MONASH University
Castan Centre for Human Rights Law

Improving Educational Outcomes for Children with Disability in Victoria

Final Report

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EXECUTIVE SUMMARY

Around one in every six Victorian students lives, and learns, with disability.[1] Children with disability[2] make immeasurable contributions to their schools and communities. However, across Australia these children continue to be left behind at school, experiencing poorer educational outcomes than their peers without disability.[3] For these students, their school experiences can play a pivotal role in the success, security and independence they enjoy as adults. People with disability are less likely to participate in the workforce,[4] and enjoy a weekly median income less than half of those without disability.[5]

In recent years, a number of inquiries and reports have drawn attention to the disadvantage facing students in Victoria's government schools, including a review of the Program for Students with Disabilities (PSD Review).[6] The Government of Victoria has responded to the growing chorus of concern by launching a wide-ranging inclusive education reform agenda, underpinned by a considerable boost to funding. These moves are much needed, and very welcome.

This research aims to shed light on the current situation by applying a human rights analysis to the experiences of children with disability in the Victorian mainstream government school system. It highlights areas in which progress has been achieved, and those in which children with disability continue to experience discrimination and disadvantage. The report offers recommendations which are intended to strengthen

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[1] Most recent estimates range from 15% (Department of Education and Training, *The Education State: Review of the Program for Students with Disabilities* (2016) 14) to 17.2% (Education Council, Nationally Consistent Collection of Data: School Students with Disability, *2016 Emergent Data On Students In Australian Schools Receiving Adjustments For Disability* (2016) 3).

[2] A note on terminology – this report follows a recommendation from People with Disability Australia to ensure that a social model of disability is reflected in descriptions of people with disability (see: People with Disability Australia, 'Terminology Used by PWDA' <http://www.pwd.org.au/student-section/terminology-used-by-pwda.html>). The main features of this approach include acknowledging the person before their disability (including using person-first language), electing not to focus unnecessarily on a person's disability, and centring instead upon the processes and practices that have disabling effects.

[3] As of 2015, 41% of Australians with disability completed year 12 or equivalent, compared to 62.8% of their peers without disability (Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, CAT 4430.0 (2015)).

[4] 52.8%, as opposed to 82.5% for people without disability (Australian Bureau of Statistics*, Disability and Labour Force Participation*, CAT 4433.0.55.006 (2012)).

[5] Australian Bureau of Statistics, Disability, Ageing and Carers, Australia: Summary of Findings, CAT 4430.0 (2015).

[6] Department of Education and Training, *The Education State: Review of the Program for Students with Disabilities* (2016) *('PSD Review').*

the current reform process, and to assist the Department of Education and Training (the Department) to protect and fulfil the rights of children with disability.

Our findings are based on almost 100 interviews with stakeholders, including former students, school staff (including principals, teachers and support staff), and individuals working to support and represent them. The research also draws on detailed analysis of relevant policies and laws, in particular the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) and state and federal anti-discrimination legislation.

Summary of findings

It is important to acknowledge at the outset the considerable progress made by the Government of Victoria and the Department in responding to the many recommendations contained in the PSD Review and other reports. The scale and scope of the inclusive education reform agenda, and the resources provided for its implementation, are evidence of a genuine and much-needed commitment to improving the educational experiences and outcomes of children with disability.

It is too early to evaluate the impact of the many initiatives being rolled out as part of the reform agenda. However, the findings of this research point to ways in which these initiatives may be enhanced, and gaps which remain. Many of these gaps relate to two overarching challenges. The first is the challenge of translating legislative and policy imperatives into action in the school and classroom. The second is the failure to temper increased school autonomy with effective oversight and accountability.

Under law, every student in Victoria has the right to access education without discrimination,[7] and participate in the courses or programs, and use services and facilities provided by an educational institution, on the same basis as students without disability.[8] This includes a right to reasonable adjustments, where these are necessary to fulfil the right to participate.[9]

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[7] *Equal Opportunity Act 2010* (Vic) s. 38 *('Equal Opportunity Act')*.
[8] Disability Standards for Education 2005 (Cth) Pt 5.1 *('Disability Standards')*.
[9] Disability Standards Pt 5.1; *Equal Opportunity Act* s. 40.

Our research reveals that some government schools continue to turn away students because of their disability. This often takes the form of school leaders discouraging parents from seeking enrolment for their child, on the basis that the school isn't the right 'fit' for the student, or can't accommodate the student's needs. This is occurring in an informal manner, without an analysis of the adjustments needed by the child, and whether they can be reasonably provided by the school.

Once enrolled and in the classroom, students are not always receiving appropriately designed and implemented adjustments. Schools often rely heavily on aides who can support multiple students, rather than implementing more complex, targeted adjustments. Our research also indicates that teachers often struggle to modify curricula in ways which suit the needs and capacities of individual students with disability, instead simply 'dumbing down' work tasks.

The challenge facing schools in responding to the needs of students with disability is made even more difficult by the current funding model. According to the PSD Review, while 15 out of every 100 Victorian students is estimated to be in need of a reasonable adjustment support due to a disability, only four of these students receive targeted funding under the Program for Students with Disabilities.[10] Moreover, eligibility is based on deficit and diagnosis, rather than a student's functional needs and capacities. The result is that many students are not receiving the support they need to participate in education on the same basis as their peers without disability: students eligible for the PSD don't always receive the specific adjustments they need; ineligible students are less likely to receive adjustments than their eligible peers; and schools are disinclined to enrol students with disability, paving the way for discrimination.

While the Department pursues a policy of inclusion within mainstream schools, many students with disability continue to be segregated from their peers in the classroom or playground (a phenomenon known as 'micro-segregation'). Several parents reported that their children were placed in separate areas of the classroom (such as in the alcove where school bags are kept) or were separated from other children at break times. As well as contravening the principle of inclusion, these practices also

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[10] Department of Education and Training, *PSD Review,* above n 6, 14.

contribute to social exclusion, and are linked to the manifestation of challenging behaviours.

At the level of the education system, significant gaps exist in oversight and accountability. While the Department has made substantial headway in developing rights-compliant policies relating to inclusive education, the extent to which these policies are binding upon schools is often unclear, and few mechanisms exist for ensuring they are implemented. Instead, schools are required to self-assess their implementation of Department policies on inclusion. The Department has not clearly articulated *what* duties are imposed on *which* duty-bearers by Department policies, nor has it attached clear consequences for failure to fulfil these obligations.

While positive steps have been taken to improve the quality and consistency of data collection on students with disability, mechanisms which enable the Department to respond to red flags in the data and to intervene to improve school performance are lacking. Where appropriate data is being collected, it is not being publicly released, further undermining accountability.

These gaps are the product of a long-standing orientation towards devolving responsibility to the school level. While this can have positive effects, this research reveals that without accompanying oversight and accountability processes, devolution can lead to patchy and arbitrary implementation of policies across schools, and to inconsistent protection and fulfilment of students' rights. The Department must be mindful that its obligations under the Victorian Charter extend beyond merely enacting rights-consistent policies, and extend to ensuring these policies are brought to life in every Victorian classroom.

RECOMMENDATIONS

1. Unequal access to schools

To the Department of Education and Training:

1.1. Make information regarding the rights of children with disability and their parents accessible prior to enrolment (including the permissible bases for refusal of enrolment and the required process for making such an assessment). At a minimum, the Department should include this on its website and mandate its inclusion on individual school websites.

1.2. Put together an information pack that must be distributed to the parents of any prospective student with disability, which includes at a minimum:

- information on relevant laws and policies;

- plain language explanation of their child's rights in relation to enrolment;

- guidance on how the school will conduct an analysis of the prospective student's anticipated adjustments and determine their reasonableness;

- information on supports available for students with disability, including targeted funding, Individual Learning Plans (ILPs) and Student Support Groups (SSGs); and

- details of the school and Department's complaints processes, and options for escalating a complaint.

1.3. Amend the existing policy guidance on admissions and placement to clearly state the rights of children with disability to seek admission to, or apply for enrolment in a government school on the same basis as a prospective student without disability, and without experiencing discrimination. The guidance should note that 'seeking enrolment' includes pre-enrolment processes, such as school tours and meetings with staff.

1.4. Develop and roll out practical guidance and tools for principals to conduct an analysis of a prospective student's anticipated adjustments, which integrate a human rights-based approach, and are designed to achieve compliance with the requirements of the *Equal Opportunity Act 2010* (Vic) s. 40(3) and the Disability Standards (Cth) Pt.

4. These tools should be user-friendly and come in simple to use formats, such as matrices or checklists.

1.5. Require all mainstream schools to collect and report to the Department de-identified data relating to the enrolment of students with disability (both receiving PSD and requiring adjustments but without PSD funding). This should include numbers of enrolments, numbers and reasons for refusals, changes in attendance, and discontinued enrolments. The Department should publish this data annually (aggregated across schools to ensure proper protection of privacy).

1.6. Monitor trends in the enrolment of children with disability (both receiving PSD and requiring adjustments but without PSD funding) within and across schools, and develop mechanisms to follow up on potential breaches revealed in the data. At a minimum this should include:

- requiring schools enrolling fewer students with disability than would be expected to demonstrate how students with disability are being supported during pre-enrolment and enrolment processes, and to provide evidence that gatekeeping is not taking place; and

- requiring schools whose enrolment of students with disability drops off in later year levels to demonstrate how it is working with students with disability to support retention and attendance.

1.7. Emphasise in all policies, training materials and other guidance relating to admissions that anti-discrimination and human rights legislation apply to actions undertaken prior to admission and during discussions regarding a child's ongoing enrolment.

2. Assessment and Funding Experiences: the Program for Students with Disabilities

To the Department of Education and Training:

2.1. Develop a new funding model to replace the PSD, based on the recommendations made in the PSD review. The new funding model should:

- be based on human rights principles and standards;

- reflect a strength-based functional needs approach, and use eligibility criteria based on a student's functional needs, rather than diagnosis or clear cut-offs (for example, based on IQ);

- close the existing gap in support for children with autism, Aspergers, dyslexia, and related disorders; and

- incorporate enhanced accountability mechanisms, which ensure that the Department is able to determine the impact of funding on students' schooling outcomes.

2.2. Apply a human rights-based approach to developing and implementing a new funding model. This should involve special emphasis on meaningful, ongoing consultation with stakeholders (especially students and their families), and strong monitoring and accountability processes which are embedded in all stages of the policy design and implementation process.

2.3. Ensure that the rollout of the new funding model (and all associated guidance and tools) raises school staff and parent awareness of schools' legal and policy obligations to make reasonable adjustments, and how these obligations are to be fulfilled in the context of the new funding model.

3. The Right to Participate: Curriculum Modifications, Adjustments, and (Low) Expectations

To the Department of Education and Training:

3.1. Make ILPs and SSGs compulsory for all students who require adjustments beyond quality differentiated teaching and learning, not only those receiving PSD support.

3.2. Require all ILPs to be submitted to the Department, and develop a moderation process for ILPs. This could involve undertaking random reviews of ILPs. Where the review identifies a potential concern (for example, a manifestly inadequate ILP, or an ILP which has not been updated), support should be extended to the school in question to build the capacity of its staff and leaders until the learning supports in place meet requisite standards.

3.3. Evaluate the effectiveness of existing professional development opportunities and other guidance (such as online materials) designed to assist teachers in making

appropriate adjustments and curriculum modifications. Develop new guidance and opportunities where existing support is ineffective or gaps exist, so that a comprehensive suite of options is available to teachers needing to build their skills. This should include options for seeking specialist advice, peer skill sharing, and ongoing mentoring relationships.

3.4. Elevate the personalised support profiling tool currently in development into a 'hub' for each student. The hub should integrate all planning and assessment tools and documentation (including ILPs), reports and results, SSG minutes and other correspondence, and should enable easy reporting for the purposes of the Nationally Consistent Collection of Data on School Students with Disability (NCCD). The hub should also provide links to all relevant policies, guides and tools, and to professional development opportunities and support.

3.5. Ensure that the guidelines on the use of teacher aides currently in development include guidance to teachers to enhance understanding of the policies which delineate instructional responsibilities for teachers and aides. They should also include practical tools to help teachers and aides apply the relevant policies in the classroom, for example studies of best practice in how teachers and aides can best work together.

3.6. Examine options for increasing rights-compliance in standardised testing, in particular VCE and NAPLAN. Evaluate how participation by children with disability can be encouraged and necessary adjustments made to facilitate participation, and to overcome the current incentives for schools to exclude or exempt students with disability.

4. Social inclusion, dignity and self-worth

To the Department of Education and Training:

4.1. Offer mandatory training on inclusive education and the social model of disablement for all school staff.

4.2. Incorporate social risk assessment into the planning process for necessary adjustments, and ensure tools (including ILPs) used for this process direct school staff and SSGs to consider any unintended negative effects of proposed adjustments on the child's social inclusion, and take steps to mitigate these.

4.3. Develop specific policy guidance about micro segregation (that is, segregation in the classroom or playground except where it constitutes a timeout, safe space, or chill out room). This should emphasise that these techniques should not be used as behaviour management, unless they have been included in a child's ILP developed in consultation with the parents, are used as infrequently and for as short a time as possible, and as a last resort.

5. Managing Behaviours of Concern

To the Government of Victoria:

5.1. Repeal regulation 25 of the Education and Training Reform Regulations 2017 (Vic) (this is our preferred position). At a minimum, regulation 25 should be redrafted for greater clarity, to give the least restrictive means principle in section 7(2) of the Charter primacy, and with careful consideration of the human rights engaged.

To the Department of Education and Training:

5.2. Amend the School Policy and Advisory Guide - Restraint of Students to require that a meeting be held between the relevant teacher, parents, the relevant school leader, and any other relevant stakeholders after an incident of restraint or seclusion, or when an incident has been alleged by a student, witness or parent. Where a SSG is in place, the meeting should be held under the auspices of the SSG. Where an SSG is not in place, one should be convened. A Behaviour Support Plan should be put in place (and where one is in place, revised) in the wake of any incident of restraint or seclusion.

6. Workforce capacity: training and support

To the Department of Education and Training:

6.1. Require all schools to appoint a teacher to lead the school's inclusion initiatives. The teacher in this role will receive ongoing training to enable them to support classroom staff, and to embed an inclusive culture across the school.

6.2. Develop a plan to evaluate the impact and effectiveness of all workforce development initiatives relating to inclusive education. This should evaluate each initiative, as well as considering the overall effectiveness and suitability of the workforce development strategy. Report publicly on evaluation outcomes.

6.3. Expand collaborative learning initiatives on inclusive education. These should draw on lessons learned from other collaborative learning initiatives in the Department, and should emphasise ongoing support for teachers, and collaboration across schools (including at school leader level), and should address (among other things) how to make adjustments.

6.4. Develop and introduce a mandatory professional development program for school aides, and increase opportunities for aides to learn from experts outside the school.

7. Grievance Handling

To the Department of Education and Training:

7.1. Require schools to develop complaints policies which reference the Department Parents Complaints policy (including information on how to escalate concerns). Require schools to publish their complaints policies on their websites, or to provide a link to the Department guidance on parent complaints.

7.2. Clarify in all guidance related to complaints that parents have the right to refer their complaint to the Independent Office for School Dispute Resolution, once efforts at resolution at the school level have failed.

7.3. Publish a report annually on complaints made by students and parents against schools. The report should include information on the number of complaints received by the Department's regions and by central, how they are resolved, and the categories and subject-matter of complaints.

8. Barriers to Change: The Impact of Devolution

To the Department of Education:

8.1. Include indicators of inclusion and compliance with anti-discrimination laws and the Charter as key performance indicators in Principals' professional development plans.

8.2. Make explicit the nature of the obligation placed on schools by each Department policy. The School Policy and Advisory Guide should clarify the nature of schools' duties under the Guide, and identify the specific duty-bearers under each policy.

8.3. Require schools to make all their policies available online.

8.4. Incorporate into the FISO practices and measures specifically designed to improve outcomes for students with disability, and to help schools realise their legal and policy obligations to students with disability.

8.5. Conduct a comprehensive review into all aspects of the Department's disability-related monitoring and data-collection processes. The review should adopt a human rights-based approach, and should ensure that monitoring and learning are integrated into all aspects of the government's reform agenda. The review should focus on creating the conditions for: enhanced oversight of school performance in relation to their students with disability; better linkages between policy and practice at the school level; generating information which shed light on the disbursement and impact of targeted funding; and increased transparency.

8.6. Periodically audit schools' policies for compliance with Department requirements, and where the policies do not reflect Department policy or legal obligations, or do not reach minimum standards, support the School Council to revise the policies accordingly.

8.7. Develop an Access to Information policy, which enshrines the principle of maximum possible disclosure, and provides guidance to Department personnel (and to the public) on the permissible bases for not disclosing information.

To the Victorian Registration and Qualifications Authority (VRQA):

8.8. Reiterating the recommendation of the Victorian Human Rights and Equal Opportunity Commission's 2012 Held Back report, the VRQA should examine in school registrations, reviews, and inspections:

- a sample of ILPs and SSG minutes;

- data on educational outcomes for students with disability enrolled at the school;

- evidence of whole-of-school compliance with anti-discrimination laws and the Charter;

- restraint and seclusion incident records; and

- complaint data.

The VRQA should also examine enrolment and refusal data.

PART 1: ABOUT THIS PROJECT

1. Background

In recent years, the experiences of children with disability in the Victorian education system have received significant public and government attention. Reports by children, their parents and advocates alleging misuse of restraint,[11] expulsion and exclusion, and concerns regarding supports and funding,[12] have placed inclusive education firmly on the public and political agenda. These efforts to raise awareness have led to a number of reviews and inquiries. In 2012, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) published a wide-ranging report entitled *Held Back: The Experiences of Students with Disabilities in Victorian Schools,*[13] and the Victorian Auditor-General's Office published *Programs for Students with Special Learning Needs.*[14] These studies identified significant shortfalls in support for inclusive education in Victoria, and correspondingly, increasing pressure on educators and other staff in terms of skills, training and resources to provide properly for students with complex needs.

In 2015 and 2016, the Australian Senate conducted inquiries into violence against people with disability, and access to learning for students with disability respectively. The reports of these inquiries also revealed serious systemic issues with the treatment of students with disability.[15] Key issues of concern raised in these reports included the use of restraint practices and seclusion facilities in Victoria, and the practice of

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[11] Mary Gearin, 'Teachers restraining autistic kids "puts them in danger"' *ABC News* (online), 18 May 2011 <http://www.abc.net.au/news/2011-05-18/teachers-restraining-autistic-kids-puts-them-in/2717856>; Timna Jacks and Henrietta Cook, 'Students grabbed, wrestled to the floor and strapped to chairs three or more times a day' *The Age,* 9 Jun. 2017 (updated) <https://www.theage.com.au/national/victoria/students-grabbed-wrestled-to-the-floor-and-strapped-to-chairs-three-or-more-times-a-day-20170608-gwn13z.html>.

[12] Timna Jacks and Henrietta Cook, 'Desperate parents in classroom-support fight for children with disabilities' *The Age,* 30 May 2017 <https://www.theage.com.au/national/victoria/desperate-parents-in-classroomsupport-fight-for-children-with-disabilities-20170530-gwg8hv.html>.

[13] Victorian Equal Opportunity and Human Rights Commission, *Held Back: The Experiences of Students with Disabilities in Victorian Schools* (2012) (*'Held Back'*).

[14] Victorian Auditor General's Office, *Programs for Students with Special Learning Needs* (2012).

[15] See: Senate Community Affairs References Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015); Senate Education and Employment References Committee, *Access to real learning: the impact of policy, funding and culture on students with disability* (2016).

'gatekeeping', whereby schools potentially contravene their obligations under anti-discrimination legislation by refusing to enrol students with disability or refusing to allow them to attend full-time.[16]

More recently, reports by the Family and Community Development Committee of the Parliament of Victoria into services for people with Autism Spectrum Disorder,[17] by the Victorian Ombudsman into government school expulsions,[18] and a follow-up to its *Held back* report by the Victorian Human Rights and Equal Opportunity Commission,[19] have all kept the spotlight on difficulties faced by many children with disability seeking a quality education.

It is within this context that the Government of Victoria has initiated a wide-ranging process - embedded within the Education State initiative - to reform policies and practice relating to inclusive education.[20] This has involved the development of a new Inclusive Education Policy and Framework, a suite of workforce development initiatives including an Inclusive Education Workforce Capability Strategy (which at the time of writing is in development), and the injection of considerable funding to support inclusive education across the state. Other initiatives include changes to positive behaviour support[21] and the use of restraint and seclusion (including the appointment

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[16] On enrolment practices, see also: Urbis, *2015 Review of the Disability Standards for Education 2005: Final Report* (2015).

