellbeing of students (and staff) who are subjected to these practices. This risk is heightened when these practices are excessively used or misused; including for punishment or coercive reasons.
- [65] While the use of restraint and seclusion may be justifiable in genuine unplanned emergencies where the student with a disability poses an unexpected and serious threat to themselves or to others, the evidence is that these practices are being used as a common response to behaviours, in place of the engagement of credentialed behavioural experts and nonviolent methods.
- [66] We submit that the most appropriate way to reduce the use of restrictive practices is to have clear, detailed, legislative requirements and processes that governments are bound by. This would provide obligatory rules for teachers and education providers (and therefore all disability care staff) to adhere to, rather than guidance that they may consider. It would also importantly provide students and their parents or guardians a way to identify when students have been mistreated and a route for them to seek redress.
- [67] Such legislation must provide detailed rules regarding:
- a) The narrow circumstances when these practices may be used. For example, when there is a genuine threat to the physical safety of either the student, their peers, or others and when there is no possible less restrictive alternative.
  - b) The mandatory preventative proactive steps that have been taken to prevent the behaviours of concern.
  - c) The types of restraint that can and cannot be used. This must be more detailed than just 'physical restraint' but must list the types of physical restraints.
  - d) The requirements for the use of seclusion. This must include safety features of the room used, how long it can be used for, the requirement for constant supervision.
  - e) The procedural requirements. For example, who must be informed following the use of restraint, who must provide approval for the continued use of restraint, following the use of restraint, the steps required to be undertaken to prevent the need arising again.
- [68] We submit that an appropriate existing example is provided by the legal approach taken in Oregon. It demonstrates that it is not impractical to provide detailed laws around this issue, and that it is an issue of such importance that it justifies a legislative response.

## Proactive action: Functional Behaviour Assessments/Behaviour Intervention Plans

- [69] We submit that it is particularly important that education providers are legislatively required to conduct official evaluations to determine the needs of autistic students, and evidence-based plans to assist the student to access the education they are entitled to. Mandating this process is crucial in improving the educational and social outcomes for autistic students. For example, conducting a Functional Behaviour Assessment to understand the purpose of a student's behaviours of concern allows for the production of an evidence-based positive behaviour support plan/program. Such a program is likely to reduce the need for the unnecessary use or misuse of restrictive practices and the physical and psychological harm connected with this.
- [70] In this section of the submission we will discuss why the current system fails to guarantee that autistic students receive a proper evaluation and evidence-based reasonable adjustments. It will then provide an example of the approach taken under the American *Individuals with Disabilities Education Act (IDEA)*, as a way to legislatively ensure this is done.<sup>131</sup>

### The importance of FBAs/evidence based approaches

- [71] The argument for legislating the requirement to provide students with disability who have behaviours of concern evidence-based professional behavioural assistance ought to be seen as equally vital as the need to legislate for the protection of students with disability from harm.
- [72] The use of violence against students with disability and the requirement for effective behaviour support, are inextricably linked.
- [73] The use of violence is a response to uncontrolled behaviours of concern. Yet to our knowledge, no state has a mandated requirement for any particular type of behavioural support, any particular intensity of any behaviour support, or any particular qualification for behaviouralists.
- [74] In other words there are no requirements to take all reasonable professional steps to mitigate behaviours of concern, yet license is given to react with force when those behaviours of concern are displayed.
- [75] Given the importance of early intervention, and the serious repercussions (injury and death) for those receiving and subjecting others to restrictive practices, the absence of any requirement to respond to behaviours of concern in any quality or fashion, is hard to justify. Currently, in Australia, there is no regulation for those that claim to be "behaviour analysts", "behaviour therapists" or those who use other similar nomenclatures. Indeed some State governments are using persons whose backgrounds are martial arts.
- [76] The NDIS registers people to provide the behavioural services through them filling out a form. There is no requirement for any evidence to be provided of a person's skill, or their proven effectiveness in the mitigation of behaviours of concern.

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<sup>131</sup> *Individuals with Disabilities Education Act 1990*, 33 USC §§ 1400-1482 (2019) ('IDEA').