[17] Parliament of Victoria, Family and Community Development Committee, 'Inquiry into Services for People with Autism Spectrum Disorder: Final Report' (2017).

[18] Victorian Ombudsman, *Investigation into Victorian Government School Expulsions* (2017).

[19] Victorian Equal Opportunity and Human Rights Commission, *Held Back: The Experiences of Students with Disabilities in Victorian Schools (analysis paper)* (2017).

[20] Department of Education and Training, 'Special Needs Plan' (this section of the Department website is not currently operational). The Victorian government's reforms take place during a time of great change in the Australian disability sector. The National Disability Insurance Scheme (NDIS) is currently being rolled out across the country. While schools remain responsible for personalising learning and support for students that primarily relate to their educational attainment, the NDIS will fund supports that the student would require which are associated with the functional impact of the student's disability on their activities of daily living (those not primarily relating to education attainment) including personal care and support and transport to and from school and specialist transition supports to and from school to further education, training or employment, and will play a leading role in early childhood early intervention (see: Department of Education and Training, *Schools and the NDIS: Frequently Asked Questions,* 18 July 2017 (v. 2) 7). The precise contours of operational responsibility have not yet been clearly demarcated.

[21] Department of Education and Training, 'School-Wide Positive Behaviour Support' <http://www.education.vic.gov.au/school/teachers/management/improvement/Pages/swpbs.aspx> (accessed 12 Apr. 2018).

of a Principal Practice Leader (Education)),[22] and the development of resources for schools such as personalised learning and support guidelines and tools. Critically, it has also included a review of the current model used to fund supports for children with disability, known as the Program for Students with Disabilities (PSD).[23] In its response to the review, the Government of Victoria committed to carefully consider the recommendations for a new needs-based funding model.[24] At the time of writing, the Department advised that a new funding model is in development.

2. Aims

This study aims to apply a human rights lens to the laws, policies and practices which shape how children with disability are educated in mainstream schools. Specifically, it aims to:

- assess the human rights compliance of Victorian laws and Department policies and procedures relating to the education of children with disability, and recommend reforms where necessary;
- investigate how children with a disability are educated in the Victorian school system to identify how laws, policies and procedures translate into practice, and how practices could be improved to ensure that the rights of children with a disability are supported and protected in the education system; and
- propose reforms to laws, policies, procedures and practice which would ensure that the Victorian Charter and other human rights standards are being fully implemented in Victorian schools, leading to an inclusive and effective educational experience for children with a disability.

As noted above, this study takes place during a time of dynamic change to policies and practices in the Department, and within and across schools. This report therefore seeks to take into account the shifting policy landscape, and to provide insights and

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[22] Department of Education and Training, 'Restraint and Seclusion' <http://www.education.vic.gov.au/school/teachers/studentmanagement/Pages/behaviourofconcern.aspx> (accessed 12 Apr. 2018).
[23] Department of Education and Training, *PSD Review,* above n 6.
[24] Department of Education and Training, *Inclusive Education for All Students with Disabilities and Additional Needs: The Government's Response to the Review of the Program for Students with Disabilities* (2016) 24 *('PSD Review Response').*

recommendations which will assist the Department and schools to ensure that proposed reforms align with human rights principles and duties.

3. Methods

This study combines a detailed analysis of laws, policies and guidance with insights of former students, parents, teachers and other stakeholders into the lived experience of how these policies play out in reality. The project employed a qualitative approach which entailed both a legal review and empirical research.

3.1. Desk research

The Castan Centre conducted a comprehensive desk review of all laws, Department policies and procedures and analysed them for potential breaches of Charter rights. The results of this study were compiled in the first interim report, authored by Mr Adam Fletcher and completed in May 2017.[25]

In addition, the Castan Centre conducted a review of school policies using systematic sampling. Using the Victorian Schools July 2017 Summary Statistics, every 20th school was selected and its website reviewed. Details of the review methodology are contained in Appendix I to this report.

3.2. Empirical research

Informed by the findings of the first initial report, Dr Claire Spivakovsky of Monash University' School of Social Sciences conducted 93 semi-structured interviews with a broad range of key stakeholders in order to collect data on their experiences with the education system. Stakeholders included school staff, parents of students with disability, and young adults with disability, as well as individuals and organisations who work with and around students with disability and mainstream government

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[25] Adam Fletcher, 'Improving Educational Outcomes for Children with Disability in Victoria: Human Rights Review of Victorian Law, Policy and Practice Relating to Disability in Education', First Interim Report, Monash University Castan Centre for Human Rights (2017) (on file with authors).

schools. A complete breakdown of the individuals and organisations interviewed as part of this project is presented in Appendix II to this report.

Approval to recruit and interview these stakeholders was granted by Monash University's Human Research Ethics Committee (Project number: 1363) and the Victorian Department of Education and Training (Project number: 2017_003292). Approval to advertise recruitment material to parents was also granted by Scope (Project number: 108/17 LR), with recruitment material further distributed by Yooralla, Noahs Ark, and other contacts of Dr Spivakovsky.

The core themes and common experiences which emerged from these interviews formed the basis of a second interim report completed in December 2017,[26] and inform the findings of this report. Quotes from interview transcripts have been used to elucidate these findings. To protect the confidentiality of those who agreed to be interviewed as part of this project, all quotes presented in this report have been de-identified. Care has also been taken to remove any other potentially identifying details about individuals, schools and organisations, including removing references to the gender of students and staff.

3.3. Limitations of the study

The 93 interviews conducted as part of this study offer insights into some of the common perceptions and experiences of a core cross-section of people involved in the delivery, receipt or support of inclusive education practices and approaches in Victorian government schools. These insights are, however, subject to certain limitations.

The first is that the recruitment of both parents of students and young people with disability for this project was largely opportunistic. In the case of parents, information about the study was circulated through a number of groups and individuals providing services or supports to people with disability, families and/or carers. Consequently the perceptions and experiences of parents included in this study may not necessarily

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[26] Claire Spivakovsky, 'Improving Educational Outcomes for Children with Disability in Victoria: Human Rights Review of Victorian Law, Policy and Practice Relating to Disability in Education', Second Interim Report, Monash University Castan Centre for Human Rights (2017) (on file with authors).

speak to those of parents who are not linked-in to services or supports, or who make limited use of such connections.

In the case of young people with disability, it was not feasible within the timeframe for completion of this project to complete the lengthy processes necessary to secure ethics approval to interview school-age students with disability. Instead, permission was sought to interview young people with disability who are currently attending a Victorian university, and who have previously been enrolled at a mainstream school in Victoria. Accordingly, the stories young people shared about their perceptions and experiences of mainstream government schools are historical in nature, and were solicited through a process of reflection. The perceptions and experiences of young people who have the desires, supports and/or means to enrol in higher education may not always align with or reflect those of young people who do not.

It is also important to note that the parents and young people with disability who participated in the study were self-selected. Often, individuals who self-select to participate in research do so because they have had an especially negative or positive experience that they want to share. In the case of this study, the majority of parents and young people who elected to participate did so because they had had a negative experience of the mainstream education system. Their experiences should not be taken to be representative of all parents and former students.

A purposive recruitment strategy was used in relation to school staff, meaning the study targeted staff from mainstream government schools that had developed a reputation for being more inclusive of students with disability. Fourteen 'inclusive' mainstream government schools were approached to take part in this study based on this criterion. Six schools agreed to participate. There was significant variation in the level of access granted by these schools, particularly in relation to accessing classroom teachers and aides. Three principals explicitly refused to allow Dr Spivakovsky to approach their school's teachers or aides, with a fourth principal expressing support for Dr Spivakovsky to approach staff, but then failing to facilitate this occurring. Only two principals invited Dr Spivakovsky to attend their school, observe classroom practice, and speak with a small number of select staff.

To supplement these limited insights into school staff perceptions and experiences, a number of individuals employed at organisations which work with schools and/or parents to support students with disability in the classroom were also interviewed to share their observations of classroom practices. Several individuals employed at organisations that represent the rights and interests of students with disability or education personnel were also interviewed.

3.4. Acknowledgements

The Department supported the Castan Centre in the research process, including providing introductions to schools, and provided information about Department processes, policies, and initiatives. Representatives of the Department received copies of the interim reports, and reviewed a draft of this final report and provided comments.

It is important to note that this research has been conducted independently. The findings do not necessarily reflect the views of the Department, however the Department has committed to considering the recommendations contained in this report.

The authors would like to express their appreciation to the Department for its cooperation during this project.

The authors would also like to extend their thanks to Colin Biggers & Paisley Lawyers, to Adam Fletcher, and to Castan Centre interns who provided research support at various stages of this project.

Lastly, the authors wish to thank the former students, parents, school staff and other stakeholders who generously shared their experiences and insights.

PART I: IDENTIFYING RELEVANT LAWS, POLICIES AND CONCEPTS

1. Mapping the Legal Landscape

1.1. Victorian and Federal Law

The Department is subject to a number of laws and policies designed to protect and fulfil the rights of children with disability in the Victorian government school system. Chief among them is the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). The Charter makes it unlawful (subject to certain exceptions and limitations) for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.[27] These obligations attach to entities and individuals, meaning the Department, individual schools, principals, teachers and auxiliary staff all have responsibilities under the Charter.

The Charter does not expressly protect the right to education. It does however contain a range of rights relevant to the treatment of children with disability in the education system. These include rights to protection from cruel, inhuman or degrading treatment (s. 10), freedom of movement (s. 12), privacy (s. 13), freedom of expression (s. 15), protection of families and children (s. 17) and personal liberty (s. 21). Critically, it protects the right to recognition and equality before the law (s. 8), which includes the right to enjoy other human rights without discrimination, and an entitlement to protection of the law without discrimination. The Charter provides a mechanism for balancing competing rights and interests by allowing rights to be subject only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[28]

In addition to the Charter, the rights of children with disability in educational settings are protected by Victorian and federal anti-discrimination laws. The *Equal Opportunity*

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[27] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s. 38 *('Victorian Charter')*.
[28] *Victorian Charter,* s. 7.

Act 2010 (Vic), the *Disability Discrimination Act 1992* (Cth) and the Disability Standards for Education 2005 (Cth) all impose relevant duties on education providers.

It is important to note that not all these obligations apply to all schools. Non-government schools, including those within the independent and Catholic systems, are not public authorities for the purposes of the Charter and are not bound by its provisions.[29] They are however required to comply with both federal and Victorian anti-discrimination legislation, as well as those standards and policies set down by the Department which apply to all registered schools.

1.2. International Human Rights Law

Australia is a party to a number of treaties which include obligations relating to the education of children with disability. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (ICRC), and the Convention on the Rights of Persons with Disabilities (ICRPD). These treaties contain a broad range of rights which are potentially relevant to the educational experiences of children with disability. Of particular note, however, are:

- the right to education, which is enshrined in article 26 of the ICESCR and reaffirmed in the ICRC,[30] and the ICRPD.[31]
- the right to equality and non-discrimination on the basis of disability. This right is protected most notably under the ICCPR,[32] ICESCR,[33] ICRC[34]and the ICRPD.[35]

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[29] See the example provided in s. 4(1)(c) of the Victorian Charter.
[30] Nov. 20, 1989, 1577 U.N.T.S. 3, art. 28 and art. 23(3) (in relation to the right to education of children with disabilities).
[31] Dec. 13, 2006, 2515 U.N.T.S. 3, art. 24.
[32] Dec. 16, 1966, 999 U.N.T.S. 171, arts. 2.1, 24, 25 and 26. It should be noted that while disability is not expressly listed as a prohibited ground for discrimination, it is roundly accepted as being implicitly covered (see: UN Committee on Economic Social and Cultural Rights (CESCR), General comment No. 5 (1994), *Persons with Disabilities*, 9 Dec. 1994, E/1995/22).
[33] Art. 2(2).
[34] Art. 2(1).
[35] ICRPD, arts. 3, 4, 5 and 12.

The specific content and contours of these rights have been elaborated through international jurisprudence and interpretation aids (known as 'general comments' or 'general recommendations') published by relevant treaty bodies.

International human rights law is not automatically enforceable in Australian courts. However, by entering into these treaties, Australia has voluntarily committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law.[36] That implementation depends on the actions of the states and territories – including Victoria - is no justification for failure to meet treaty obligations.[37] A number of international human rights obligations have been directly incorporated into domestic legislation, most notably in this case in the Charter. However, even when treaties have not been directly incorporated by legislation, they are an indirect source of rights. They give rise to a legitimate expectation of compliance by the executive, and they provide guidance on how particular domestic laws and obligations should be understood.[38] Indeed, international law and jurisprudence are specifically nominated as aids to interpretation under section 32 of the Charter.

1.3. A Human Rights-Based Approach

The adoption of a human rights-based approach to policy development and implementation is essential to achieving compliance with human rights standards. The Australian Human Rights Commission has observed that 'human rights principles and standards provide guidance about *what* should be done to achieve freedom and dignity for all. A human rights-based approach emphasises *how* human rights are achieved.'[39] It considers that for Australia to comply with its international

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[36] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 26.

[37] Ibid., art. 27. However, note Australia's declaration in respect of the ICCPR: '"Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise." This declaration does not, however, alter Australia's obligations under international law.

[38] *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

[39] Australian Human Rights Commission, 'Human rights based approaches' <https://www.humanrights.gov.au/human-rights-based-approaches> (accessed 8 Feb. 1018). See also: United Nations Children's Fund, *A Human Rights-Based Approach To Education For All: A Framework For The Realization Of Children's Right To Education And Rights Within Education* (2007); United Nations Children's Fund, 'The Right Of Children With Disabilities To Education: A Rights-Based Approach To Inclusive Education', Position Paper (2012).

responsibilities, all areas and levels of government in Australia have a responsibility to apply human rights-based approaches.

A human rights-based approach in this context requires duty-bearers to perform their functions with regard to five key principles, known as the PANEL principles. These are:

- Participation
- Accountability
- Non-discrimination and equality
- Empowerment
- Legality

These principles underpin the analysis and recommendations contained in this report.

2. Human rights in action: Inclusive education

Central to the Department's vision and policies for students with disability is 'inclusive education'. The concept of inclusive education is rooted in human rights; indeed the Victorian SHARE Principles acknowledge that 'inclusive education is supported by and is the realisation of a human rights-based approach to education.'[40] It could be said therefore that truly inclusive education is what happens when human rights principles are fulfilled, and human rights-based approaches applied, in an educational system.

Tighter definitions of inclusive education are, however, slippery and contested.[41] Nonetheless, the Department has recently articulated its vision of inclusive education in the following terms:

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[40] Department of Education and Training, School Policy Advisory Guide, 'Students with a Disability' <http://www.education.vic.gov.au/school/principals/spag/participation/Pages/studentswithdisability.aspx> (accessed 8 Feb. 2018).

[41] For a detailed discussion of the challenges in defining inclusive education, see: Chris Forlin et al, *Inclusive Education for Students with Disability: A review of the best evidence in relation to theory and practice*, ARACY (Report prepared for the Department of Education, Employment and Workplace Relations) (2013) 6-10.

'An inclusive education system enables all students to be welcomed, accepted and engaged so that they can participate, achieve and thrive in school life. Inclusive education:

- ensures that students with disabilities are not discriminated against and are accommodated to participate in education on the same basis as their peers;

- acknowledges and responds to the diverse needs, identities and strengths of all students;

- occurs when students with disabilities and additional needs are treated with respect and are involved in making decisions about their education;

- benefits students of all abilities in the classroom and fosters positive cultural change in attitudes and beliefs about disability, in and beyond the school environment;

- contributes to positive learning, engagement and wellbeing outcomes for students.'[42]

The Department's policy on inclusive education states that it is 'committed to embedding inclusive education in all school environments for students with disabilities and additional needs. All Victorians, irrespective of the school they attend, where they live or their social or economic status, should have access to high quality education.'[43]

Aspects of the Department's definition align closely with international human rights standards. Importantly, it includes an emphasis on non-discrimination, a focus on the whole person as an individual with unique capacities, and acknowledges the benefits of inclusive education beyond the student in question – to their peers, their communities and society generally.[44]

However, the Department's definition departs from international standards in one important way. By adopting the terminology 'in all school environments' the policy does not reflect a core component of inclusive education, which is its inherent recognition

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[42] Department of Education and Training, School Policy Advisory Guide, 'Students with a Disability', above n 40.

[43] Ibid.

[44] UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 4 (2016), *Article 24: Right to inclusive education*, 2 Sep. 2016, CRPD/C/GC/4, ¶¶ 9 – 12.

of the need to work towards 'schools for all',[45] which employ 'child-centred pedagog[ies] capable of successfully educating all children, including those who have serious disadvantages and disabilities.'[46] In other words, an 'inclusive' education system is a product of ordinary schools becoming more inclusive – that is, becoming better at educating all children in their communities.[47] International legal standards therefore distinguish inclusion from *segregation* (whereby education of students with disability is provided in separate environments, isolated from students without disability), and *integration* (whereby students with disability are placed in existing mainstream educational institutions, as long as they can adjust to the standardised requirements of such institutions).[48] This component is not captured in the Department's definition.

3. Department policies and guidance for schools

The aim of this report is to investigate whether laws, policies, procedures and practice are protecting the human rights of students with disability, and to propose ways in which their rights can be better protected so as to ensure that they are treated with dignity, have a fulfilling educational experience and are equipped with the skills to lead a productive life after school. To this end, the report will take into account the following laws, policies and procedures:

Laws and standards:

- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- *Equal Opportunity Act 2010* (Vic)
- *Disability Discrimination Act 1992* (Cth)
- Disability Standards for Education 2005 (Cth)
- *Education and Training Reform Act 2006* (Vic)
- Education and Training Reform Regulations 2017 (Vic)
- *Occupational Health and Safety Act 2004* (Vic)

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[45] UN Educational, Scientific and Cultural Organization (UNESCO), *Salamanca Statement and Framework for Action on Special Needs Education*, adopted by the World Conference on Special Needs Education: Access and Quality, 7-10 Jun. 1994.
[46] As above, n 45, ¶ 3.
[47] UNESCO, *Policy Guidelines on Inclusion in Education* (2009) 8.
[48] CRPD, General comment No. 4, as above, n 44, ¶ 11.

Policies and procedures:

- Policy Guidance, Procedures and Resources for the Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools
- Guidance for Responding to Violent and Dangerous Student Behaviours of Concern
- Special Needs Plan
- Program for Students with Disabilities Handbook and Guidelines
- Nationally Consistent Collection of Data
- Health, Safety and Wellbeing policy
- Relevant sections of the School Policy Advisory Guide, including:
  o Students with a disability policy
  o Program for students with a disability (PSD) policy
  o Disability data collection policy
  o Intake policy (particularly the policy on placement)
  o Restraint of students policy
  o Duty of care policy
  o Parent complaints policy (interim)
  o Reporting (emergency and incidents) policy

The following section will examine particular issues of concern in the ways in which these laws, policies and procedures are (and are not) compliant with human rights standards, both on paper and in practice.

PART 2: FINDINGS

1. Unequal access to schools

1.1. Scope of the right to access

The right to access quality education without discrimination on the basis of disability is a core component of the right to education.[49] The ICRPD enshrines the right of persons with disability to access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.[50] This is reflected in the laws governing the Victorian schools system, which give prospective students with disability the right to enrol in an educational institution without discrimination and on the same basis as prospective students without disability, and which impose on school authorities the obligation to make reasonable adjustments to enable them to enrol on such an equal basis.[51] Under section 8 of the Charter, when the government regulates the provision of education services it should legislate and deliver those services in a non-discriminatory way.[52] As a general rule in Victoria, any prospective student is entitled to enrol at their designated neighbourhood government school (local school), and may enrol at another government school if there is 'sufficient accommodation for the child at that school.'[53]

1.2. Findings: the right to equal access in practice

The large majority (approximately 85%) of parents interviewed as part of this study did not experience any hurdles when enrolling their child in a mainstream Victorian Government school. Some parents reported very positive enrolment experiences, with Juliet, for example, explaining that:

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[49] CRPD, General comment No. 4, as above, n 44; Katarina Tomasevski, *Human rights obligations: making education available, accessible* (2001).
[50] ICRPD art. 24(2)(b).
[51] Disability Standards (Cth) Part 4; *Education And Training Reform Act 2006* (Vic) s. 2(2)(13) ('*Education And Training Reform Act')*; *Equal Opportunity Act*, ss. 38, 40.
[52] Victorian Government Solicitor's Office, Charter Guide, 'Section 8 - Recognition and equality before the law', < http://humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-8-recognition-and-equality-law> (accessed 13 Apr. 2018).
[53] *Education And Training Reform Act*, ss. 2(2)(13)-(14).

I told them all of [my child's] diagnoses and everything that had happened up until that point in [their] life, and they said, "Yes, yes, more than happy, we can deal with these situations", and I said, "Oh, okay. Great. Fantastic."

Similarly, Helen reported that:

Well the principal and the assistant principal, I've had lots of meetings with them beforehand, before I started sending [my child] to that school. And they were really, really good, they were very accommodating.

Approximately 15% of parents interviewed as part of this study did, however, experience some form of difficulty enrolling their child in a mainstream Victorian Government school. Parents faced barriers when seeking to enrol their children at their local government school, when seeking 'out of zone' enrolment, as well as experiencing pressure to leave once enrolled. It was rare for them to be explicitly told by a school that the issue in contention was directly related to their child's disability. Rather, it was more common for schools to either make subtle, generalised inferences about students with disability, or to offer alternative reasons for enrolment refusal, including references to enrolment restrictions or catchment zones – a practice commonly referred to as 'gatekeeping'.[54]

These experiences reveal patterns of discrimination against some children with disability in which they are informally forced out of their mainstream school of choice – either prior to, or after enrolment.

1.2.1. Discrimination when seeking enrolment

Most of the parents interviewed who experienced barriers to enrolling their children in a mainstream school never submitted an enrolment form. Instead, their intention to enrol their child was either discouraged or refused by the school during early-stage discussions about their child's capacities and needs (this approach is a typical example of 'gatekeeping'). A range of different reasons were offered about why a

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[54] These findings mirror the findings of previous reports. See: VEOHRC, *Held Back* report, above n 13; Senate Education and Employment References Committee, *Access to real learning*, above n **Error! Bookmark not defined.**. On the problem of gatekeeping, see also: Shiralee Poed, Kathy ologon and Robert Jackson, 'Gatekeeping and restrictive practices with students with disability: results of an Australian survey', Paper delivered at the Inclusive Education Summit, Adelaide, Oct 2017, < http://allmeansall.org.au/wp-content/uploads/2017/10/TIES-4.0-20172.pdf.>.

particular child could not attend the school of their parents' choice, with most relating either to zoning (addressed in the following section), or to the child's disability. Some parents, for instance, were told that the school was 'at capacity' and could not support another child with disability. For example, a conversation with Jennifer revealed that:

Jennifer: The majority of schools I spoke to didn't want another autistic child –
Interviewer: What makes you say that?

Jennifer: 'They already had enough ASD kids at their school', 'they didn't feel they had the capacity to support [my child]'. They said that really, 'it wasn't in my best interest to send an ASD child to their school'.

Other parents spoke about receiving a whole raft of reasons from different schools over the years. Jemma, for example, explained that in her case:

Looking for schools that practice inclusion when looking for alternative placements showed which schools didn't. There were excuses around capacity, zoning, staffing, ability to financially support [my child].

A number of parents reported problems communicating with principals, and even gaining access to tour schools. When Jane sought to enrol her child at their local school, she encountered a number of hurdles to even initiating contact. As Jane explained:

I rang up the local school - which I can walk there - and after about 70 phone calls, I finally got an interview because I threatened to actually go to [my child's specialist], to actually say 'listen, I need a meeting, my [child] has got a disability, this is [their] local school, [they are] entitled to go there'. And then, after showing them my gas bill, and my electricity bill, I was allowed to go for a tour. And then it was okay because they have got to be. Everyone I know who lives in [this suburb] gets to go there, but I had to actually produce documentation saying that I lived in the area.

Denying a prospective student the right to enrol on the same basis as their peers without disability constitutes discrimination unless the student requires adjustments in

order to participate in or derive benefit from schooling which are *unreasonable*.[55] In determining what adjustments a prospective student needs in order to enrol, schools are required to take into account considerations including the child's impairment, the adjustments they need, and the consequences of making these adjustments for the child and for others (including for staff, other children, and the financial consequences for the school).[56] In doing so, the school must provide certain information to the student or their parents and consult with them.[57]

In a number of cases encountered during this study, these requirements were not fulfilled. Prospective students and their families were not provided with information regarding their rights and the process for determining their enrolment, and were often not meaningfully consulted. Detailed information regarding students' capacities, impairments, and potential adjustments was not elicited.

It is a key recommendation of this report therefore that the rights of children with disability to access education in Victoria would be better protected through the clearer articulation of schools' responsibilities in relation to prospective students *before* the submission of enrolment forms, and by the adoption of rights-compliant processes and tools for assessing the reasonableness of adjustments at the earliest point of contact with parents.

1.2.2. 'Out of zone' enrolment

Often the reason given for refusing a child's enrolment request was that the child resided outside the school's residential catchment area. It was common for parents to seek enrolment in schools other than their child's local school, either because their local school was unable or unwilling to accept their child or was unaccommodating, or because the family felt another school was a better fit for their child.

Importantly, schools may refuse admission to prospective students residing outside their zone if the school has 'insufficient accommodation' for them.[58] According to the

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[55] *Equal Opportunity Act,* s. 41. See also: *Disability Discrimination Act 1992* (Cth), ss. 5-6; Disability Standards, Pt. 4. Also, under the Disability Standards, failure by an education provider to make reasonable adjustments is not unlawful if to do so would impose unjustifiable hardship on the provider (s 10.2).
[56] *Equal Opportunity Act*, s. 40(3).
[57] Disability Standards, Pt. 4.
[58] *Education And Training Reform Act*, ss. 2(2) and (14).

Department's School Policy Advisory Guide, where there are insufficient places at a school for all students who seek entry, students are enrolled in the following priority order:

- Students for whom the school is the designated neighbourhood school.
- Students with a sibling at the same permanent address who are attending the school at the same time.
- Where the regional director has restricted the enrolment, students who reside nearest the school.
- Students seeking enrolment on specific curriculum grounds.
- All other students in order of closeness of their home to the school.
- In exceptional circumstances, compassionate grounds.

Parents interviewed as part of this study were aware (and accepted) that some schools would be entitled to refuse the enrolment of their child based on these grounds. However, some parents were of the opinion than their child had been refused enrolment because of their disability, contrary to Department policy, and to Victorian and Commonwealth anti-discrimination law. It is impossible to confirm or refute these perceptions, because schools are not required to report on how they allocate places and the Department does not monitor placement to prevent discrimination.

The experiences of some parents who were considering moving into a particular school's catchment area suggest that some students are being treated unfavourably because they have a disability. Several of the parents interviewed as part of this study spoke about their willingness to move across Victoria (some from Geelong to Melbourne) in order to ensure that they would fall within the zone of their preferred school. Understandably however, before finalising their decision to uproot their families from their current place of residence, these parents would contact the principal of the prospective school and ask to meet or take a tour of the school's facilities. It was at this point in the process that these parents would encounter certain difficulties in relation to residential restrictions.

Rachel, for example, was thinking of moving to the other side of Melbourne because she had heard that there were a few schools in the area who worked well with students with disability. Before selling her family home, she contacted two prospective schools

to ask if she could meet with the principal and take a tour of the school's grounds. The first school refused to meet with Rachel, as she explained:

We wanted to look at another mainstream school near where we live now, and we told them we were thinking of moving into their zone to go to it, and they wouldn't even let us come to the school to have a look at it to see if we'd want to move to go there.

The second school Rachel approached was more accommodating, and the principal agreed to meet with Rachel and her husband as prospective parents moving to the area. During the meeting, Rachel and her husband spoke candidly about their child's needs, and their concerns about their child's current enrolment in a specialist school. Rachel believed that this meeting with the prospective school principal had gone well. A few days later, however, Rachel received the following call from the school's principal:

[the principal] called me on the phone and said he can't enrol [my child] because he has a number of concerns. So I said, 'Can you tell me all the concerns?' he said, 'It's because the school is in [one residential zone] and we live in [another residential zone]'. But when we went for the interview the zone was never a question.

It is important to emphasise that disability is not a permissible ground for determining placement – either under anti-discrimination law, or under Department policy. However the experiences of parents interviewed for this study expose a lack of transparency in the placement of children from outside catchment zones, which may obscure instances of discrimination.

1.2.3. Pressure to leave once enrolled

Of the parents interviewed as part of this study, 15% reported feeling pressured to leave their school once their child had been enrolled. For some parents, this pressure to leave manifested in a general feeling of being unwelcome at the school. For other parents, the pressure came from suggestions that their child might be better placed elsewhere. Typically these suggestions were made by schools to parents after a parent had raised a concern about the school's treatment of their child and/or their

child's academic or social development, as Rebecca and Aileen explained in their cases:

I remember the day [my child's] prep teacher said to me, "Look, if you don't think [your child] is going to be okay here, then maybe you should send [your child] to the special school." I just sort of went home feeling really, really sad about that. (Rebecca)

They made me feel like we weren't welcome. They said "we are doing all of these things for your [child], and if you don't think they're working, then maybe we're not the right school for your [child]". But what are they doing? (Aileen)

As both Rebecca and Aileen's accounts illustrate, in these kinds of conversations the suggestion to leave was presented as a choice for parents to make: accept that the school is doing enough to support your child, or take your child elsewhere. In other conversations, however, some parents were told that choosing to stay at their present school was no longer an option; that their child was not suited to a mainstream school. As Bethany and Jane recounted in their children's cases:

About 4 months into [my child's] enrolment at the mainstream school they called me up and asked me to come in. They said "we don't think [your child] is coping, and we should think about sending [them] to a special school". They said they'd help me find the right special school for [my child]. I accepted what they said, I guess I didn't even think about how [my child] might feel about having to move schools again. It was all so new to me – I didn't really know anything about autism, and I had only just moved to Australia and needed to settle in. (Bethany)

The principal and assistant principal both sit me down and let me know that my [child] is not appropriate for this school, and how usually by this age people with disabilities are not good in the mainstream schools and they usually get booted off to the special schools, however they can keep [my child] until the end of the year – this is in June - they can keep [my child] until the end of the year, but it's probably best - because [my child's] funding goes with [them], to send [my child] off for term three. I left there crying, thinking, 'what do I do?' I have got to move [my child], because they're saying no to [them] coming to this school. (Jane)

Not all parents who were told that their child would fare better at a specialist school accepted the school's suggestions. Some, like Bianca, pushed back:

Every year the school would tell me [my child] should be at a special school. I said no. I want [my child] to get a mainstream education because I want [my child] to mix with other kids and learn how to get along so [my child] can be independent later on in life. It was really important to me that [my child] stayed in a mainstream school, so I kept refusing their request to move [my child] to a special school.

These experiences raise serious concerns regarding the process by which schools assess the reasonableness of the adjustments necessary for a student, and the ways in which students and parents are engaged in such a process. It was often unclear to parents the basis upon which the school had reached the conclusion that their child would be better suited elsewhere, what alternatives to leaving the school might exist (including additional or alternative adjustments), and what rights parents have to resist a school's request to withdraw their child.

While it is essential that parents and schools are able to engage in a dialogue about a child's schooling experience, these conversations must be rooted in, and reflect, a human rights-based approach. In particular, school representatives (be they principals, teachers or others) must seek to empower children and their families to make the best choices for the child and to participate fully in the decisions surrounding the child. Schools must also ensure that there is adequate information and transparency regarding their own decisions and recommendations and must ensure that all of their actions reflect a commitment to fulfil a child's right to an education on the same basis as their peers, without discrimination.

1.2.4. Impacts of discrimination on the enjoyment of other rights, and the rights of others

The barriers children with disability face in enrolling at some schools – both refusals of enrolment and more general impressions of being unwelcome – lead many to pursue enrolment at a limited number of schools which have a reputation for inclusivity. Parents spoke of reading parent forums, reaching out to other parents of children with disability, or speaking to service providers and advocacy organisations to identify the government schools in Victoria that had reputations for supporting the academic and

social development of students with disability. Once such a school was identified, parents then either moved into the correct residential zone, or approached these schools from their current place of residence and – living up to their reputations as being more welcoming or inclusive than other schools – these schools enrolled their child without issue.

Staff at these schools were often acutely aware of the broader context and dynamics within which their reputation as being more inclusive and welcoming school had been generated. A wellbeing coordinator at one mainstream school noted that:

> *Currently we have [X][59] students on the program with a disability - so that's on the official program - but when I fill in the national consistent census there is considerably more than that. Our school has a reputation in our area for supporting children who have additional needs. Prior to this year when we had a catchment put on our school, people were coming from out of the area to attend our school because they know that we'll put the work in. Of the [X] students that we have currently on the Programs for Students with a Disability only [one third] are in our current catchment area. All the rest are out.*

As another school principal explained:

> *And there are a lot of principals that I get really annoyed about, that don't return phone calls, who shut the door on these people. Therefore, they go to a school like mine and others, who, you know, will do it. I've got most of mine coming from out of area. If I had a zone, I probably might have [one third of the children] that are on the PSD program.*

Expecting some schools to cater for up to two-thirds more children with disability on the PSD program than might be expected produces a range of consequences – for the schools in question, their staff, the students with disability enrolled there, and for the broader student bodies.

For the students with disability and their families, many are faced with the choice between long travel times or uprooting their families entirely to attend their preferred

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[59] To protect the identity of the school, numbers have been removed and, where relevant and appropriate, indicative proportions have been added.

school. This can have a considerable negative impact on the family, in contravention of section 17 of the Charter. Moreover, the challenges in finding an appropriately inclusive school for a child may mean that the choices of a child with disability are constrained in other ways. Many children will seek enrolment in particular schools based on their academic, sporting and artistic interests, on the professed pedagogical orientation of the school, or on its social environment and 'fit' for the personality of the child. Such considerations are often closed off to children with disability, who must instead choose a school solely on its inclusivity, rather than on its suitability for them as a whole, complex individual.

As a handful of parents in this study also made clear, when the idea of moving either within or outside the mainstream education system becomes either undesirable or simply unfeasible, some students with disability end up going through their school years at home:

We basically got right to secondary school by just [my child] going across to the school, getting the books and bringing them home. (Deidre)

It has been [X months] since [my child] has stepped foot into a classroom, all whilst still being allocating PSD funding … As I was advised by DET, if [my child] was not enrolled at a school, then PSD funding would cease, and we would be required to apply all over again. (Jemma)

The channelling of a disproportionate number of children with disability into some schools also has consequences for their staff and their broader communities. The additional pressure placed on teachers in these schools may impact their wellbeing, raising occupational health and safety concerns. For example, an aide working at a school with a reputation for being more inclusive spoke about the pressure on frontline staff:

… It's fairly full-on. I do admire the fact that our school takes on kids that are probably - well, they've not been successful in up to two or three other schools. And we've taken them on and kept them and helped and tried to accommodate. So from that point of view, that's wonderful. From the day-to-day and working point of view, we haven't quite caught up with how to mix that through one person's day without getting really stressed and pushed to the limit all the time.

A specialist school teacher providing outreach support and training to mainstream government schools in Victoria spoke about the effects this development can have on other parents' perceptions of their local school:

… and I find too that when the school gets a name or a parent starts saying that they've been really good - and I find it's not necessarily that they've done a good job with the child, it's that they're accepting and they're welcoming and they're inclusive in the sense of feeling good about it all - that those schools then become magnet schools and everybody goes to them. Then they get overrun with too many kids, and then it becomes too difficult, and then people sometimes in their own community don't go to their own school because they see it as a school for kids with special needs. That's a big problem.

It is important to note the strong evidence that inclusive education benefits everyone – not only students with disability. Students without disability in inclusive learning environments have been found to have better outcomes in reading, writing and mathematics, better results on academic achievement tests, enhanced communication and language development, and growth in interpersonal skills.[60] However, these benefits can only be fully realised if inclusivity is achieved across the system, and is properly resourced and supported. Absent these protections, the rights of staff to a safe and healthy workplace, and of all children to a quality education, may be at risk. The issue of funding is discussed in detail in section 2. However, it is critical that problems of equal access are addressed in tandem.

Recommendations

To the Department:

- **Make information regarding the rights of children with disability and their parents accessible prior to enrolment (including the permissible bases for refusal of enrolment and the required process for making such an**

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[60] Dr Kathy Cologon, 'Inclusion in Education: Towards Equality For Students With Disability', Issues paper, Children with Disabilities Australia (2013), 24-25; Afroditi Kalambouka, 'The impact of placing pupils with special educational needs in mainstream schools on the achievement of their peers', *Educational Research* (2007) 49(4): 365-382.

assessment). At a minimum, the Department should include this on its website and mandate its inclusion on individual school websites.

- Put together an information pack that must be distributed to the parents of any prospective student with disability, which includes at a minimum:
  o information on relevant laws and policies;
  o plain language explanation of their child's rights in relation to enrolment;
  o guidance on how the school will conduct an analysis of the prospective student's anticipated adjustments and determine their reasonableness;
  o information on supports available for students with disability, including targeted funding, Individual Learning Plans (ILPs) and Student Support Groups (SSGs); and
  o details of the school and Department's complaints processes, and options for escalating a complaint.

- Amend the existing policy guidance on admissions and placement to clearly state the rights of children with disability to seek admission to, or apply for enrolment in a government school on the same basis as a prospective student without a disability, and without experiencing discrimination. The guidance should note that 'seeking enrolment' includes pre-enrolment processes, such as school tours and meetings with staff.

- Develop and roll out practical guidance and tools for principals to conduct an analysis of a prospective student's anticipated adjustments, which integrate a human rights-based approach, and are designed to achieve compliance with the requirements of the *Equal Opportunity Act 2010* (Vic) s. 40(3) and the Disability Standards (Cth) Pt. 4. These tools should be user-friendly and come in simple to use formats, such as matrices or checklists.

- Require all mainstream schools to collect and report to the Department de-identified data relating to the enrolment of students with disability (both receiving PSD and requiring adjustments but without PSD funding). This should include numbers of enrolments, numbers and reasons for

refusals, changes in attendance, and discontinued enrolments. The Department should publish this data annually (aggregated across schools to ensure proper protection of privacy).

- Monitor trends in the enrolment of children with disability (both receiving PSD and requiring adjustments but without PSD funding) within and across schools, and develop mechanisms to follow up on potential breaches revealed in the data. At a minimum this should include:
  - requiring schools enrolling fewer students with disability than would be expected to demonstrate how students with disability are being supported during pre-enrolment and enrolment processes, and to provide evidence that gatekeeping is not taking place; and
  - requiring schools whose enrolment of students with disability drops off in later year levels to demonstrate how it is working with students with disability to support retention and attendance.
- Emphasise in all policies, training materials and other guidance relating to admissions that anti-discrimination and human rights legislation apply to actions undertaken prior to admission and during discussions regarding a child's ongoing enrolment.

2. Assessment and Funding Experiences: the Program for Students with Disabilities

2.1. Scope of the Department's funding obligations

Under international law, States are obliged to work towards the progressive realisation of the right to education, subject to maximum available resources.[61] While States are not expected to achieve full realisation of the right immediately, they are obliged to 'move as expeditiously and effectively as possible towards that goal' as possible, taking into account their resource constraints.[62] In the context of inclusive education, this means that duty-bearers should develop a funding model that allocates resources and incentives for inclusive educational environments to provide the necessary

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[61] ICESCR, arts. 13 and 2; CRPD, General comment No. 4, as above, n 44, ¶ 70.
[62] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 Dec. 1990, E/1991/23.

support to persons with disability.[63] However, the specifics of the funding model should be informed by the local context and needs of potential students.[64]

An exception to the principle of progressive realisation is non-discrimination, which is 'an immediate and cross-cutting obligation.'[65] Nonetheless, the Committee on the Rights of Persons with Disabilities has determined that available resources may be considered when determining the reasonableness of necessary adjustments. According to the Committee:

> The availability of resources and financial implications is recognized when assessing disproportionate burden… The extent to which reasonable accommodation is provided must be considered in the light of the overall obligation to develop an inclusive education system, maximizing the use of existing resources and developing new ones. Using a lack of resources and the existence of financial crises to justify failure to make progress towards inclusive education violates article 24 [on the rights of persons with disabilities to education].[66]

The approach described above is largely reflected in Commonwealth and Victorian anti-discrimination legislation. Educational authorities are required under state and federal laws to make (and by implication to fund) necessary reasonable adjustments.[67] However, the financial impact of making a particular adjustment may be taken into account when determining its reasonableness.[68] The Disability Standards also excuse education providers from complying to the extent that compliance would impose unjustifiable hardship on them.[69]

2.2. Findings: funding for children with disability in practice

Schools have a legal obligation to make reasonable adjustments for students, subject to the exceptions and exemptions outlined in section 1.1 of this report. Under current arrangements, schools are expected to fund these adjustments using their student

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[63] CRPD, General comment No. 4, as above, n 44, ¶ 68.
[64] Ibid.
[65] CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 Jul. 2009, E/C.12/GC/20.
[66] CRPD, General comment No. 4, as above, n 44, ¶ 28.
[67] *Equal Opportunity Act* s. 40(1); also *Disability Discrimination Act* ss. 5-6.
[68] *Equal Opportunity Act* s. 40(3)(d).
[69] Disability Standards, s. 10.2.

resource package (which is the non-targeted, overall pool of funds which the school is allocated to pay for its operations) and programmatic funding (for example, the Language Support Program).