- [77] Teachers, who as mentioned above are struggling with the bare necessities of simply teaching effectively, are expected to be behaviour analysts, and to assess students with disability with behaviours of concern and then write effective behaviour intervention plans for those students. It is submitted that this practice is unethical and dangerous, given some of the outcomes for students with disability and those around them, of not effectively mitigating behaviours of concern.
- [78] It may not be coincidental that using violence and illegal imprisonment against students, is a great deal less expensive than engaging a credentialled behavioural expert to provide intensive assistance to students and those working with them. This comes back to adequate funding of schools.
- [79] Given Australia's:
- a. lag in the recognition that the mitigation of behaviours is a professional skill mastered by people after years of supervised practical work, study and appropriate qualification (for example those certified by the Behaviour Analyst Certification Board);
  - b. overreliance on violence to respond to behaviours of concern;
  - c. overreliance on unqualified staff to respond to behaviours of concern;
  - d. only recent establishment of Masters courses in Applied Behaviour Analysis;
  - e. failure to fund individual schools appropriately;
  - f. lack of direction from state education departments in relation to the quality of behaviour plans

the only workable response for the protection of students with disability exhibiting behaviours of concern is to legislate that protection.

- [80] Again, the *IDEA* stands out as providing the sophisticated protections that Australian legislation sorely lacks. The requirement, for example, for Individual Education Plans to contain services based on peer reviewed research is something that is a far cry from Australia's completely unregulated requirements in this area, and has been in place for quite some time.<sup>132</sup>
- [81] If one compares Australia's legislative protections or lack thereof in relation to violence against students with disability, and simultaneously the lack of legislative imperative to provide students with evidence-based behaviour supports, one could conclude the legislative situation to be unethical and immoral.

### The failings of the Australian system

- [82] Under the Australian approach, the only possible way to ensure that an autistic student has the right to receive a functional behaviour assessment or a similar evaluation is to request it as a reasonable adjustment through the *DDA* or *EOA*. This is problematic for two important reasons.
- [83] Firstly, it is not entirely clear whether an evaluation to determine the need for further adjustments can, in and of itself be considered a reasonable adjustment. The Victorian Department of Education has resisted this understanding, instead suggesting that the reasonable adjustment is the final change made for a student to enable them to access an education, not the steps taken to determine or identify

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<sup>132</sup> Ibid, § 1414.

those changes.<sup>133</sup> The problem with this is twofold. Firstly, logically you cannot identify those changes a student may need prior to having the relevant evaluation. The purpose of the evaluation is to identify the changes needed. Secondly, it encourages education providers and the parents and guardians of students to rely on their own knowledge of what the student needs. While they may have some knowledge of Autism and the needs of the student, they are not experts in Autism and should not be expected to play the role of expert.

- [84] There is currently no definitive legal decision which clarifies whether the steps needed to determine the reasonable adjustment can, in and of themselves, be considered an adjustment. While the decision in *Snell* supported the view that evaluations should be considered a reasonable adjustment when a company by a plan developed from the results of such an evaluation, this decision was provided by a registrar and is thus of reduced precedential value.<sup>134</sup> Without a guarantee that these evaluations will be considered a reasonable adjustment, the *DDA* and *EOA* provide little practical help in ensuring that autistic students get the evidence-based adjustments they need.
- [85] Secondly, for evaluations such as a functional behaviour assessments to be effective, they need to be conducted by a trained professional. Identifying the functions of certain behaviours is a professional field of knowledge. While teachers and those around the student should be involved they do not have the required knowledge to be able to conduct one themselves. With this in mind it is concerning that courts and tribunals appear to recognise that teachers and schools can legitimately perform these evaluations. A recent example of such a decision is *Connor v Queensland Department of Education*.<sup>135</sup>

### An alternative approach – the *IDEA*

- [86] We submit that the example provided by the *IDEA* is something that is required in the Australian education system. The *IDEA* is a piece of federal American legislation that is concerned with the provision of education to students with disability in American public schools. Much like Australia, the United States of America is a federation where the responsibility of providing a primary and secondary education rests solely on the states rather than the federal government. However, again similarly to Australia, there is a financial imbalance between the federal and state governments that allows the federal government to exert considerable influence over how the states deliver their education systems. The *IDEA* is an example of this. The federal American government agrees to provide a significant amount of funding for students with disability on the condition that the states comply with the requirements and standards laid out with in the Act. This is important to note because it demonstrates that although it is the states' responsibility to provide education to Australian students, including those with disability, the federal Australian government is more than capable in playing a significant role if it elects to do so.
- [87] While the *IDEA* covers a range of different obligations imposed upon states to ensure the provision of an education for students with disability, relevantly for this section of our submission we will focus on the legal requirements regarding the evaluation of students with a disability and the creation of individualised education

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<sup>133</sup> *Snell v State of Victoria (Department of Education and Training)* [Federal Court of Australia, JR Allaway, 8 August 2019].