Additional targeted supplementary funding is provided to Victorian government schools for eligible students with disability through the Program for Students with Disabilities (PSD). Where a student is found to be eligible for the PSD, funds are provided directly to the school and the school is entitled to use the funds allocated in a number of ways to support the learning, engagement, wellbeing, pathways and transitions of students with disability. This may include providing:

- teaching staff;
- specialist staff (e.g. Special Needs Coordinator, occupational therapists, speech pathologists);
- teacher professional development;
- specialist equipment/materials, including assistive technology; and/or
- education support staff.[70]

Of the 15 out of every 100 Victorian students estimated to be in need of a reasonable adjustment support due to a disability, approximately four of these students receive targeted PSD funding.[71]Problems with the current funding model have been identified in a number of reports and reviews in recent years,[72] culminating in a Review of the Program for Students with Disabilities, the results of which were released in 2016. These reports identified a number of shortcomings with the PSD, including:

- a difficult and expensive application process, based on rigid and inflexible criteria, and relying too much on the cooperation and initiative of the school;
- the effective ineligibility of certain disabilities (in particular autism without significant deficits in language skills, Asperger's syndrome, and dyslexia) and hard, seemingly arbitrary cut-off points for eligibility;

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[70] Department of Education and Training, *Program for Students with Disabilities – operational guidelines for schools 2018*, above n 14, 18-19.
[71] Department of Education and Training*, PSD Review,* above n 6, 14.
[72] See e.g.: VEOHRC, *Held Back,* above n 13; Senate Education and Employment References Committee, *Access to real learning,* above n **Error! Bookmark not defined.**.

- a deficit-focused process for allocating funding (i.e. focuses on identifying what students cannot do/achieve) and overemphasis on diagnosis at the expense of functional capacity; and

- a lack of accountability (to students and parents, and to the Department) both in terms of measuring the progress of individual students as well as identifying the outcomes obtained as a result of PSD funding.

Our research closely reflects these earlier findings, as described in the following sections.

2.2.1. Deficits of the PSD: eligibility and the application process

According to the Program for Students with Disabilities – Operational Guidelines for Schools 2019 (PSD Guidelines),[73] schools are responsible for preparing and submitting applications for PSD support. Some parents reported encountering difficulties with this process. Parents described schools discouraging or delaying the establishment of an Application Student Support Group for their child, a necessary first step in making an application for PSD funding. Others reported finding themselves under pressure to obtain a diagnosis for their child. Penny explained:

And there's this crazy thing that every school has ended up wanting a diagnosis, irrespective of whether [my child] actually fits a diagnosis. They've all been coercive about: "Just get one, so we can get funding".

Notably others, like Juliet, spoke about how these feelings of being pressured to obtain PSD funding would sometimes also be extended to their child:

And their whole demeanour changes whenever they want [my child] to be assessed for funding. Even [my child] knows it. [My child] says, "they were being nice to me again: they want me to meet with someone". Because it's all about the funding.

For the majority of parents interviewed, however, the primary issue of concern when speaking about the PSD was its eligibility criteria. Specifically, parents were frustrated

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[73] Department of Education and Training, Program for Students with Disabilities – *Program for Students with Disabilities – operational guidelines for schools 2018,* above n 14, 4.

that despite their child having a number of additional support needs in the classroom, they were unable to meet the eligibility criteria for PSD funding due to the kind of evidence requested, and the test limits set.

This issue was particularly common among parents who identified as having a child with an autism spectrum disorder. This is because many of these children do not meet the PSD's eligibility criteria under the category of 'Autism Spectrum Disorder'. Another issue raised was the cut-offs that are set around IQ tests under the 'intellectual disability' category. As one mainstream school principal put it:

> *I think one of my bugbears is the children who are just a little bit above [an IQ of] 70 and they're unfunded. They're the ones that are even harder. Every school struggles with those children, and they're just left to – I mean, schools do the best but, you know, there's no funding, there's nothing for those children. That would be something that as a whole system we really could do so much better if there was something for them.*

In response to these circumstances, several of the parents interviewed as part of this project spoke about encountering encouragement from others to obtain poor testing outcomes for their child so as to ensure they received the funding they needed. Mary, for example, was advised by other parents to keep her child awake overnight so as to promote the likelihood of a lower result in her child's IQ test. Mary did not disclose if she followed this advice, but she reflected that when her child did the first part of their speech assessment:

> *[My child's] teacher said to me, "So [you child] didn't do too well, [your child] was really good". And you sort of think, do you want the lower result? It's ridiculous really the whole thing.*

This also illustrates some of the pitfalls of a deficit-focused approach. By focusing on the assessable challenges faced by a child, the child's actual capacities and needs may escape notice. As Veronica explained:

> *…and it's not really fair that you have to – trying to demonise your child in order to get the appropriate funding for them… My occupational therapist wrote two reports. She'd write one for us and one for them. The one for us had the good things, as*

well as the bad things, and the one for them just had the bad things. That is not fair in the slightest, but it also means that the kids who need support are only getting it if they externalise their behaviours. If they're kids who withdraw and don't cause much bother then they're going to sit there and not get the help they need because they're quiet, because they don't disrupt the class. That's just not right.

2.2.2. Deficits of the PSD: use and distribution of funds

The use and distribution of PSD funds was also a topic of considerable concern for parents. While eligibility for PSD funds attaches to an individual student, the disbursement of those funds does not. Schools have significant discretion in how to use PSD funding and in doing so may choose to evaluate 'any common requirements' among students, such as 'the funding of therapy services or special needs teacher positions'.[74] In other words, the current system is a combination of two opposing approaches: an individual needs approach for assessment of funding, and a group needs approach for expenditure of funding.

In cases where students have not received PSD funding, schools are expected to make reasonable adjustments 'using their SRP allocation and funding provided through the PSD's programmatic funding (for example, LSP)'.[75] Accordingly, when making decisions about how to use PSD funding, schools are expected to be cost-efficient, and may find themselves having to stretch the funds they have received for one or more children in order to make reasonable adjustments for quite a number of others.

Interviews with parents of children in receipt of PSD funding revealed considerable dissatisfaction with this arrangement. Several parents expressed frustration that the funds their child had secured for the school would not be used in the specific way that they wanted:

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[74] Department of Education and Training, *Program for Students with Disabilities – operational guidelines for schools 2018,* above n 14, 19.

When we asked for speech therapy and an OT he said the funding was for the aide, to provide an aide, so he doesn't have any more funding for speech therapy and an OT. (Rachel)

These parents also expressed a mixture of either concern that their child's needs might not be fully addressed through the employment of a shared aide, and/or confusion as to why the funds secured by their child would be distributed to support other children:

… and then I've had a big battle with the principal, because he goes, "This funding's for the whole school, not for your child". And I go, "Hang on, where are we going here?" And he goes, "Just because your child's got it, it's for the benefit of the whole school which in turn will benefit your child." So I sat down and I thought, what is it that [my child] needs? [My child] needs [XXXXX]. So I said to him that I wanted to have [a specific initiative] in the primary school. And he goes, "I'm not doing that." It was [$X] and [my child's] funding was [twice that amount]. He goes, "Nope, I'm not doing that. I need to employ my aides." (Jennifer)

Parents of students with disability who were ineligible for PSD were more positive about current funding arrangements. Some were delighted that the school they had chosen was willing to do something to better accommodate the needs of their child:

… because the school is actually kind enough to put [my child] in a classroom with another autistic boy, who actually is getting the funding. So they've got an aide for [my child] that they obviously share between the two of them, which was very nice of them (Helen).

It is clear, however, that students who are found to be ineligible for the PSD, but still require supports, find themselves in a perilous position. An ineligible child's access to support is largely arbitrary, depending on the goodwill of the school (and the level of resourcing available which is highly dependent on the number of other PSD eligible students). The chances are low that such support is properly tailored to the child's needs. Indeed, schools are less likely to make necessary adjustments for ineligible students,[76] and no accountability system is in place to ensure such students' needs

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[76] VEOHRC, *Held Back,* above n 13, 162.

are being met. The risks that some of these students are being discriminated against on the basis of their disability can only be described as considerable, and troubling.

2.2.3. Parental supplementation

In response to concerns about the use of PSD funds in mainstream government schools, and in particular, the common perception that more personalised support was needed for their child, some parents interviewed paid for certain adjustments out of their own pockets. Several parents spoke about feeling either explicitly or implicitly pressured by their school to invest in other mechanisms for supporting their child's needs:

> [My child's] PSD funding was not granted until [my child] began the next school year, Grade 1. During this time there was immense guilt and pressure put on me from the school as [my child's] needs "were costing the school money" (Jemma).

For others, the feeling of needing to supplement PSD funding came from a fear that their child would fall behind if further investments weren't made to personalise their education-based support:

> [My child] wasn't engaged, and I was having, I was having my OT going in weekly to the school. I have a private therapist going in to work with the school every week, so I'm providing support for this school … and during one of those sessions, the OT set up colour coordinated visual timetable, obviously for [my child], but it was for the whole class. She had other students coming and thanking her for doing that because it helped them understand what was going on. (Jennifer)

These cases are a clear breach of Department policy and the *Education and Training Reform Act 2006* (Vic), which specifies that 'a parent of a student with a disability or impairment is not required to contribute to the cost of the provision of additional support for the education in a Government school of that student.'[77] However, the appropriate response to this trend is not to simply enforce the Act and prevent parents from supplementing PSD funding, but to ensure that there is no need for them to do so.

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[77] s.2.2.6. CRPD, General comment No. 4 also addresses this issue, stating that 'States parties must recognise that individual support and reasonable accommodation are priority matters and should be free of charge at all compulsory levels of education." (as above, n 44, ¶ 17).

This will require a fit-for-purpose funding model, better access to specialist services, greater accountability for the achievement of learning goals through the disbursement of PSD funds, and more consultation with parents regarding necessary adjustments.

2.2.4. Problems of perception: understanding the relationship between legal obligations and funding

The frustrations detailed above regarding eligibility and distribution of PSD funding suggest a more fundamental misunderstanding among parents and school staff of schools' legal and policy obligations. Parents' accounts reveal a perception that without targeted PSD funding, their children will not receive the adjustments they need. This perception appears to be shared by some school staff.

In fact, a school's legal obligation to make reasonable adjustments is not dependent or conditional on a student's eligibility for the PSD. Whether or not a child is eligible for the PSD should have no bearing on whether they benefit from the adjustments they require to participate in, and benefit from, their education. Further, determining which specific adjustments are necessary should precede questions of funding; schools should identify appropriate adjustments, then consider how they might pay for them (through the Student Resource Package, PSD, or another funding stream). Many adjustments, such as modifications to curricula, can be made at little to no cost.

In short, the prevailing understanding of the funding system seems to be backwards – positioning eligibility for targeted funding as a precursor to the implementation of necessary adjustments, instead of the other way around. This is a problem of perception and culture as well as one of system design, and should be taken into account when considering options for reform of the funding model.

2.2.5. Reforms in motion: Placing a human rights-based approach at the heart of the new funding model

The Government of Victoria is in the process of overhauling the current funding model, with the stated intention of ameliorating many of these issues. In responding to the PSD review, the Government accepted 21 out of 25 recommendations, and has implemented (or is in the process of implementing) many of them. The Government

committed to carefully consider the remaining four recommendations, which all relate to the development of a new tiered funding model based on a strength-based functional needs approach (the 21 accepted recommendations were not related to the structure of the funding model). At the time of writing, details of any reform to the funding model have not been announced. However, the Department has advised that work is underway on developing a tiered funding model, based on a functional needs assessment tool which is currently being piloted.

It is, of course, too early to comment on the extent to which the new model responds to prevailing concerns and reflects a rights-based approach. On the basis of the limited information currently available, it is possible only to say that the Government's intended focus on a tiered approach and functional assessment appears promising. Nonetheless, it is possible to make several observations regarding the process for designing and implementing any comprehensive reform of funding for students with disability, and the critical importance of ensuring that a human rights-based approach informs every stage of the process.

As noted in section 1.3, a human rights-based approach to policy and programming requires duty-bearers to perform their functions with regard to five key principles, known as the PANEL principles.

In this case, there are several applications of the PANEL principles which we contend must be central to the design and implementation of the new funding model. These include:

PANEL Principle	
Participation	The Department must undertake broad and meaningful consultation with stakeholders, especially children with disability, their families and representatives
	Consultations must take place at all phases of the process – including during and after each implementation phase
	There must be institutional mechanisms in place to ensure two-way information flow between the Department and stakeholders
	As participation is an essential element of a human rights-based approach, indicators should be developed to measure the degree to which relevant policies and programs are participatory
Accountability	The process for developing and implementing the funding model should be transparent, and information made readily available and accessible
	Processes for monitoring, evaluation and learning must be built into the model from the outset
	Processes for gathering, analysing and handling the data necessary to properly monitor outcomes must be established from the outset
	There must be an effective grievance handling process for complaints regarding funding decisions and processes
Non-discrimination and equality	The new model must be directed towards the respect, protection and fulfilment of the rights of children with disability, including their rights to non-discrimination and education

	Participation in the processes of developing, implementing and evaluating policy must be facilitated without discrimination on the basis of disability, including making it accessible
	The new model - and the process for developing and implementing it - must take into account intersecting vulnerabilities, including the experiences and barriers faced by indigenous children with disability, culturally and linguistically diverse children with disability, children with disability in rural and remote areas, and other children living with intersecting vulnerabilities (and their families)
Empowerment	The new model and any consultation process must be accompanied by a comprehensive outreach program to the families of children with disability, to schools, and the wider community, so that they can understand and claim their rights

Moreover, as noted in the preceding section, the view among schools and parents that a school's obligation to make adjustments is contingent on receiving targeted funding may contribute to uneven outcomes for children with disability. Any new funding model must be accompanied by measures to ensure school staff and parents understand the nature of schools' legal and policy obligations, and how these relate to any targeted funding program.

Recommendations:

To the Department:

- **Develop a new funding model to replace the PSD, based on the recommendations made in the PSD review. The new funding model should:**
  - **be based on human rights principles and standards;**
  - **reflect a strength-based functional needs approach, and use eligibility criteria based on a student's functional needs, rather than diagnosis or clear cut-offs (for example, based on IQ);**

- o **close the existing gap in support for children with autism, Aspergers, dyslexia, and related disorders; and**
- o **incorporate enhanced accountability mechanisms, which ensure that the Department is able to determine the impact of funding on students' schooling outcomes.**
- **Apply a human rights-based approach to developing and implementing a new funding model. This should involve special emphasis on meaningful, ongoing consultation with stakeholders (especially students and their families), and strong monitoring and accountability processes which are embedded in all stages of the policy design and implementation process.**
- **Ensure that the rollout of the new funding model (and all associated guidance and tools) raises school staff and parent awareness of schools' legal and policy obligations to make reasonable adjustments, and how these obligations are to be fulfilled in the context of the new funding model.**

3. The Right to Participate: Curriculum Modifications, Adjustments, and (Low) Expectations

3.1. Scope of the Right to Participate

At the heart of the right to education is the right held by every person to receive the support required, within the general education system, to facilitate their effective education.[78] This right is incorporated into law in Victoria through section 40 of the *Equal Opportunity Act*, and through Part 5 of the Disability Standards for Education (which are formulated under the *Disability Discrimination Act 1992* (Cth)). These domestic laws frame this right as one of participation without discrimination - every student has the right to participate in the courses or programs, and to use services and facilities provided by an educational institution, on the same basis as students without disability.[79] This includes a right to reasonable adjustments, where these are necessary to fulfil the right to participate.[80] It is important to note that a school's duty to make adjustments applies only to those which are *reasonable*.

The *Equal Opportunity Act* sets out certain considerations which an educational authority must take into account when determining whether an adjustment is reasonable. These include, among other things, the nature of the adjustment required to accommodate the student's impairment, the effect on the student of making (or not making) the adjustment (including on participation and learning outcomes), and the effect on the school, staff, and other students of making the adjustment, including the financial impact.[81] The Disability Standards for Education focus more on process, by requiring schools to consult with the student or their parents, and reaching their decision in light of this consultation.[82]

There is however no legislative guidance on the exact nature of the adjustments which can or should be implemented by schools.[83] This reflects the principled and rights-

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[78] ICRPD art. 24(d).
[79] Disability Standards, Pt. 5.1.
[80] Disability Standards, Pt. 5.1; *Equal Opportunity Act* s. 40.
[81] *Equal Opportunity Act* s. 40(3).
[82] Disability Standards, Pt. 5.
[83] The Disability Standards do however provide a list of measures for compliance.

based commitment to ensuring adjustments respond to the unique capacities and needs of each student.

3.2. Findings: the right to participate in practice

Interviewees' insights suggest that students' right to participate is often impacted by the failure of their school to make appropriate adjustments, or to implement adjustments effectively. In particular, interviewees reported inappropriate curriculum modifications, and deferral of responsibility for instruction from teachers to aides. These issues reflect a broader phenomenon of low academic expectations for students with disability, which reflects a problematic deficit-based understanding of disability and is evident in reported experiences of children being discouraged from participating in standardised testing.

3.2.1. Inappropriate curriculum adjustments

Schools enjoy broad discretion to determine which adjustments are reasonable and appropriate for their students. A common adjustment is the modification of the curriculum to better suit the strengths and needs of a particular student, allowing them to participate and to maximise their potential for learning. An aide working in a mainstream government school provided a powerful illustration of how curriculum modifications can support learning:

> *Sometimes the executive functioning's a big thing with our ASD kids. So I think some of my favourite adaptations are when, you know, the steps they have to take, they can't see past the big question. And so you break it down for them, and then they can do each individual part. So they're actually achieving the same as any other student, but you've just done the big strategic thinking for them. And they do all the little bits. And they've done the same thing, just this one big thing is too scary when they start, or too intimidating.*

However, a number of interviewees raised concerns that some teachers lacked the skills to make appropriate adjustments for students with disability to achieve desired learning outcomes:

I think teachers all have the same intention: they want the best for the kids. I think from a teacher's point of view, they have to look at the entire class, and there's quite a responsibility, and there's a lot of work that comes with that job… So instead of looking at the student, saying, "oh, okay, if the question relies on inference rather than direct question, then that's suddenly not appropriate for perhaps three or four or five of the students in my class, and if it's just given in point form instead, and just specific questions, then that could be answered and achievable and successful". But that's a bit of work to rearrange - actually rewrite what you've done. So what tends to happen is that all the questions aren't changed; they just take away half of them. Still what's left still needs to be chopped around by us when we see it. So often we'll get a handout, and the teacher will say, "Oh, yes, I've modified this. Look, the others all have to do 20-odd things. But, look, if they just do these five, I'll be happy with that." And I'll look at those five things and I'll think: but it's still inaccessible. (Aide at a mainstream government school)

A common complaint was that modifications frequently consisted simply of 'dumbing down', without consideration for a child's individual capacities, their specific impairments and targeted strategies for helping them achieve their learning outcomes:

In the case of one of my clients who was in high school, while the rest of [my client's] class was learning about medieval history, this [student's] aide has got [my client] to make a castle with icy-pop sticks. [My client's] a teenager, and [my client's] actually quite smart, [my client] had ADHD and a severe language disorder … and then, in geography where everyone was learning about geography, [my client's] aide has [them] colouring in countries with coloured pencils. So the real issue I think, is schools' ability to (a) understand what a modified curriculum is and then (b), put it into place. They seem to think that a modified curriculum is just easier work, or less work. Now the problem with that is that if a child has a significant academic delay - let's just say they're 10 and they've got the English level of a six year old - they're going to continue having the academic levels of a six year old if you keep on giving [them] a six-year-old's work. (Disability advocate)

Several parents complained about their children being given 'learning' activities and alternatives which had virtually no educational value. Pam reflected that:

If [my child] comes home with a card that [my child's] made, I look at it and I think: 'that's taken you hours, why were you doing that?' That's not going to make [my child] independent.

Similarly, Rachel reported that in the case of her child:

The problem is at the moment, what's happening at school is they say "music is too loud" or "art is too loud", then what is the alternative? The alternative, like I told [the principal] is not to come to class and drink water - I saw the aide just sitting there on their mobile phone, and [my child] is just drinking water for half an hour, [my child] was just seated drinking water for half an hour, she was on her phone. I told [the principal], "maybe take a ten minute break, then take [my child] back to class", because we can't just leave [my child] out of everything".

Of particular concern in these accounts is the extent to which parents do *not* mention those structures which are meant to ensure quality, personalised learning. A Student Support Group (SSG) is mandatory for all students in the PSD and is strongly encouraged for any student with additional learning needs. It is designed to provide schools with a process to support them in meeting their obligations under relevant disability and anti-discrimination laws. An SSG enables those with the most knowledge of – and responsibility for – the student to plan reasonable adjustments and monitor the student's progress.[84]

However, none of the parents described raising their concerns regarding curriculum or adjustments through an SSG. This is not to say that SSGs were not in place for any of the parents interviewed, or that schools did not consult at all. Indeed, a number of parents described having discussions with individual principals, teachers, or other staff members. The experiences of interviewees do, however, lend weight to previous findings that implementation of SSGs can be patchy across schools and across time, have variable quality, and could play a much stronger, more consistent role in ensuring proper consultation and planning for individual students.[85]

Similarly, the existence of an Individual Learning Plan (ILP) seemed to have little bearing on whether parents reported inappropriate adjustments. In some cases,

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[84] Department of Education and Training, *Student Support Group Guidelines* (Apr. 2018) 1.

[85] See: VEOHRC, *Held Back,* above n 13, 82.

adjustments were made in the absence of an ILP and SSG being in place. In other cases, adjustments approved in the ILP were misused in practice. This was, for example, the case in Rachel's situation, described above. In this case, the use of a 'break' from class was identified as an appropriate adjustment in the ILP. However, the way it was used in practice, as described by Rachel, was not consistent with Rachel's understanding of its purpose.

It is important to mention that the Department offers a range of resources to assist teachers to make adjustments, most notably the Abilities Based Learning and Education Support (ABLES) assessment tool. However, these experiences suggest that the capacity of teachers to design and implement appropriate adjustments and modifications require further improvement, and that the structures currently in place to support these processes need to be strengthened. In a positive step, the Department has expressed its intention to start addressing these gaps by developing personalised learning and support planning guidelines, to be accompanied by a personalised support profiling tool.

3.2.2. Deferring responsibility for instruction to aides

The issue of poorly or inappropriately designed modifications can be compounded in situations where teachers devolve their instructional responsibility to aides. While schools have broad discretion to offer a range of adjustments (and often do - in the form of occupational therapists, speech therapists, specialist equipment and/or accessible materials), many rely heavily on the use of aides to support students. Indeed, during the course of this study, the primary adjustment discussed by interviewees was the provision of aides in mainstream classrooms.

These discussions suggest that the role of aides in facilitating adjustments to courses or programs can vary significantly between schools, and - as is to be expected - between students. Some students may require assistance to stay on task, others may require assistance with their executive functioning, or receptive communication, as explained by the following mainstream school principal:

With this we've really strived very hard to have these kids doing - it might be a modified version of what's happening in the classroom. Some of them, it's exactly what they're doing in the classroom, and all they need is someone to just keep

them on track, keep them focused. And then get them in, or explain things, you know? The number of the kids we've got, their receptive communication isn't as strong, so they just don't get it when the teacher says it the first time. But if they're one-on-one with an aide, then the aide hears it, and they can explain it to them.

However, sometimes the variations that can be observed between different schools' adaptations to courses or programs may also arise because aides are increasingly taking on instructional roles with students with disability.[86] In these cases, variation can occur because aides are typically unqualified to take on such roles,[87] and in the absence of being trained in best practice approaches, some will take an ad hoc approach to curriculum adjustments.

This concern was particularly prominent among specialist school teachers who were providing outreach support to mainstream school teachers. Specifically, specialist school teachers were concerned that aides were being expected to prepare teaching material for students with disability in mainstream government schools when this was not part of their role, as the following two accounts illustrate:

I was asked just to come and have an open chat with the AP, the psychologist, the speech therapist and the teacher aide staff. They just asked me to have a round-table discussion. And the first question I got - so significant it sticks in my head - was "how much time do the teacher aides at [your school] get to prepare to work with their students?"…I said "the teacher aides at [my school] have no time for preparation, because they do not prepare for the children. They work under the direction of a teacher all the time. It's not part of their job description, they're not paid to do it, and they're not qualified to do it."

Another special school teacher providing outreach support to mainstream schools made a similar observation:

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[86] For a discussion of the use and efficacy of aides in general education settings see: Renee Punch, *Use and efficacy of paraprofessionals in special education: An internal report commissioned by the Program for Students with Disabilities Review Unit, Department of Education and Training* (2015) <http://www.education.vic.gov.au/about/department/Pages/psd-review-research.aspx>.
[87] Or at least aides do not require certain qualifications as part of their employment.

Often in my job it is just about telling the teachers that, you know, "there might be an ES staff there, but their role is to work under your direction, and you're responsible for the child's learning still".

These experiences and insights suggest that significant room exists for building the capacity of both teachers and aides to understand, make, and execute appropriate curriculum modifications. They also suggest that teachers and aides would benefit from a clearer delineation of instructional responsibility. While the document Dimensions of Work – Education Support Class - which forms part of the Victorian Government Schools Agreement 2017 - offers policy guidance on the distinct roles of teachers and aides,[88] it seems that additional efforts are needed to ensure this guidance is understood and applied in the classroom. As of the time of writing, the Department has indicated that additional guidelines for schools on the use of teacher aides are being developed.

3.2.3. Low expectations

In addition to gaps in teacher and aide capacity, discussions with parents indicate that low expectations of students with disability, reflecting problematic understandings of disability, may be a factor in classroom staff viewing the sorts of modifications discussed above as acceptable, meaningful, or appropriate.

A number of parents who took part in this study reported encountering the notion that their child was (only) being included in mainstream schools so that they can 'feel good about themselves'. Most often this sentiment was voiced at the end of the school year, when school staff were assessing satisfactory completion of curriculum requirements, and considering students' progression to the next year level.

Francis, for example, recalled that her child was about to be put up another year level when '*[my child's] never passed a subject, ever'.* When Francis asked why her child would be moved up to another year level when they hadn't met the requirements for their current grade, she was told by the vice principal: *'oh, but we need to, because it's for [your child's] self-esteem.'*

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[88] Dimensions of Work - Education Support Class, Victorian Government Schools Agreement 2017, Sch. 3.

A similar scenario was recounted by Juliet, who explained that in her child's case:

They just kept putting [my child] through the years, and I thought, how can they pass someone, and put them through, when they have been absent from the class more often than not? They said: "it's for their self-esteem, so they can feel good about themselves", but that's just bullshit.

The approach taken by schools in these cases is in fact broadly consistent with the Department's guidance on attendance, which reads:

Schools should regularly promote students to the next year level with their peer group. Schools use their professional expertise and judgment in relation to these matters. Students are retained only in exceptional circumstances where a school considers it is required for the long-term benefit of the student e.g. considering their social, welfare and academic needs. Schools must ensure that parents/guardians are fully advised of the options that the school considers to best meet individual student needs…[89]

These cases may reflect a misunderstanding among parents that year level movement is based on achievement, rather than the default position. They may also reflect differences of opinion between schools and parents as to the long-term best interests of the child in question, and more specifically, to the relative value of academic learning. This is reflected in the comments of Helen:

I've been told that they never fail a child that's on the spectrum. They always push them through the system, because they find that they learn better with their peers, their age group. Which is interesting because at the same time, if my [child] has low comprehension then [my child] could be pushed through every year and [my child's] not going to learn the foundations for basics. And I'm thinking very far ahead, how [my child's] going to cope as an adult if [my child] hasn't got the basics? And that really worries me all the time, I always think about it, because I actually said, and this is a conversation with the principal, and I said, "Well what happens, because [my child] is on the spectrum, and [my child's] obviously not at the same

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[89] Department of Education and Training, School Policy Advisory Guide, 'Attendance', <http://www.education.vic.gov.au/school/principals/spag/participation/pages/attendance.aspx> (accessed 7 Jun. 2018).

level as [their] peers academically, what happens there? Do you keep [my child] back if [they're] not doing so well?" and he said, "Oh no, no we don't keep them back, we don't usually keep children on the spectrum back, we always push them through with their peers because they learn best with their peers".

This approach to student learning can lead some schools to engage in practices of exclusion during standardised testing such as NAPLAN and VCE, when a child's unpreparedness can no longer be ignored (and has wider consequences for the school as a whole). Bianca, for example, recalled that in her child's case:

Up until year 10 the school had been happy to grade [my child] differently, give [my child] special consideration so [my child] could go through the year levels. But in year 10 they started to really insist that [my child] go to another school. I think they were worried about their school rankings. But I refused to move [my child]. So they said [my child] couldn't complete [their] VCE, they asked [my child] not to sit it. But I refused that too, I wanted [my child] to get [their] VCE because [my child] needs to get a job so [my child] can be independent. [My child] spent a lot of those two years by [themselves] reading in the library.

There were similar scenarios reported by parents in relation to NAPLAN. Kathy, for example, recalled that:

We had the principal call and say that [my child] was too stressed and anxious to complete NAPLAN; [my child] didn't even know anything of NAPLAN at that point.

The *National Protocols for Test Administration* states that:

students with significant intellectual disability and/or those with significant coexisting conditions which severely limit their capacity to participate in the tests may be exempted from sitting the national tests. This is determined after consultation has occurred by the principal and the relevant parent/carer, and the student is not able to access the tests with adjustments.[90]

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[90] State of Victoria, Victorian Curriculum and Assessment Authority, *2012 NAPLAN Handbook for Principals*, 8.

The Protocols further require principals to obtain the written consent from the student's parents or carers should a student be exempt from testing. It is unclear in Kathy's case if written consent was ever obtained, or if her child would be unable to access the tests if adjustments were made.

In Juliet's case, written consent was indeed obtained, although the methods by which it was obtained again appear to run counter to the National Protocols:

> *The Grade 5 teacher was okay, but at the same time she didn't want [my child] to sit the NAPLAN. [My child] was quite happy to sit the NAPLAN because what we did is I coached [my child] in Grade 3 for the NAPLAN and [my child] got really good results because I would do visual. So say if it was three times five I would draw three apples five times, and [my child] would be able to visualise that and go, "Yep that's 15." So that's how I coached [my child]. The Grade 5 teacher put a lot of pressure on [my child] because [my child] said, "I want to do it", I said, "Well you're going to do it, no problems whatsoever." So then they got me to sign this form and I said, "No I'm not signing it, [my child] wants to do it, [my child] is going to do it", "Oh well we can't have [your child] do it" and I said, "Sorry, I'm not signing that form." So what they did is they decided to tell [my child] that maybe it might not make [my child] feel good about themselves if [my child] did it. [My child] came home and said, "Mum please, please sign that form. I just don't want to keep hearing all of this stuff" and I said, "It means you won't be able to do it", "I don't care, I don't want them talking to me like that anymore", I said, "Okay, I'll sign it." (Juliet)*

The low expectations held by some school staff seem to reflect a deficit-based understanding of disability, which focuses on what a student cannot do. This understanding has been expressly rejected in international human rights norms[91] and in Victoria itself.[92] Instead, there is now broad consensus that policy and practice should harness a strength-based approach that recognises the resilience of individuals

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[91] CRPD, General comment No. 4, as above, n 44, ¶ 16.

[92] Department of Education and Training, *PSD Review*, as above n 6, 122, (quoting Grant and Cadell 2009).

and focuses on the potentials, strengths, interests, abilities, knowledge and capacities of individuals, rather than their limits.[93]

Recommendations:

To the Department:

- **Make ILPs and SSGs compulsory for all students who require adjustments beyond quality differentiated teaching and learning, not only those receiving PSD support.**

- **Require all ILPs to be submitted to the Department, and develop a moderation process for ILPs. This could involve undertaking random reviews of ILPs. Where the review identifies a potential concern (for example, a manifestly inadequate ILP, or an ILP which has not been updated), support should be extended to the school in question to build the capacity of its staff and leaders until the learning supports in place meet requisite standards.**

- **Evaluate the effectiveness of existing professional development opportunities and other guidance (such as online materials) designed to assist teachers in making appropriate adjustments and curriculum modifications. Develop new guidance and opportunities where existing support is ineffective or gaps exist, so that a comprehensive suite of options is available to teachers needing to build their skills. This should include options for seeking specialist advice, peer skill sharing, and ongoing mentoring relationships.**

- **Elevate the personalised support profiling tool currently in development into a 'hub' for each student. The hub should integrate all planning and assessment tools and documentation (including ILPs), reports and results, SSG minutes and other correspondence, and should enable easy reporting for the purposes of the Nationally Consistent Collection of Data on School Students with Disability (NCCD). The hub should also provide links to all relevant policies, guides and tools, and to professional development opportunities and support.**

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[93] Ibid.

- **Ensure that the guidelines on the use of teacher aides currently in development include guidance to teachers to enhance understanding of the policies which delineate instructional responsibilities for teachers and aides. They should also include practical tools to help teachers and aides apply the relevant policies in the classroom, for example studies of best practice in how teachers and aides can best work together.**

- **Examine options for increasing rights-compliance in standardised testing, in particular VCE and NAPLAN. Evaluate how participation by children with disability can be encouraged and necessary adjustments made to facilitate participation, and to overcome the current incentives for schools to exclude or exempt students with disability.**

4. Social Inclusion, Dignity and Self-worth

4.1. Scope of the right to inclusion

A central tenet of the right to education under international human rights law is that education must be directed to the full development of the human potential and personality, and sense of dignity and self-worth.[94] This 'whole person' approach is reflected in the Department's own vision for inclusive education, to 'enable all students to be welcomed, accepted and engaged so that they can participate, achieve and thrive in school life.'[95] Achieving inclusive education therefore requires duty-bearers to move beyond questions of curricula and academic achievement to consider risks of social disablement. Here the term 'social disablement' is used to refer to the specific barriers that disable students from having opportunities to interact with their peers and reach their full social development.[96]

4.2. Findings: social inclusion, dignity and self-worth in practice

During the course of our research, approximately 70% of parents interviewed expressed concern about the meaningful inclusion of their child in mainstream classrooms and playgrounds. Specifically, parents were concerned that while their

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[94] ICRPD art. 24(1)(a); ICESCR art. 13(1).
[95] Department of Education and Training, 'Students with a Disability', above n 40.
[96] As opposed to its alternative meaning, whereby it is used to refer to the barriers, attitudes and other social processes that work to disable students with impairments in general.

child was attending a mainstream school, they were also subject to a range of exclusionary practices within these schools, and that these practices were hindering the full development of their child's potential. The majority of these concerns related to one of three potentially exclusionary practice: segregation within the classroom; unintended social disablement through inappropriate deployment of adjustments; or lack of interaction with peers.

4.2.1. Segregation in the classroom

A small number of parents described their child being routinely segregated from their peers in the classroom or playground (a phenomenon known as 'micro segregation'). Rachel and Jane for example, spoke about their children being seated away from their classmates, in the area at the back or side of the classroom normally reserved for schoolbags:

> *[my child] is probably 80% of the time in between - you know where they hang the bags? The little room? [My child's] in there. [My child] will do one-on-one activities with the aide in there, and then they would try and integrate [my child] into the classroom for snack time or whatever. (Rachel)*

> *[my child] was segregated from [their] peers. [My child] was put in the back of the classroom where the bag lock was next to [them], and everyone else was in the other part of the classroom - within a horseshoe-shape - learning. (Jane)*

Juliet recalled several instances when her child was removed from their designated classroom and was told to sit in the back corner of a different classroom. Here, Juliet spoke about the kinds of rationales school staff had offered when she questioned them about why this approach was being taken with her child:

> *One day I went to pick [my child] up for an appointment, and the teacher went, "[your child's] in the next room". I said, "What's [my child] doing in the next room?" and she said, "Oh, sorry I can't talk, I've got a class to teach" and I went, "Fine"… I walked into the next classroom and asked for [my child], and there [they were] sitting on the ground. I can even picture how [my child] was sitting; [my child] was facing the corner, [my child's] legs weren't crossed, [my child] was sort of just sitting on [their] side, with [their] legs bent on the ground, and just playing with the carpet.*

I said to the teacher, "What's going on here?", "Mrs [X] sent [your child] over", I said, "Why?", "She does it all the time…occasionally I feel sorry for [your child] so I get [your child] to join the group."

These incidents raise serious concerns about the level of dignity being afforded to some students with disability in mainstream schools. They also raise questions about how some schools might interpret what it means to deliver inclusive education to students with disability. As noted in section 2, inclusive education is not achieved merely through integration - that is to say, by simply allowing students with disability to occupy the same general spaces as their peers. Inclusion requires taking further measures to foster all students' development through meaningful participation in classroom activities and other aspects of school life.[97]

4.2.2. Social disablement through the improper implementation of adjustments

A number of interviewees also expressed concern that, when implemented without consideration for their social impacts, otherwise appropriate adjustments may have negative, unintended consequences. This primarily related to the use of aides. An advocate for students with disability described the general challenge in the following terms:

So I think when students don't want to identify as having a disability, it can be harder. And even if you have a visible disability that impacts on how you might want your support delivered. So students talk to us sometimes about having an aide in the classroom, and how this can actually be socially disabling. So navigating the fact that they're sitting beside a person - and some of the other kids might not want to sit next to an adult in the classroom. It can be quite difficult for some students.

At times, the social disablement is a result of a simple failure to take the child's social inclusion into account when designing a particular adjustment. Pam, for example,

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[97] 'Thematic study on the right of persons with disabilities to education', Report of the Office of the United Nations High Commissioner for Human Rights (18 Dec. 2013) A/HRC/25/29, ¶ 4; UNICEF, *The Right of Children with Disabilities to Education: A Right-Based Approach to Inclusive Education* (Geneva, 2012); and CRPD, General comment No. 4, as above, n 44, ¶ 11.

described how the use of an aide to support her child who has limited mobility ended up limiting the child's opportunities to interact with their peers in the playground:

What they were doing - and I only discovered it through my [other child] - they were getting an aide to come from another classroom, walking [my child] down the stairs with this aide, five minutes before everybody else. The kids were in the classroom eating their lunch and [my child's] taken out of [their] classroom. So [my child] loses [their] sole social interactions. So the captive audience is gone, and [my child's] is made to sit under a friendship tree with an aide, and eats [their] lunch there.

However, as Jane explained in her child's case, the social disablement of students with disability can also occur in more instrumental ways, where aides are used to segregate students with disability from their peers:

[My child] would go out at recess and lunchtime when the other children came back in, so [my child] had [their] own recess and lunch. They gave [my child] a full-time aide the whole time [my child] was out and in the classroom, which sounds great, but it wasn't. It wasn't to actually make sure [my child] interacted with other kids because [my child] has ASD and [my child] needs help socially, no, it was to keep [my child] away from everyone else. So therefore, when they went out to play, [my child] got to stay inside. When they came back in, [my child] was allowed to go out. So they weren't doing it for my [child's] potential.

These experiences illustrate the importance of adopting a 'whole person' approach to designing and implementing adjustments for children with disability; an approach which ensures that any risks to a child's social inclusion are assessed and mitigated. This is consistent with the ICRPD, which imposes a duty on States to ensure that 'effective individualized support measures are provided in environments that maximize academic and *social* development, consistent with the goal of full inclusion.' (Emphasis added).[98] The critical importance of social inclusion was captured aptly by Pam, who explained that:

My biggest problem all along is that we've been fighting fears, we've been fighting isolation, social issues that they create, and [my child's] now lost all [their] –

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[98] ICRPD art. 24(e).

because the friendships start from the younger years, so by now, in grade five, all the other kids are all groups of great mates and [my child] hasn't been able to make any because [my child's] always been separated.

4.2.3. Social disablement through isolation from peers

The young people with disability interviewed during the course of this research raised interactions with peers as fundamental to their experiences of inclusive or exclusionary education in mainstream government schools. Young people often reflected on the school-based practices they felt worked for or against the development of positive peer relationships, and spoke in particular about a desire to be treated the same as everyone else in the class. Indeed, many expressed frustration, discomfort and sadness about having to be subject to practices that made them feel like they and their disability stood out to their peers:

I was always away from everyone else. And I didn't really like it because everyone could see that I was in a room, doing something, and it just pointed out that I had a disability, and that I was different. And throughout my whole education, with things like that, you do feel a bit isolated from everyone else. It highlights the disability I guess. (Susie)

Some young people felt that the impact of the differential treatment went beyond making them feel 'like an outsider', to making their peers think they were getting an unfair advantage:

For me, it was more the students, maybe, thinking that I was getting an easy way out. When it was really - if they could only understand how hard it was, and how much extra effort I had to put in. It felt like they were just taking it easy and maybe, to them, it looked like I was getting too much help. But I wasn't. I think that was probably one of the hard things, especially in high school. (Susie)

These experiences lend weight to the conclusions drawn in the preceding subsection - that adjustments must be made sensitively, with regard to a child's social inclusion as well as their academic participation. They also draw attention to the breadth of the concept of inclusion, and a school's responsibilities in relation to it. The Disability Standards impose certain duties on education providers to prevent or respond to

harassment or victimisation of a student with disability. However, a true human rights-based approach to education involves schools facilitating the participation of students with disability in all aspects of school life, including its social dimensions, and fostering a school culture which moves beyond mere integration to valuing the unique traits, capacities and dignity of each student.