<sup>134</sup> *Ibid*, [26]

<sup>135</sup> *Connor v State of Queensland (Department of Education and Training (No 3))* [2020] FCA 455.

programs. This is effectively how the *IDEA* determines the curriculum to be provided to the student.

- [88] The *IDEA* requires the state educational agency to “conduct a full and individual initial evaluation” so that the provision of supports or special education to cater for the child’s needs can be identified.<sup>136</sup> The *IDEA* also provides clear proscriptive requirements for that evaluation<sup>137</sup>:

**(b) Evaluation procedures**

**(1) Notice**

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

**(2) Conduct of evaluation**

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

**(3) Additional requirements**

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

- [89] Of particular note is the requirement to use a variety of assessment tools and clear guidance that these are to be used to identify “relevant functional, developmental and academic information,” and that these assessment tools be “technically sound” for their identification purpose.<sup>138</sup> It’s also worth noting that these assessments must be conducted by “trained and knowledgeable personnel” and the assessments conducted “in accordance with any instructions provided by the producer of such assessments.”<sup>139</sup>

- [90] The information gained from this evaluation is then used to produce an individualised education program (IEP). Again this IEP is defined in-depth with a clear intention of ensuring any changes made to a student with disability’s education program does not pose a risk to them receiving an meaningful education. The relevant provisions are as follows:<sup>140</sup>

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<sup>136</sup> *IDEA* (n 129), § 1414(a)(1)(A)

<sup>137</sup> *Ibid*, § 1414(b).

<sup>138</sup> *Ibid*, § 1414(b)(2)(A)-(C).

<sup>139</sup> *Ibid*, § 1414(b)(3)(A)(iv)(v)

<sup>140</sup> *Ibid*, § 1414(d)(1)(A)(i)

**(A) Individualized education program**

**(i) In general**

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

- (I) a statement of the child's present levels of academic achievement and functional performance, including—
  - (aa) how the child's disability affects the child's involvement and progress in the general education curriculum;
  - (bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and
  - (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

- (II) a statement of measurable annual goals, including academic and functional goals, designed to—
  - (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
  - (bb) meet each of the child's other educational needs that result from the child's disability;

- (III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

- (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

- (aa) to advance appropriately toward attaining the annual goals;
  - (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
  - (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

- (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

- (VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

- (bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

- (AA) the child cannot participate in the regular assessment; and
    - (BB) the particular alternate assessment selected is appropriate for the child;

- (VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

- (VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

- (aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

- (bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

- (cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

[91] The *IDEA* also provides clear minimum requirements for the IEP team who are responsible for formulating the IEP. The act clearly envisages that the group responsible for the production of the IEP is comprised of people with appropriate and sufficient knowledge of specialist areas. The *IDEA* requires:<sup>141</sup>

[92]

**(B) Individualized education program team**

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local educational agency who—
  - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (II) is knowledgeable about the general education curriculum; and
  - (III) is knowledgeable about the availability of resources of the local educational agency;

- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

- (vii) whenever appropriate, the child with a disability.

[93] Each of these provisions within the *IDEA* demonstrate that the American approach to determining the educational program for students with disability is highly prescriptive, has clear procedural safeguards, involves clear evaluation requirements and the involvement of those with the relevant specialised knowledge, and is not an unbound plenary power for a department of education to make any and all changes that they feel is in the 'best interests' of the child.

Prescriptive not permissive

[94] When comparing the legislative framework adopted in the United States and Australia, a glaring difference is the nature of the power given to the relevant

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<sup>141</sup> Ibid, § 1414(d)(1)(B)

authority to make curriculum or educational program changes for students with disability. The capacity to make changes to an individual's curriculum or educational program is necessary for any educational system. While this is often particularly relevant to students with disability it is just as important for the diverse range of abilities of their able-bodied peers. This is the reason flexibility and adaptability of the curriculum or educational program is of such importance in education systems that have embraced elements of inclusive education. This includes the national Australian Curriculum.<sup>142</sup>

- [95] Unlike Australia, where the approach is to provide plenary powers to education ministers to make changes for individual students when they see fit, the American approach provides a highly prescriptive procedure that education agencies are required to comply with. This is particularly clear in the requirements for the student's evaluation, the production of an IEP, and the individuals who must be involved in both of these processes. This is important because it creates clear expectations for both those involved directly with the student and education providers for what is required to happen when a student with disability begins school and who is required to do what. By clearly proscribing these processes it provides transparency and clarity, which could be argued is lacking in the Australian systems.