Recommendations:

To the Department:

- **Offer mandatory training on inclusive education and the social model of disablement for all school staff.**
- **Incorporate social risk assessment into the planning process for necessary adjustments, and ensure tools (including ILPs) used for this process direct school staff and SSGs to consider any unintended negative effects of proposed adjustments on the child's social inclusion, and take steps to mitigate these.**
- **Develop specific policy guidance about micro segregation (that is, segregation in the classroom or playground except where it constitutes a timeout, safe space, or chill out room). This should emphasise that these techniques should not be used as behaviour management, unless they have been included in a child's ILP developed in consultation with the parents, are used as infrequently and for as short a time as possible, and as a last resort.**

5. Managing Behaviours of Concern

5.1. Scope of the rights involved in managing behaviours of concern

The management of behaviours of concern, and the use of restraint and seclusion, give rise to considerable human rights risks. Rights to freedom of movement,[99] to liberty and security of the person,[100] to non-discrimination,[101] and the rights of the child under section 17(2) of the Charter, may all be breached by the use of restraint and

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[99] *Victorian Charter*, s. 12.
[100] *Victorian Charter*, s. 21.
[101] *Victorian Charter*, s. 8(2).

seclusion, depending on the nature and degree of the intervention.[102] Perhaps most significantly, the use of restraint may – where the severity of the engagement is sufficiently high – violate section 10 of the Charter which protects students from cruel, inhuman or degrading treatment. Several high profile cases of the use of restraint on children with disability in schools in Victoria and beyond have placed the issue on the public agenda.[103]

It is therefore unsurprising that the issue of restraint in Victorian schools has been the subject of considerable scrutiny in recent years. In response, the Department has undertaken a significant reform process. This has included the revision of the Education and Training Reform Regulations, the creation of the role of Principal Practice Leader (Education) to provide enhanced oversight of restraint and seclusion in government schools, and the introduction of a revised restraint and seclusion policy, accompanied by new guidance, procedures and resources (to be reviewed in December 2018).

The new suite of guidance limits the use of physical restraint on a student to when there is an imminent threat of physical harm or danger to the student or others and where such action (i.e., to physically restrain or seclude) would be considered reasonable in all the circumstances and there is no less restrictive means of responding in the circumstances.[104] It also emphasises prevention and early intervention, as well as de-escalation, as a means to eliminating restraint and seclusion; a range of positive behaviour support initiatives have been concurrently

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[102] For a more detailed discussion of the full range of rights and laws relevant to the management of behaviours of concern, see: Adam Fletcher, *Education and Training Reform Regulations 2017 (Draft): Submission to Department of Education and Training Consultation,* Castan Centre for Human Rights Law (Feb. 2017).

[103] See, e.g.: Timna Jacks and Henrietta Cook, 'Students grabbed, wrestled to the floor and strapped to chairs three or more times a day' *The Age* (9 Jun. 2017) < https://www.theage.com.au/national/victoria/students-grabbed-wrestled-to-the-floor-and-strapped-to-chairs-three-or-more-times-a-day-20170608-gwn13z.html>; Pallavi Singhal 'NSW schools using restraints and isolation against guidelines, Ombudsman finds' *Sydney Morning Herald* (11 August 2017) <https://www.smh.com.au/education/nsw-schools-using-restraints-and-isolation-against-guidelines-ombudsman-finds-20170811-gxu0d5.html>.

[104] Education and Training Reform Regulations 2017, r. 25; Department of Education and Training, School Policy Advisory Guide, 'Restraint and Seclusion', <http://www.education.vic.gov.au/school/teachers/studentmanagement/Pages/behaviourofconcern.aspx> (accessed 16 Apr. 2018).

rolled out.[105] Human rights has been placed at the heart of this reform strategy, with the Principal Practice Leader (Education) noting that 'human rights principles permeate all areas relating to restraint and seclusion and strongly influence both proactive strategies to address behaviours that cause harm to self or others and reactive strategies in response to behaviours that cause harm to self or others.'[106]

The Department is to be commended on its commitment to reducing - with the aim of eliminating - the use of restraint and seclusion in Victorian schools. Victoria is, rightly, seen as a leader on this issue. We note that many of the initiatives put in place by the Department are in their infancy, and we look forward to a thorough evaluation of their impact in due course. In the meantime, room for improvement remains, particularly in the implementation of positive behaviour supports and of human rights-based environments and adjustments, and in the reporting and monitoring of the use of restraints and seclusion.

5.2. Findings: managing behaviours of concern in practice

In the context of this study, five parents reported that their child had been subject to physical force, restraint or seclusion in a Victorian government school at some time in the past decade.[107] In general, these parents provided little detail about the events that occurred, or the circumstances surrounding their development. Notably, school staff, staff of organisations representing the interests of education institutions and personnel, and staff of organisations providing support or advocacy for students with disability, similarly provided few direct examples of the use of restraint and/or seclusion in government schools at this time.

Consequently, the insights this study can offer into parents' and children's experiences of restraint and seclusion in government schools at this time are limited. In particular,

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[105] Department of Education and Training, 'School-Wide Positive Behaviour Support', <http://www.education.vic.gov.au/school/teachers/management/improvement/Pages/swpbs.aspx> (accessed 16 Apr. 2018).
[106] Department of Education and Training, 'Restraint and Seclusion: Legal Obligations', <http://www.education.vic.gov.au/school/teachers/studentmanagement/Pages/legal.aspx> (accessed 16 Apr. 2018).
[107] In addition to these accounts about restraint or seclusion in Victorian Government schools, two additional parents spoke about their decision to remove their children from specialist schools because they were being subject to restraint and seclusion, and another parent spoke about how their child had come home from a childcare centre when they were 18 months old with bruising consistent with restraint.

the methodology adopted does not enable us to make any assessment of the prevalence of restraint or seclusion, any historical trends in the use of restraint or seclusion, or the impact of recent reforms on the management of challenging behaviours in practice. Interviews, coupled with legal research, have however provided valuable insights into the human rights compliance of several policies, and into broader issues of behaviour support.

5.2.1. Inconsistency of regulation 25 with the Charter

In June 2017, the Education and Training Reform Regulations 2017 (Vic) (2017 regulations) came into effect, following a review process which included public consultation. The 2017 regulations include regulation 25, which reads:

> A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour that is dangerous to the member of staff, the student, or any other person.

This provision has been retained unchanged (bar a slight change to some wording) from the 2007 regulations. It was the Castan Centre's position at the time of the review that this regulation has the potential to result in outcomes which breach human rights, including section 10 of the Charter which protects students from cruel, inhuman or degrading treatment.[108] Whether an engagement violates the right under section 10 will depend upon its severity, and it is important to note that the threshold in the education context is low. There are specific protections in international law for children's bodily integrity.[109] Treatment which may constitute a justifiable limitation on an adult's rights under section 10 of the Charter may not be justifiable when a child is involved. The Committee on the Rights of the Child has emphasised that all forms of violence against children are unacceptable,[110] and has also noted that '[c]hildren with disabilities are more vulnerable to all forms of abuse be it mental, physical or sexual,'

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[108] See: Castan Centre, *Education and Training Reform Regulations 2017 (Draft): Submission to Department of Education and Training Consultation*, above n 102. This view was shared in a number of other organisations' submission, including the VEOHRC (Letter from Kristen Hilton to Education and Training Reform Regulations Review, titled 'Submission to the Education and Training Reform Regulations Review', undated); and the Law Institute of Victoria (Letter from Nerida Wallace to Ms Lizzie Blandthorn MLA, titled 'Submission to the Education and Training Reform Regulations Review', dated 9 Aug. 2017).
[109] See: ICRC, arts. 19 and 37.
[110] See: Committee on the Rights of the Child, General comment No. 13 (2011), *The right of the child to freedom from all forms of violence,* 18 Apr. 2011 (CRC/C/GC/13), ¶ 17.

and recommended that 'institutions providing care for children with disabilities [be] staffed with specially trained accessible and sensitive complaints mechanisms.'[111] The intersectional vulnerability of children with disability therefore means that any potentially violent intervention, including in particular restraint or seclusion, carries a high risk of breaching students' rights under section 10 of the Charter.

The wording of regulation 25 is problematically vague and its scope ambiguous. In particular, the terms 'reasonable action', 'restrain' and 'behaviour dangerous to a member of staff' lack sufficiently precise definition. This exacerbates the risks posed to the rights engaged.

The Castan Centre submitted at the time of the review that regulation 25 ought to be omitted from the 2017 regulations. It remains our position that this provision is, in its present form, incompatible with the Charter, and possibly also with the *Disability Discrimination Act 1992* (Cth). At a minimum, the regulation should be redrafted for greater clarity, to give the least restrictive means principle in section 7(2) of the Charter primacy, and with careful consideration of the human rights engaged.

5.2.2. The link between adjustments and behaviours of concern

The Department's *Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools* (the Principles) encourage schools to make 'every effort' to prevent the need for restraint or seclusion practices by implementing comprehensive positive behavioural supports to respond to students with a history of behaviours of concern.[112] This reflects an emphasis on preventative measures (from early intervention through to de-escalation) as the primary means of reducing, and eventually eliminating, the use of restraint and seclusion in schools. In recognition of the fact that behaviours of concern 'do not happen in isolation from the student's

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[111] Committee on the Rights of the Child, General comment No. 9 (2006), *The rights of children with disabilities,* 27 Feb. 2007 (CRC/C/GC/9, 2006), ¶¶ 42-43.

[112] Department of Education and Training, 'The Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools', <http://www.education.vic.gov.au/Documents/school/principals/participation/15Principals.pdf> (accessed 28 May 2018).

environment and skills,'[113] and in line with current understandings promoted across the disability services sector,[114] the Principles state that behaviours of concern:

> may be the most adaptive way the student knows how to communicate, or they may be the only way the student can communicate when they feel under pressure, or where they believe their needs have not been recognised. Environments can be structured to greatly reduce, and in many cases eliminate, the need to use restraint or seclusion.[115]

However, the experiences of a number of interviewees reveal persistent challenges in the implementation of positive behaviour support and appropriate environments for students, and in the adoption of a 'prevention mindset' within some schools.

A number of interviewees identified certain environments as contributing to behaviours of concern. These environments were the same environments as those identified in section 4 of this report as impinging on students with disability's social inclusion, dignity and self-worth. That is to say, the segregation of students with disability in the classroom, as well as the social disablement of these students, were seen by participants in this study as being connected to behaviours of concern. This connection was explained in detail by a number of participants including parents, specialist school teachers providing advice and support to mainstream government schools, and disability organisations working to support the needs of students with disability in the classroom. Rachel, for example, explained how she saw her child's behaviour as stemming from the school's decision to seat her child in the classroom alcove where students' bags are hung:

> *[My child] has been having lots of issues staying in the class, in [their] individual area. And when I saw the class, I spoke to the principal and said, "it's cause all the bags are in that area and it's probably a lot of stimulus, yeah? [It's]very cluttered. And maybe that's why [my child] doesn't want to stay in the classroom." The*

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[113] Ibid.

[114] See, e.g. Victorian Department of Health and Human Services, *Positive Behaviour Support Learning Program – DAS Staff: Learner's Guide. Version 1* (Jan. 2016) <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/positive-behaviour-support-getting-it-right-from-the-start>.

[115] Department of Education and Training, *The Principles for Reduction and Elimination of Restraint and Seclusion in Victorian Government Schools,* as above n 112.

principal said, "I can't do anything because we've got to think of the other children."
He said he can't move the bags. So then you should expect behaviours; [my child]
might kick up.

As Pam clarified in the context of her child's situation, the socially disabling impact of constant surveillance by aides in some student's school environment can also contribute to behaviours of concern:

The school burnt - that's my word - two and a half hours of the day following [my child] in the playground. … So that was our first battle with the school, trying to stop them following [my child] in the yard. The neurologist, the paediatrician is saying "this kid needs help in the classroom!" …So this aide wrote something about, "Hi [parent], I'm really sorry I just realised [your child] didn't eat all [their] lunch, but I got [them] to eat it in the classroom." And I wrote back, always trying to be nice, "Hey don't worry about it as long as [my child] ate something." Because I thought: can you not worry about what [my child's] eating? Can you leave [my child] alone, you know? … Anyway two days later, she writes me this note and she's really on fire with this note, because it said that she told [my child] to eat [their] sandwich before [their] treats. And [my child] refused. So she kept [my child] in the classroom for 40 minutes, and by this stage [my child] kicked her and pushed past her and there was another aide blocking [my child] from the door. So I was in tears, because I was thinking it's only because you sit with my child. No other kid has someone being nasty on what they're eating and telling them what to eat.

Interviewees' experiences also reveal a close link between the appropriateness of adjustments made to enable a child's learning as discussed in section 3.2.1 of this report, and a child's behaviour. The following example illustrates the connection between challenging behaviours, the disabling presence and use of aides within segregated classrooms, and poorly designed curriculum modifications which do not help the child to learn:

We had another school which is one of the first ones I went to... [The child] was sitting at the back of the room, and they asked me to come because [the child] was physically hurting [their] teacher aide, kicking her and biting and pinching. They had [the child] at the back of the room facing the wall and sitting one to one with

her… And I watched [the child] - [they] needed to go to the toilet, [they] needed to sharpen [their] pencil, [they] needed a drink. Everything was about avoidance because the academic work was too bloody hard for them… I said, "I'd like to see you…move away from [the child]. [The child] needs to be given work that [they] can do independently, and if [they] can't independently do the work, then the work's too hard. If you have to talk [the child] through every little bit of it, the work is too hard and you need to simplify it." [The child] was working well above where [they] were] actually at, because she was doing all the work for [them]. (Specialist school teacher)

Similar observations were made by the following representative from a disability organisation who had been invited by a mainstream government school to assist their staff in developing appropriate strategies to respond to a specific student's behaviours of concern:

I'm thinking of one school in particular that I supported last year in Prep, and this year in Grade One, and they've really not done anything that we've recommended, and the child hasn't really developed at all in 18 months, and [the child's] displaying quite a lot of behavioural issues, and it's really frustrating because, as I said, none of the things have been put in place. There isn't an Individual Learning Plan, [the child's] facing the wall, everyone else is on a table of four or five, and it's so obvious that [the child's] behaviours of leaving the classroom or trying to engage with others is seen as interrupting or difficult, are directly connected to not being engaged. … But again, I think it comes back to, has the school done that consistently, or do they give up too easily, and then blame the child? … And so, one of the schools I was talking about before, where [the child's] facing the wall, [the child's] not engaged in any learning with anyone else – the school wants to focus on [the child's] behaviours now, but that's – what's first, the chicken or the egg? It's not the behaviours that we need to focus on, it's everything else, and the behaviours will probably improve.

These experiences speak to the instrumental value of adopting a human rights-based approach to education, and specifically to focusing on designing and implementing adjustments and supports which fulfil a child's rights to learn, to participate, and to develop their personality and potential. Beyond its own inherent benefits and value,

such an approach plays a role in preventing behaviours of concern, and in doing so contributes to making a school a safe and inclusive space for all children and staff.

5.2.3. Variation in approach to managing behaviours of concern

The interviews undertaken in this study reveal significant variation in respondents' perceptions of different schools' approaches to behaviours of concern. Interviews with disability advocates and specialist school staff who provide advice to mainstream government schools indicate that some mainstream schools lack the skills or willingness to implement positive behaviour support processes and procedures, and are struggling to build a culture of prevention. The following special school principal offered a perspective on why this may occur:

I think our school, and I think most special schools, will see that behaviour is a core responsibility of supporting a child to be able to learn and it's not just you need to improve your behaviour, it's how can we facilitate that improvement in behaviour. From what my observations are, that's less obvious in a mainstream school. They have more of a rule-based structure. And we've got [X number of] students; the mainstream down the road have [ten times that amount]. That flexibility is not there, or the time is not there, or the resources or the training is not there. We have trained staff, develop individual behaviour plans, collect data around behaviour. Those are not available in most mainstream schools either because of resources or time or inclination … But I think there are adequate resources to skill people up. It's around the structures and the time and the importance that is placed on it.

These accounts contrast starkly with the experiences and perceptions of the mainstream government school staff interviewed for this study. Most of these interviewees provided almost textbook perfect accounts of how they responded to behaviours of concern at their schools, and may reflect the fact that we actively approached schools with reputations for inclusiveness. According to one Wellbeing Coordinator and High School Teacher:

I'd say one of the biggest challenges is to change the thinking of students and parents to say, "Perhaps your child's not being naughty." Maybe the setting that we have set up is not meeting a need for them and we need to distinguish between: is this a need or is this a want, and then if it's a need, then what sorts of things can

we do to change the child's environment or what adjustments can you make to your teaching or to the learning environment in order for that need to be met in a way that's positive for the child and doesn't impact too much on the other children, because those adjustments can be made and it is your obligation to make those adjustments. We could go down a really strict disciplinary line with particular sorts of things that children are facing, but I always say to teachers, "What has the behaviour been triggered by? What is this need and what could you do differently? How can we help? What can we do to change the environment?" It's about just having continuous conversations.

In a similar vein, the following mainstream government school principal spoke about how their school further embeds these individualised responses to students within broader processes and procedures:

We've got a lot of processes in place. We have a snapshot, which it gives a quick glance of all these children, about what their meltdown would be, what their triggers are, what works, so that's just a snapshot thing. We've got - and that goes in for all your specialist teachers, ES teachers, it goes in the folders. We've got a behaviour management plan, so if they're down at camp, okay, it goes through all the things that if this was to happen, and you look at this. There's a whole range of processes and procedures. We have reference to the legislation in all of our policy development now, so it's formalised at a working level, but also in I guess the school's official documentation.

These divergent accounts suggest (perhaps unsurprisingly) that some schools are excelling at embedding the positive behaviour support model in their school culture and practice, while others continue to lag. It is important to acknowledge the very significant steps which have been taken by the Department to address this. In particular, the Department has launched the School-Wide Positive Behaviour Support (SWPBS) framework, supported by $5.9 million in funding. A pilot of the framework was commenced in 100 schools in 2017, and in 2018 the Department announced the creation of a state-wide coordinating team, and the employment of 17 region-based coaches to assist schools to implement the framework. The Department has also implemented several initiatives to develop skills and confidence within schools to undertake functional behaviour assessments, including a pilot project designed to

increase the capability of the Student Support Services to be able to conduct function-based assessments and implement function-based interventions for students with complex behaviours.

While implementation of the framework is in its infancy, it is encouraging to see the Department's commitment to an evidence-based prevention-based approach, and to see the government providing earmarked funding for its support. We note that the framework includes significant data collection, to be used to assess the effectiveness of the program. We will follow the implementation of the framework and the release of data with interest.

5.2.4. Reconciling the rights of children with disability with the rights of others

It is clear from interviews with school staff and their representatives, and from the public discourse on restraint, that many see the rights of teachers and non-disabled students to be in tension with those of students with disability:

> *So restraint and seclusion are issues that we're aware of, and that we're supportive of the Department in terms of the work that they're doing around that. But our concern is that the rights of the student and the family shouldn't make for an unsafe workplace... We're seeing times where the safety of the other students, but in particular, of the employees who are just attending work, is not seen as important, or as important as the rights of the students and the parents. (Organisation representing the interests of education institutions and personnel)*

In particular, concern has arisen that the rights of students with disability have 'trumped' the rights of other students to learn in a safe environment, and of staff to a healthy and safe workplace:

> *I know there are regulations surrounding restraint and seclusion. And I know there are rules, but I am absolutely aghast that the Disability Act overrides the OHS Act. And this has been a case in that an employee has been injured in a horrific manor. And [the student] could not have done anything more severe. It is a horrific situation, and now the staff member, you know, the child remains at the particular spot. And that's where the staff member works… So, staff safety is secondary to*

a child's right to an education in a certain setting, no matter what they've done. I cannot fathom that one … That's hard. That's really hard, and it doesn't make it easier for people to do what we do … The child's rights are above the staff member's rights. And there's got to be a balance there. (Mainstream school principal)

This insight speaks to the profoundly negative impacts which school violence can have on staff and students alike. While 72.6% of staff surveyed for a 2013 report by the Auditor-General rated their school environment as 'safe' or 'very safe', over 50% identified students with challenging behaviour as a risk of concern.[116] These figures reveal the very pressing need to take measures to ensure that all members of school communities – students and staff – are secure, and feel safe, at school.