#### Involvement of relevant professionals

- [96] Another difference between the approaches taken in the two nations is the legislative requirements for involvement of professionals with relevant expertise and the use of relevant evaluating assessments in accordance with the instructions from the expert who design them. In Australia, no legislation requires the use of experts or relevant evaluating assessments. The approach taken in the Northern Territory is the closest Australia gets, and even that is phrased in permissive rather than mandatory language.<sup>143</sup> This is not to say that other states or territories do not expect the use of expert advice or relevant tests when making changes for individuals. Rather, this is largely contained in policy statements and these do not provide the same level of assurance or enforceability.
- [97] Mandatorily requiring the use of experts and relevant tests is important because teachers or education administrators are often not in the best position to make these decisions. There is a danger that without requiring their involvement, ultimate decisions will be made by mainstream school principals or education department staff members who do not have the relevant knowledge to make informed decisions that are beneficial for the students involved. There is no guarantee that a mainstream education provider or a special education provider has enough knowledge about individual disabilities to be able to understand the individual capacities and abilities of particular students with disability. They are not in a position to make such a decision without appropriate support from relevant professionals.

### Recommendations

#### **Recommendation 16 – The introduction of legislation detailing the proactive steps that education providers must undertake when providing an education to a student with disability**

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<sup>142</sup> Australian Curriculum, Assessment and Reporting Authority, 'Student Diversity', *Australian Curriculum* (Web Page) <<https://www.australiancurriculum.edu.au/f-10-curriculum/languages/student-diversity/>>.

<sup>143</sup> *Education Act 2015* (NT), s 51.

- [98] We recommend that legislation is introduced that clearly details the proactive steps education providers must undertake when providing an education to a student with a disability, modelled upon the *IDEA*.
- [99] Currently, there is no consistent manner in which education providers identify the needs of students with disability, nor the adjustments that will be required to cater for their needs. Nor is there any requirement for education providers to adopt adjustments that are evidence-based and considered best practice. Moreover, there is no reliable legal route for students or their parents/guardians to ensure that they can access the education they are entitled to.
- [100] We submit that the most appropriate solution to this problem is to have a piece of clear and detailed legislation that outlines the obligations that education providers owe to students with disability and the steps they are required to take when a potential student with a disability intends to access the education provider's service.
- [101] Such legislation must include:
- a) The types of evidence based testing and evaluations a student with a disability is entitled to undergo to identify their particular needs.
  - b) Who may request the student undergo these tests and evaluations, including the student themselves, the education provider, or the student's parent/guardian.
  - c) That the evaluation or testing is conducted by a trained professional or by another under the clear instruction of a trained professional.
  - d) How the evaluations and testing should directly inform any adjustments made for the student.
  - e) That any adjustments made for the student are the product, primarily, of the views of the student, the parent/guardian, and their medical practitioners, and supported by evidence. While education providers must be involved in this decision-making process their views should be secondary to those others listed.
  - f) That any adjustments made are clearly defined, tied to the student's education, and are clearly measurable.
- [102] We submit that an appropriate existing example is provided by the legal approach taken in the *IDEA*. It demonstrates that it is not impractical to provide detailed laws around this issue, and that it is an issue of such importance that it justifies a legislative response.

### **Recommendation 17 – The Disability Standards for Educations are rescinded**

- [103] We submit that the *Disability Standards for Education* should be immediately rescinded.
- [104] As we have discussed throughout this submission, the *Disability Standards for Education* have fundamentally weakened, not strengthened, the protection of students with disability's rights to receive an education on the same basis as their peers without disability. This is fundamentally due to the low requirements in the *Disability Standard for Education*, the vague malleable language used in these requirements, and that the compliance with a standard acts as a complete defence to a claim under the *DDA*.
- [105] We believe that these problems are so fundamental that they cannot be resolved by amending the *Disability Standard for Education* but rather require their removal and replacement with the type of legislation discussed under Recommendation 16.