It also speaks, however, to the misconception that the rights of children with disability under the law trump those of other students and staff. All students and teachers possess the same rights to bodily integrity and right to education as their peers with disability. Charter rights engaged by the use of restraint are subject to certain limits,[117] which enables a balancing of rights. For example, medical necessity or the safety of others may be relevant considerations in determining whether a right has been breached.[118] Moreover, schools owe a common law duty of care to their students[119] and their staff, and have obligations under the *Occupational Health and Safety Act 2004* (Vic) to provide a working environment that is safe and without risks to health.[120] Contrary to the perception of the Principal quoted above, one law does not trump another, and compliance with legal obligations in respect of students with disability does not excuse the Department or a school from its responsibilities in respect of staff and other students.

Instead, the Department and schools are required to fulfil all parties' rights as far as possible, and where this is impossible, to balance those rights. A stronger focus on positive behaviour support – on prevention rather than reaction – presents a path for

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[116] VAGO, *Programs for Students with Special Learning Needs*, above n 14, Appendix A.
[117] *Victorian Charter*, s. 7(2).
[118] See, eg: *Kracke v MHRB* [2009] VCAT 646.
[119] Department of Education, School Policy Advisory Guide, 'Duty of Care', <http://www.education.vic.gov.au/school/principals/spag/safety/Pages/dutyofcare.aspx> (accessed 16. Apr. 2018).
[120] s. 22.

better fulfilment of everyone's rights. As discussed in more detail in section 5.2.3, positive behaviour support can contribute to a reduction in behaviours of concern, leading to a safer school, and enabling all students and staff to benefit from an inclusive educational environment. This requires a shift in perception, from seeing the rights of students with disability and staff as opposed, to seeing them as aligned and mutually reinforcing. As the following disability advocate explained:

Some of the restraint that occurs in schools, if you looked at it in isolation you would think to yourself, "Of course, they had to restrain him. He had picked up a chair and was about to throw it at the teacher." And that's the sort of thing that the Department will focus on. But then when you have a look at the student's file, you'll see, hang on, this kid's been showing severe behaviours of concern for two years and they've been getting worse and worse. There's no behaviour plan. There's been no functional behaviour assessment. There's not even a proper individual education plan with strategies and measurable outcomes. There's no proper Student Support Group. And so what sometimes is leading up to a standard response of restrictive practices to a violent situation is a whole history of not doing what they should have done in any way, shape or form. It's very rare that you will ever find a response to restraint and seclusion which is what the Senior Practitioner would refer to as 'an unplanned emergency'.

Recommendations:

To the Government of Victoria:

- **Repeal regulation 25 of the Education and Training Reform Regulations 2017 (Vic) (this is our preferred position). At a minimum, regulation 25 should be redrafted for greater clarity, to give the least restrictive means principle in section 7(2) of the Charter primacy, and with careful consideration of the human rights engaged.**

To the Department of Education:

- **Amend the School Policy and Advisory Guide - Restraint of Students to require that a meeting be held between the relevant teacher, parents, the relevant school leader, and any other relevant stakeholders after an**

incident of restraint or seclusion, or when an incident has been alleged by a student, witness or parent. Where an SSG is in place, the meeting should be held under the auspices of the SSG. Where an SSG is not in place, one should be convened. A Behaviour Support Plan should be put in place (and where one is in place, revised) in the wake of any incident of restraint or seclusion.

6. Workforce Capacity: Training and Support

6.1. Scope of the rights involved in workforce capacity

The VEOHRC's 2012 report, *Held Back,* identified a number of key tensions in relation to workforce capacity and the implementation of inclusive education. These included the widespread conviction among teachers that they did not have the support, training and resources they needed to teach students with disability well, low levels of awareness by teachers of their obligations under the Disability Standards*,* and teacher training university courses and ongoing professional development programs which fell short in preparing teachers for the inclusive classroom.[121] Similar issues in relation to workforce capacity and inclusive education were raised in the Department's 2016 report of the *Review of the Program for Students with Disabilities.*[122]

Since the release of both of these reports, the Department has taken a number of steps to improve workforce capacity. These steps include requiring all registered teachers to develop their capability to support the learning and participation of learners with disability, and mandating initial teacher education programs to include specific learning activities about teaching students with disability. Work on an Inclusive Education Workforce Capability Strategy is underway, and is supported by a range of other workforce development initiatives. These include workforce training on diversity and inclusion, enhanced school and regional staff online training modules, and the development of a toolkit for students with learning difficulties.

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[121] VEOHRC, *Held Back,* above n 13, 171.
[122] Department of Education and Training, *PSD Review*, as above n 6, 76.

6.2. Findings: workforce capacity

This section offers insights which may support the implementation of the Department's initiatives to build workforce capacity, and highlight areas which still require attention. School staff interviewed during this research expressed concern regarding the quality and utility of professional development opportunities designed to build their capacity to teach children with disability. Several discussed the steps they or their schools had taken to supplement this training through other educational experiences. Interviewees also described the importance of a school culture which supports professional growth and risk-taking, and the role of leadership in fostering this.

6.2.1. Professional development experiences of classroom teachers

The Department offers a range of professional development programs and modules for educators in Victoria. While this study did not formally evaluate these offerings, and is therefore unable to speak definitively about their overall quality or effectiveness, school staff participating in this study generally spoke of the limitations – in both content and form – of these offerings, rather than their benefits.

A number of school staff spoke about the gap between what is offered in these training modules and what is needed by staff on the ground:

> *I've read stuff, been to PD, done modules, all those things, and there are just these core things that keep coming down. It's social stories, and it's visual schedules, and it might be sensory needs, et cetera. And they may or may not be helpful because they may or may not be the case. The child may not have sensory issues. The child may actually be really awesome at communicating. They might actually not need a visual schedule. They may not need a social story. It's not everything. And, yet, you're just given this almost - and I understand from the Department's perspective, it's really hard to provide something so nuanced. But what we're saying is, "This is what you need," because to - those training modules that tick maybe two ticks out of 10 for a child, that's not going to make the difference. (Mainstream school teacher)*

Staff also raised concerns about the format of professional development opportunities, and the extent to which they were translatable to the classroom:

Those documents, they tell us what to do and - well, I haven't even read them, to be honest, so I don't even know where they are - but documents aren't useful in the real world. And each kid is so different that every single minute thing is different. (mainstream school teacher).

Given the reported limitations with the Department's offerings, some school staff spoke about supplementing them with other educational opportunities for teachers. Often this meant bringing someone with relevant expertise into the school to enhance the awareness and understanding of teachers in relation to the specific needs of their student cohort, as the following mainstream principal explained:

The other thing is that whatever the teachers do, it has to come back to how is this going to improve student access, and improve student learning? So, it's all about the child. You can send someone - and we like to do more in-school things, because external one-offs don't usually work, unless they're building on some sort of skill or knowledge that already exists. So, we're quite specific, and a lot of the support for these children, it will come down to - it could be phonological awareness, so there might be some PD on that. Or, we've had a lady who works with some of our children on dyslexia actually come in and present at the staff meetings. So, we continue to build knowledge and skills in a variety of ways, so that for those children, they do need their curriculum differentiated. And, teachers must make reasonable adjustments for whatever child needs it.

This approach to staff training and development was also captured in the following parent's account of their child's school:

They know that they can't do it all, so you have got to bring people in or you have got to take your kid out to do extra stuff. They don't punish you for it. Whereas other schools in the area – and probably across the country – it is very much discouraged – we will deal with it in-house. And here it is like, "We don't know the answer to everything." Like the speech therapist my [child] sees, my teacher organised for a few teachers to meet with her and my speech – she just went, "What do they want to do? Gang upon me" And I said, "No, they want to learn from you." And she went, "That never happens." And so my teacher in grade two just organised for a bunch of teachers to sit down with her for an hour, and I said I will pay whatever,

whatever. She goes, "No, no. I have never been given the opportunity to come into a school." So I am learning more and more that our school is abnormal in that way. Our teachers are just desperate to try and find more avenues that they can help pick up issues with kids and either refer them on if their parents are happy to do that, or what can we do in class?

Accessibility issues exacerbated these challenges for staff of rural and regional schools:

I think one of the challenges for country schools is distance. You talk about professional development and workshops, I'm not going to drive two hours to Melbourne for a one-hour workshop, and then three hours home again while I wrestle the traffic. Because I'd like to hear what they've got to say, but the reality of spending that sort of time is just unachievable or not worthwhile. So I think sometimes the regional rural schools are disadvantaged, and I would definitely say that to us, and I said, I'm not going down to Melbourne for stuff that the Department puts up, I'm quite selective. (Mainstream government school principal)

6.2.2. Capacity building for aides

Teachers, however, are not the only staff who work directly with students with disability in the classroom. Aides work in close contact with many students with disability in the classroom, and are integral to the delivery of the curriculum adjustments process. Currently, there are no formal qualifications required for aides in Victorian schools, and there are no associated requirements for ongoing professional development. This lack of requirements has already been flagged as an issue of concern within both the VEOHRC's 2012 *Held Back,*[123] and the more recent Department *Review of the Program for Students with Disabilities.*[124] The Department's response to the review indicates that they 'will work with stakeholder to provide guidance on training and role description for Support Staff',[125] and as of May 2018, the Department has indicated that guidance for principals on the use of education support staff is in development.

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[123] VEOHRC, *Held Back,* above n 13, 173.
[124] Department of Education and Training, *PSD Review,* above n 6, 80-81.
[125] Department of Education and Training, *PSD Review Response*, as above n 24, 12.

Discussions with the aides interviewed as part of this project suggest that while there are currently no requirements for aides to undergo professional development, some schools provide limited training opportunities for their aides. However, the scope and quality of these opportunities varies greatly across schools:

I'd say it's haphazard. So we don't get very much PD, other than what [the Leading Teacher] chooses - she manages the team. What she brings and what she shares and then what we have - we learn from each other, there's not really a formalised process for ED support across schools to get professional development. So that comes through teachers, through other members of staff, but it's very self-directed or very team-directed. So it's dependent on your school and the resources you've got at your school, which is tricky. (Mainstream government school aide)

Similar to teachers, aides found interactions with external experts - selected to impart relevant, targeted, technical knowledge and skills – especially helpful. They expressed concerns that relying exclusively on peer support and knowledge sharing was less effective in building their skills:

We used to have external PDs often. But it's slowed down now to PDs that are internal, where other staff members might show you certain things around the school, for example a software program that they're using in maths. And they'll sort of teach you on that, so if you're working with a student in maths, you'll know what's going on. They're good to have, but they're the PDs now, where we used to go external and see someone - you know a professor in the field or something - and telling you about strategies in autism, rather than other staff that aren't - well, you're probably actually more qualified in that specific area, obviously not as a teacher, never, but just in the knowledge. I don't think we've really benefited from what our work is. We've benefited by understanding how the school operates and how to use their resources and how to apply them maybe to the students you work with. But not really developing your own personal understanding of any diagnosis. We're not really getting that. (Mainstream government school aide)

6.2.3. Creating a culture of professional growth

The experiences of both teachers and aides interviewed for this report reveal that developments in workforce capacity are not related only to the amount of training on

offer by the Department, or the relevance of such training to classroom dynamics. Rather, teachers' and aides' capacity to create more inclusive education environments is shaped by the amount and kind of support they receive to implement what they have learnt from formal and informal training, as the following mainstream school teacher explained:

> *I think nothing was going to prepare me for the real thing other than to be supported by a whole team, you know like [the Assistant Principal] who had been there and done that from outside the classroom, and [the specialists we work with], and the other staff that had worked in this situation. So, for me, all that PD, or module or whatever was hands-on. But not to just be thrown in there, but to be supported with all that knowledge and experience. That was the real thing for me.*

Moreover, as the following aide clarified, it is important for teachers and aides to feel like there is enough support around them for them to regain traction after making a mistake:

> *I've made mistakes in the beginning. For sure, I have. So when I first started, I realised that. So I - my boss at that time, who's now our Wellbeing Officer, who's fantastic - but at the time, he sort of said, "Look, just you keep going with doing your rapport. Just keep going with that, and you'll learn what to do with them. It will all come to you. Don't worry." And it did, you know, and that was really great advice. So now that's the way I work all the time.*

In fact, as the following special school teacher working to support and train mainstream government school staff explained, providing this kind of support is instrumental to staff continuing to pursue an inclusive education agenda after they have made a mistake or encountered a particular challenge in their practice:

> *There's not a lot of support out there for those teachers with kids with big behaviour problems. Well that's what I do a lot of. And you're a role model too. And I think that teachers who they hear someone using the language and doing it, watching the strategies and seeing them work, then they think oh, maybe I'm going about it the wrong way. So it gives them the encouragement to have a go too. Supporting them while they're doing it as well. Saying "you're doing a really good job, keep at it, keep at it, keep at it".*

Indeed, as another special school teacher who works to support mainstream school staff clarified, absent this kind of support and encouragement, teaching staff can begin to doubt their capacity to work with students with disability:

This year, I've actually visited four first-year-outs who all have three to four children in their room with autism. And that's bloody hard and, you know, even the fact that I'll go in there and I'll observe and at playtime I'll sit them down and I'll say wow, that's bloody hard isn't it. And I've only had one who hasn't cried. The rest have all cried and they're just saying, "it's not just me and my lack of ability is it?"

The problem is, however, that in many of the schools included in this study, these support dynamics are largely dependent on one or two key members of the leadership team. The reliance on individual personalities makes a school's inclusive culture highly contingent and tenuous. This is exacerbated by the absence of a common staffing structure to support inclusive education across schools. While some schools have a leading teacher to champion inclusivity, others do not, meaning that cultures of inclusivity are liable to vary across time, and across schools. This raises again the benefits and challenges to inclusive education associated with enhanced school autonomy, discussed in the preceding section, and aptly explained by a mainstream school aide:

I went to this thing, and they were talking about, in schools where this works really well, what drives it? And I think the common response - and one that I think is really true of our school - is that you have one person or two people in leadership that support what you're doing. We have an inclusion leading teacher. Schools get to allocate - lots of schools have a literacy leading teacher or a numeracy leading teacher. We've got both of those but we also have an inclusion leading teacher. So that is part of a funding decision that the school has made. And that means we've got someone to go to that leads our team and that knows where all the resources are and knows how to access more PDs. And I think if that changed or if that particular person - … I think if [that person] left and we had someone else doing that role, we'd lose a lot of what we have. Which is sad and a bit scary, and it's sad that it's not - that it's person-contingent. Because if it was part of the system, it wouldn't matter who was in that role, but I think it's very much dependent on who's doing that role.

6.2.4. The need for communities of learning

The experiences of school staff interviewed for this project reveal a pressing need for an architecture of continuous learning on inclusive education, which facilitates ongoing learning from experts and peers, and enables school staff to adapt and tailor new methods for their particular students. Such an architecture must also incorporate a strong element of peer support. As part of its Inclusive Education Agenda, the Department is rolling out a series of workforce development reforms. These include a new Inclusive Education Workforce Capability Strategy and Inclusive Education Professional Practice Branch to support a range of new professional learning modules and initiatives specifically targeting staff capacity to respond to learning difficulties and autism. These initiatives sit within the three levels of networked-based learning initiatives put in place under the Education State reform agenda: Professional Learning Communities, which provide a collaboration structure for teachers; Communities of Practice, aimed at school leaders; and Learning Places, which aligns regional staff to deliver place-based system of support.

These initiatives demonstrate the Department's emerging recognition that training is not enough, but must be supported by ongoing structures of expert and peer support. Of particular interest are the introduction of autism coaches (two per region) who will provide ongoing support to school leaders, the establishment of scholarships for teachers to undertake a Masters of Education in Special Education Needs, and the Specialist Schools as Centres of Expertise initiative which will provide support for mainstream schools to develop more inclusive practices. The Department is also developing an Inclusive Schooling Index designed to help schools reflect on current practice, and identify strengths and areas that require improvement to create an inclusive school culture. The Department should further consider how collaborative networks at various levels can be formed which enable the exchange of skills and knowledge relating to inclusive education, between staff within schools, across schools, and between school staff and the Department.

As the Department seeks to expand the range of learning opportunities available to its workforce, it is critical that all of these initiatives are rigorously evaluated on their own terms, but also as components of a holistic learning framework. The Department's approach to professional development must reflect the many ways in which people

learn, must support classroom staff's ability and confidence to apply new approaches in their classrooms, and must provide the space, support and expert input necessary for classroom staff to respond appropriately to the needs of their students with disability.

Recommendations:

To the Department:

- **Require all schools to appoint a teacher to lead the school's inclusion initiatives. The teacher in this role will receive ongoing training to enable them to support classroom staff, and to embed an inclusive culture across the school.**
- **Develop a plan to evaluate the impact and effectiveness of all workforce development initiatives relating to inclusive education. This should evaluate each initiative, as well as considering the overall effectiveness and suitability of the workforce development strategy. Report publicly on evaluation outcomes.**
- **Expand collaborative learning initiatives on inclusive education. These should draw on lessons learned from other collaborative learning initiatives in the Department, and should emphasise ongoing support for teachers, and collaboration across schools (including at school leader level), and should address (among other things) how to make adjustments.**
- **Develop and introduce a mandatory professional development program for school aides, and increase opportunities for aides to learn from experts outside the school.**

7. Grievance Handling

7.1. Scope of the rights involved in handling grievances and complaints

An effective complaints resolution process is fundamental to a human rights-based approach. Raising rights-related complaints is an important way in which people may

be empowered to claim and exercise their human rights.[126] Moreover, an effective complaints process is critical to enabling authorities to discharge their obligations under international law to provide access to justice for people whose rights may have been violated (including administrative and other mechanisms), to investigate allegations of rights violations, and where these are shown to have occurred, to provide effective remedy.

The way in which a complaint is handled can also engage a range of human rights. The right to privacy,[127] the right to receive and impart information (including as it relates to the transparency of information held by a public authority),[128] and the right of access to justice without discrimination,[129] are all relevant to the way grievances are managed.

Lastly, an accessible, empowering and effective grievance handling process can also play a vital role in enabling authorities to monitor their own real-life compliance with human rights obligations, legislative requirements and policies. According to Deborah Glass OBE, Victorian Ombudsman:

> Complaints are free feedback to government about how someone thinks it is doing its job, and using the Charter as a tool to enable, respond to, and learn from those complaints will assist you to protect the human rights of the community you serve.[130]

7.2. Findings: grievance handling in practice

The Department's website includes a comprehensive and recently revised section on Parent Complaints.[131] In addition to the Department's Parent Complaints Policy (interim), the website contains information for parents on how to make a complaint to the school, and how to escalate a complaint to the Department if it is not resolved at

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[126] See: Victorian Human Rights and Equal Opportunity Commission, *From Principle to Practice: Implementing the Human Rights Based Approach in Community Organisations* (2008) 14, 25-27.
[127] *Victorian Charter,* s. 13; ICCPR, art. 17.
[128] *Victorian Charter,* s. 15; ICCPR art. 19.
[129] *Victorian Charter,* s. 8; ICCPR art. 26.
[130] Department of Justice and Regulation, *Good Practice Guide: Managing Complaints Involving Human Rights* (2017) 7.
[131] Department of Education and Training, 'Parent Complaints' <http://www.education.vic.gov.au/school/parents/complaints/Pages/default.aspx> (accessed 16 Apr. 2018).

the school level. The practical effectiveness of this process for grievance management is, however, limited by three factors. The first is low levels of awareness among parents of the complaints process and of their right to complain. The second is a number of structural barriers which prevent parents from escalating their concerns. The third is a lack of transparency regarding the handling of complaints, and how (if at all) information generated from complaints is harnessed and used to make systemic improvements.

7.2.1. Limited awareness of the complaints system

Interviews with parents during the course of this project indicated that awareness of the complaints resolutions process may be low, and suggested that the current system was failing to empower parents to frame their concerns as rights issues. None of the parents interviewed during the course of this study described making 'complaints', or spoke of escalation or formal pathways of redress. Instead, many parents framed their experiences in terms of informal discussions with principals or other senior teaching staff. While these discussions were often fruitful, some parents reported feeling frustrated, confused or ill-informed about the reasons for the school's actions or decisions.

The parents interviewed for this study did not tend to understand their concerns as fitting within a formal complaints resolution structure, and certainly did not have a clear sense of the resolution pathway. Although it is a guiding principle of the Department's Parent Complaints Policy (interim) that 'information about how and where to make a complaint, as well as how a complaint will be handled, should be regularly publicised within the school community,' and that 'the actions taken to respond to a complaint should be well documented and include the reasons underpinning any decisions made,'[132] none of the parents described being advised of the complaints resolution process by their schools.