## Training

- [106] The training provided to education providers in inclusive education and disability education has a clear connection to a variety of the issues we have identified above. If teachers have received a meaningful education in inclusive education principles and strategies, there is less of a need for a segregated education system. If education providers have a stronger grounding in disability education, the discretion they hold in determining reasonable adjustments under the *DDA* or *EOA* may be more justifiable. If teachers have a stronger understanding of inclusive education and disability education there might be less of a need to rely on restrictive practices rather than proactive processes.
- [107] A prominent problem in the Victorian approach to disability education is that teachers and education providers are relied upon to be experts in disability. While some teachers may have particular knowledge of or experience with certain disabilities, they do not have comparable knowledge to medical experts. Nor should teachers with tertiary degrees in special education be expected to formulate and implement individualised education programs or positive behaviour support programs without active input from student's medical professionals.
- [108] It is worth noting, that "experience" does not equate to "expertise". We submit that it means nothing to have a teacher state that they have worked with autistic students for 20 years, when that teaching has never been measured, and when the school in question may have a failed history of dealing with autistic students in all areas.
- [109] An example of the misplaced expectations placed on Victorian teachers is the Victorian Department of Education and Training's 'school-wide positive behaviour support' program. This program is based on a coaching model which provides support for school staff to develop their own skills to identify and implement their own positive behaviour support programs.<sup>144</sup> While developing skills in staff is important, it is unrealistic to expect them to learn the skills of another profession that requires years of learning and practice to master. Equally concerning is that the program is not mandatory, schools may elect to take part in the program, and not all schools receive financial support to do so. There is little utility in providing optional information or programs to schools as to how to address behaviours of concern, when, due to time and resource considerations, they will inevitably feel they cannot justify it.
- [110] The 'school-wide Positive Behaviour Support' program has been claimed to have been in place by the Victorian Department of Education and Training since 2006. With no correlation in the reduction of violence used against students with disability, the evidence suggests mainly autistic students, (anecdotally due to the refusal by the Department to provide data, or perhaps take it), then surely one can infer that this program has failed.
- [111] There is no watchdog ensuring that services for autistic young people have any evidence base. The [REDACTED] emanating from [REDACTED] [REDACTED] is a case in point. Like many other Victorian Autistic schools, numerous complaints of violence against autistic students have been raised about the school.<sup>145</sup>

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<sup>144</sup> Department of Education and Training, *School-wide positive behaviour support* (Web page, 22 June 2018) <<https://www.education.vic.gov.au/school/teachers/management/improvement/Pages/swpbs.aspx#link46>>.

<sup>145</sup> [REDACTED]  
[REDACTED]  
[REDACTED]

The [REDACTED] has been claiming to train teachers in teaching autistic students since 2006. However since that time numerous reports about the failure to support autistic students effectively have come to light.

- [112] Indeed in 2016 after the Victorian Senate Inquiry into Services for Autism their report stated thus:

*“The Committee also found that there was: a lack of understanding and knowledge in the school sector of ASD, coupled with poor or non-existent training of teachers; bullying; a lack of appropriate learning environments; and a lack of opportunity for academic achievement. The Inquiry’s stakeholders consistently highlighted the need for an education system that is inclusive and welcoming of students with ASD.”*

- [113] How can this be? The answer is that like other schools and many services claiming to specialise in providing interventions for autistic young people, there are no checks and balances, and claims of using “evidence-based” approaches are flung loosely around without a clear understanding of what such a phrase means. How can the Autism Teaching Institute train teachers at all, when the school they are based in prolifically uses restrictive practices, even in the past using “aversive” practices, and having a policy describing the same? How can they train teachers when there is no one who is qualified in Applied Behaviour Analysis at the school?

- [114] Similarly, [REDACTED] which again claim to use evidenced-based practices, use violence against students with disability who have behaviours of concern, and also do not use Applied Behaviour Analysis, the only evidence-based intervention for Autism Spectrum Disorder.

### Recommendations

**Recommendation 18 – That within the *Disability Standards for Education*, if they are retained, the decision-making process for reasonable adjustments is revised to emphasise the primacy of expert knowledge of disability and reduce the discretion given to education providers**

- [115] We recommend that the *Disability Standards for Education* are amended to explicitly recognise the importance of education providers seeking expert advice regarding reasonable adjustments for students with disability from those students’ medical professionals.
- [116] As expressed above, we are concerned that under the current system teachers and education providers are given a large degree of discretion when choosing whether to provide a reasonable adjustment and if so what adjustment is appropriate. Teachers are not experts in disability and should not be treated as such.
- [117] Students’ medical professionals do have the relevant expertise and their advice and consultation should be required when formulating adjustments.