It may be that awareness among teachers and school leaders of their obligations in relation to complaints is itself limited, and that some teachers do not always recognise that any 'expression of dissatisfaction with an action taken, decision made or service

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[132] Ibid.

provided (or failure to do so)' constitutes a complaint under the Parent Complaints Policy (interim), and should be handled accordingly.[133]

These gaps in awareness are unsurprising, given the patchy information provided at school level. The Department's guidance stresses that 'parent complaints are best handled at the school level', and defers to schools' own complaints policies in how grievances will be managed. However, despite the requirement that all schools have their own complaints policy, a review of school complaints policies conducted as part of this study revealed that of 73 schools reviewed, only 27 had a complaints policy available on their website (or 36.9%).[134] Of these, a mere 14 informed parents that they were entitled to escalate their complaints to the Department should the matter not be resolved at school level (19.1% of the total). Some of the policies even refer to principals making the decision to escalate a grievance, giving the impression that parents do not have the power to do so.

While it is likely that a number of schools have complaints policies which have not been placed on their websites, this is less than ideal. Parents may feel uncomfortable approaching the school to ask for a copy of their complaints policy, or may simply not be aware that the school is required to have one. Proactively publicising the school's complaints policy encourages parents to frame their concerns as grievances, and in doing so makes it more likely that they will seek resolution according to the process set out in the policy. It also permits scrutiny of the school's policy, to ensure it is consistent with Department policy, and meets the needs of the school community.

7.2.2. Barriers to escalating complaints

In addition to revealing a lack of awareness of complaints processes, interviews with parents indicated that some experienced blocks along the escalation pathway set out in the Department policy.

There is no doubt that the quick, early and satisfactory resolution of grievances at the school level is always the optimal outcome. The vast majority of concerns raised by parents are resolved to mutual satisfaction through discussions with school staff, and the guidance provided in the Parent Complaints Policy (interim) that parents first make

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[133] Ibid., 4.
[134] See Appendix I for information on the review of school policies.

their complaint to the school is entirely appropriate. Nonetheless, there will be times when efforts to resolve the problem at the local level are unsuccessful, inappropriate, or not entirely satisfactory to one of the parties.

This reality is reflected in the Parents Complaints Policy (interim), which envisages a progressive series of tiers, starting at the school level. Where a grievance is not resolved at the school level, a parent may escalate a complaint to the Departmental Regional Office, or in the case of children with disability, to the Wellbeing, Health and Engagement Division of the Department. Contact information for the regions and Central Office are provided on the Department website, along with clear instructions on how to lodge a complaint, and a Parent Complaint Form template.

However our research suggests that parents often felt that they had reached the end of the road once the prospects of resolution of a dispute at school level had broken down. Once this occurred, some parents reached the conclusion that they had no alternative other than to accept the action or decision with which they were dissatisfied. Other parents decided to pull their children out of the classroom, either seeking enrolment elsewhere, or keeping their child home for extended periods of time. Lastly, a minority of parents sought the help of disability advocates. These advocates would then make representations to the school on the child and parents' behalf, and in some cases would guide them through the process of registering a formal complaint through an external complaints process.

Several factors may be contributing to these outcomes. The first is that many of the parents interviewed did not characterise their grievances as complaints, and may simply not have realised that they had options beyond a conversation with the classroom teacher or principal. As noted in the preceding section, schools do not always seem to be advising them in this regard. Secondly, it is possible that willingness to seek redress from within the Department may be compromised by low levels of trust or a sense that nothing will change, particularly if parents feel let down or alienated after a dispute with a school. As one representative from a disability advocacy organisation put it when describing parents' reactions to gatekeeping behaviour by a school:

Yes, the parent can pursue [the issue], but are you going to want to keep your child at a school like that? So, generally they don't send them to that school, or they take them out of that school, and don't make the complaint, and the school keeps getting away with it.

Perhaps most worryingly, some parents expressed reservations that a formal complaint may adversely affect their relationship with school staff, and in turn their child's school experience. There is little doubt that a power imbalance exists between parents – who are reluctant to alienate a school for fear that to do so may impact their child's wellbeing – and the school. This imbalance is exacerbated where the student in question has disability, and parents may be especially concerned about finding a place in another school, or about disrupting their child's routine and environment. This imbalance is not currently taken into account in the Parent Complaints Policy (interim), and particularly in its emphasis on school-level grievance handling. While it is unquestionably best if problems can be resolved early and at the most local level possible, it is important that parents do not feel that they have more to lose than gain by raising their voices.

Lastly, it appears that there are barriers preventing parents from escalating their concerns to institutions outside the Department. The Policy advises parents of children with disability that they may also make a complaint to the VEOHRC or the AHRC. It is revealing however that every parent interviewed who made a complaint to an external body did so on the advice of, and with the support of, a disability advocate. This suggests that awareness of this dispute resolution pathway is low, and/or many parents lack the skills or confidence to pursue it by themselves.

In 2017, the Victorian government launched the Independent Office for School Dispute Resolution as a final step in its complaints resolution process. The Office is independent of the Department, and uses alternative dispute resolution methods to assist in resolving the most intractable and complex disputes. The launch of the Office is a welcome and positive development. However, its role is, unfortunately, circumscribed in ways which limit its utility to the parents of children with disability who are dissatisfied with their educational experience. The first is that the Office is not empowered to consider Department program or policy decisions. This means it cannot consider, for example, eligibility for funding under the PSD.

The second is that ambiguity exists regarding who may refer a matter to the Office. The Office's Guidelines addresses complainants by stating that while 'normally a dispute will be referred to us by the Department's Central Complaints Team… if you think that your dispute has not been referred to the Independent Office but should have been, you can lodge an application directly with us.'[135] This is not reflected in the guidance provided by the Department, which states only that 'the Department may refer your complaint to the Independent Office for School Dispute Resolution.'[136] Complainants' right to refer an eligible matter to the Office should be made clear in all Department policies and guidance, and any ambiguity in the complaints pathway rectified.

7.2.3. Turning grievances into learning: the complaints process

A key function of an effective grievance handling process is to surface recurring and systemic problems. In the context of the experiences of children with disability in Victorian schools, a complaints process can play a vital role in revealing persistent gaps between policy and practice, highlighting rights violations or issues of concern which are common across schools, and shining a light on schools which may be excelling or falling short in providing an inclusive environment. This information is critical to achieving continuous improvement within the Department and to ensuring accountability.

Based on the information currently made publicly available by the Department, it is impossible to know whether the complaints process is fulfilling these functions. Indeed, it is impossible to make any rigorous assessment of the quality and functioning of the complaints process at all. The Department does not make public any data on complaints, such as how many complaints are received (at school, regional or central level), the nature or subjects of complaints, or how these complaints are resolved. While privacy and confidentiality of students, school staff and others is paramount, the release of de-identified and aggregated data would be entirely consistent with the

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[135] Independent Office for School Dispute Resolution, *Guidelines*, 7.
[136] Department of Education and Training, 'Not Satisfied with the School's Response to Your Complaint?', < http://www.education.vic.gov.au/school/parents/complaints/Pages/escalate.aspx>. It is worth noting that this guidance is provided on the Department website, but not in the Parent Complaints Policy (interim), which dates from 2016 (prior to the establishment of the Independent Office for School Dispute Resolution).

Department's privacy obligations. The Department also has not made public any information on how the complaints process is used to identify systemic problems. It is unclear how complaints data is collected, analysed or acted upon.

Besides representing possible opportunities to improve educational and human rights outcomes in specific cases, complaints also represent an opportunity for learning within the Department. The barriers described in this section mean that this opportunity to obtain a clearer picture of conduct within schools, and to learn from it, is too often being lost.

Recommendations:

To the Department:

- **Require schools to develop complaints policies which reference the Department Parents Complaints policy (including information on how to escalate concerns). Require schools to publish their complaints policies on their websites, or to provide a link to the Department guidance on parent complaints.**
- **Clarify in all guidance related to complaints that parents have the right to refer their complaint to the Independent Office for School Dispute Resolution, once efforts at resolution at the school level have failed.**
- **Publish a report annually on complaints made by students and parents against schools. The report should include information on the number of complaints received by the Department's regions and by central, how they are resolved, and the categories and subject-matter of complaints.**

PART 3. BARRIERS TO CHANGE: THE IMPACT OF DEVOLUTION

As the preceding Part makes clear, the extent to which the rights of children with disability are protected and fulfilled, and true inclusivity achieved, varies greatly across schools. This is due in no small part to the overarching commitment in Victoria's education sector to devolving decision-making power from central and regional bureaucratic levels to the school level. 'Devolution' in this sense refers to the process of increasing the decision-making autonomy of schools in critical areas, such as infrastructure, funding, workforce management, operational areas, and curriculum, assessment and pedagogy. As a result of several decades of school-autonomy initiatives, Victoria is recognised as having the most devolved government school sector in Australia.[137] In particular, Victorian government schools possess considerable authority to make decisions in relation to curriculum and pedagogy, and about how operational funding is spent.[138]

The orientation towards local decision-making is evident in all facets of the inclusive education agenda. Reasonable adjustments and modifications to curricula – their assessment, design, implementation and monitoring – are undertaken at the school level. Decisions about the disbursement of PSD and other funds to support children with disability are made at the school level, as are many choices about staffing support and professional development (such as whether to appoint a leading teacher for inclusion). The Department complaint policy explicitly reflects this approach, stating that 'the underlying premise of the complaints management policy is that parent concerns and complaints are best and most effectively managed at the school level.'[139]

Local decision-making has a broad range of undeniable advantages.[140] It empowers school staff to meet the specific needs of their students, to tailor curricula and the school environment to their users, and to respond to the profile and characteristics of

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[137] Victorian Competition and Efficiency Commission, *Making the Grade: Autonomy and Accountability in Victorian Schools*, Inquiry into School Devolution and Accountability, Final Report (Jul. 2013), XXVIII *('Making the Grade')*.
[138] Ibid., 62.
[139] Department of Education and Training, School Policy Advisory Guide, 'Parent Complaints', as above n 131.
[140] See, e.g.: Brian John Caldwell, *The autonomy premium: professional autonomy and student achievement in the 21st century* (2016).

the broader community. Devolution allows for autonomy, creativity and flexibility within the school and the classroom.

However, devolution is not without drawbacks, and its effects are increasingly seen as complex and sometimes problematic.[141] In this Part, we consider three structural and cultural factors identified during the course of this research as key influencers on the growth and endurance of inclusive culture and practice. These are: the importance of school level leadership in driving the inclusivity agenda; the alignment of Department and school policies; and monitoring, oversight and accountability mechanisms. Under Victoria's current devolved model, these factors complicate the realisation of meaningful inclusion. These three factors are by no means intended to cover the field; the underlying causes of rights violations are complex and nuanced. They do however focus attention on the broad conditions under which true inclusivity, and the proper fulfilment of all children's rights, may flourish.

8. School-level leadership

Some mainstream schools are brilliantly inclusive, and some are not, and that's influenced by exactly the same factors that we know students' outcomes are: leadership and teacher capacity. (Special school principal)

Interviewees – teachers, parents, and external stakeholders – identified school leadership as a critical factor in achieving meaningful inclusivity in a school. Strong school leadership was seen as instrumental in 'setting the tone' for both staff and the broader community, and in doing so seen as being the most important factor in building a school-wide culture of inclusivity.

A total of eight school leaders were interviewed as part of this study, from across seven different mainstream government schools in Victoria. All seven of these schools had developed reputations among organisations, parents and/or the Department for being more inclusive of students with disability. In speaking with these eight school leaders,

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[141] See, e.g.: Amanda Keddie, 'School autonomy reform and public education in Australia: implications for social justice' *The Australian Educational Researcher* (2017) 44(4-5): 373-390; Richard Niesche and Pat Thomson, 'Freedom to What Ends? – School Autonomy in Neoliberal Times', in *The Wiley International Handbook of Educational Leadership*, Duncan Waite and Ira Bogotch (eds.) (2017).

it became clear that they had worked hard to set a more inclusive tone for the rest of their school staff, as illustrated in the following assistant principal's reflections:

Every child can learn and has the right to learn, and should be encouraged and promoted and supported. So, I guess our belief - and it comes from the school leadership, and then having that relationship with their staff – [is] that this is what it is, and there's no question about it. If you've got that and that commitment, then you'll get anything to work there that you want. And, because we had growing numbers over the last eight years, we could bury our head, and life would be a nightmare for everyone, but you realise - and I guess you've got to have a bit of an inkling or an interest in wellbeing or however you want to describe it. But, these kids are fabulous you know, and you've got to - you want to encourage other children to have empathy for them, and be able to support them, look past themselves. And, therefore it just becomes part of the culture, and it now just happens because we always keep the focus on it. It may not be something that we need to be working on right now, but it's never far from our thoughts.

These school leaders described placing inclusive education at the centre of their staffing decisions, and staff management practices. When encountering teaching staff that were reluctant or resistant to creating these more inclusive environments, leaders spoke of adopting a suite of measures to increase understanding of inclusivity and provide additional support to teachers and students:

Well, initially there was frustration, because of how you deal with these children and da-da-da. But, if your leadership isn't committed, then it's not going to - it won't gain any mileage anywhere. So, we made commitments within our - well now it's our strategic plan, and our AIP, so over time we've formalised our commitment. The school council was informed, they were very supportive. So, the teachers knew that it was something that was going to happen, and so we had to find out what their needs were. We had to let them know that it was legislation, parents had the right to send their children here, so that inclusion is inclusion, and you have to make reasonable adjustments. You have to differentiate the curriculum, and what that looks like for each child is different. So, by having the inclusion coordinator, by putting supports in if a child was having a particularly bad time, then we would make sure there was extra support put in for the child, as well as the teacher. And,

it was skilling them up too, we'd find out what the particular concern was, but we had to skill them up, it was no use having someone else come in and sort of - in inverted commas – "fix" the situation. (Mainstream principal)

In the instances where staff did not respond to such training or support, school leaders described encouraging teachers to move elsewhere:

It's not okay not to try to make those adjustments. You may not be always successful, but your moral purpose as a teacher is to provide the best learning environment for all of your children, and that means sometimes you're going to have to work really, really hard and yes, some of those children are difficult and very challenging, but if it's not working this way then your moral obligation is to continue to work until you find a way to support that child. If you aren't able to make those - it takes teachers a long time to adjust to those things. It's hard. It's exhausting, but if you're not prepared to do that we often in a subtle way suggest that you might like to look at other schools to work at. (Leading Teacher)

Finally, some school leaders also spoke about taking measures to ensure than any new staff they hired would meet their expectations of taking an inclusive approach to students with disability:

It's just it's embedded in our culture to the point that our culture is a bit unique, and what we do, it just comes naturally now. When we're advertising for staff, the sixth criteria, which is a school-based one, is quite specific on autism and inclusion… And if you don't have it - we haven't got time the way that the school is growing and the busyness and the level of education, which was the whole time, you know social, emotional, as well as the academic. We haven't got time to be I guess training up someone from zilch, so they've got to come in with some knowledge, and they've got to be able to - from within their response, you know if they've got the initiative to pick up and run with stuff. So, it's a very important criterion. (Mainstream principal)

School leaders interviewed as part of this project also took measures to set the tone among parents of students without disability. As was the case with school staff, sometimes school leaders approached this task by raising awareness and understanding among parents through education:

I remember a number of years ago, there was a particular year level, a year one, and we had some really, really tricky boys. And, a couple of them - there was one boy who had an obsession with another little girl in class, and he would target her, and so therefore we had to work quite closely with the parents. But, luckily the parents trusted that we couldn't do a fix overnight, but we worked with them, and with both parents, both families, and there was constant conversation. We held coffee mornings, so that we could have speakers in, and it might have been [our Leading Teacher], or someone from [a special disability school], or whatever, so they could talk about the diagnosis. And, so parents could develop an understanding beyond the child, and not looking like there was anything wrong with them, and why are they so naughty? (Assistant principal of a mainstream government school).

However, as was also the case with some school staff, sometimes these attempts to raise awareness and understanding among the broader school community were unsuccessful. When this occurred, members of the leadership team made it clear to unreceptive parents that they could either change their attitude or go elsewhere, as explained by the following Wellbeing Coordinator.

Some of our challenges are also probably in maybe the early years when people come to our school to notice that they will have children with disability in their child's or children's classroom and 'Not in my backyard' doesn't cut it at [this school]. Yes, time will be taken away from your child's learning, but having someone with a disability or learning difficulties or a difficulty actually helps your child realise that there is diversity in society and it's a really important part of society and that person still has value and brings a richness to our society, so sometimes they have to have those difficult conversations with other parents. It's now fairly rare because people know, people come here because of the culture that we've established, but sometimes when people have complained I've said, "Well, we're not going to be changing your child from the class unless it's having a severe emotional impact on your child, but you're going to face this wherever you go, but you can choose to go to another school if you like." I just say upfront, "Not all schools suit all children. We are not going to be upset if you choose to go to another school. This is your choice. You have to make the right choice for your child."

Unfortunately, the decisive importance of school leadership in establishing a culture of inclusivity at a school also jeopardises its longevity. A change to less committed leadership can – and often does – result in a rapid backslide. As the following mainstream government school teacher explained in the case of her school:

When I first began at the school we had a principal who was particularly passionate about the PSD program and he was actively involved in the program, he knew all of the children, he knew where they were at. And so his passion very much had a trickling down effect to everyone. And the next principal that we had was equally as passionate. And that really created a climate and a culture within the school of respect, and it was seen very much as part of the school. That's what we were about. We were inclusive and we were respectful, and that message was very much put out to the community and really highlighted whenever there was an opportunity. Whereas now, because the leadership is different and the passion isn't there, it's probably not just changed the culture of how the school community sees the PSD program, but within the staff as well, and upon the children not just the parents.

These accounts reveal some of the potential benefits of local decision making for inclusive education. Where principals and other leaders are committed to realising meaningful inclusivity, devolution provides them with the scope to take actions which are tailored to their needs of their students, staff and communities. However, they also reveal the pitfalls. Where school leaders have such decisive control of school priorities and culture, the scope to build consistent, enduring cultures and institutions of inclusivity is curtailed.

If students' rights are to be protected and fulfilled in all schools at all times, structures which both encourage and compel school leaders to develop and maintain an inclusive environment must be implemented. This should include incentives as well as increased accountability measures.

9. The interaction between Department and school policies

Another feature of the present devolved system which contributes to inadequate protections for students is the lack of clarity regarding how Department policies apply to schools and how these policies interact with school policies.

The Department is engaged in a significant, ongoing review of its policies relating to children with disability. The Department's policies are contained with other guidance in the School Policy and Advisory Guide, which is accessible online. However, the extent to which the contents of the Guide are binding on schools is unclear, and indeed its perambulatory statement neatly captures this uncertainty, stating, 'the School Policy and Advisory Guide provides Victorian government schools with quick and easy access to governance and operational policies and advice.' The Department has advised that the 'extent to which schools are required to implement policies and guidelines [in the Guide] are dependent on upon the nature of the policy and related legislation and other requirements.'[142] It is therefore almost impossible for a school leader or teacher to ascertain from just looking at a section of the Guide whether the contents must be implemented, or are simply helpful advice.

The picture is further complicated by the presence of local school policies. Schools (or, more specifically, school councils) enjoy wide discretion to develop policies on various topics for their school. The Department requires schools to develop policies on some issues, such as investments, parent payments, and student dress code. On other topics, schools are essentially free to develop policies as they please. According to the Department, 'typically, school councils also develop policies about a small number of other topics common to most schools such as visitors, volunteers in schools, camps, excursions and outdoor activities, community use of school facilities, canteen and other school food services.'[143] It is unsurprising therefore that the school policies (including those of special relevance to students with disability) provided on school websites vary dramatically – from each other, and from the Department's own policy guidance.

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[142] Correspondence with Department of Education and Training (on file with authors).
[143] Department of Education and Training, 'School Council Functions'
<http://www.education.vic.gov.au/school/teachers/management/community/Pages/schoolcouncilsfunction.aspx#link87> (accessed 16 Apr. 2018).

As well as having discretion over what policies to enact at school level, schools have wide discretion over the content of many policies. Indeed, the extent to which school policies are required to align with Department policies appears to be haphazard. For example, the Department's Information and Privacy Policy explicitly states that 'schools must adopt the Department's Schools' Privacy Policy' and further states that 'this can be achieved by creating a link to the policy on the school's website.'[144] Further along the spectrum, the Parent Complaints Policy (interim) does not require schools to fully incorporate the entire policy, but instead asks them to 'develop local policy and procedures in accordance with Department policy.' A review of school complaints policies reveals that schools adopt varying aspects of the Department policy in their school policies.[145]

Lastly, many Department policies do not contain any guidance on whether or how they should be incorporated into local school policy, including the Department's Students with a Disability Policy. Moreover, there is no requirement that schools develop a school policy on disability at all.[146] It is perhaps unsurprising then that the guidance provided by schools on their websites is limited, and patchy in the extreme. Only eight – or 10.9% - of the 73 schools reviewed have enacted and published a policy dedicated to the inclusion of children with disability. Of these eight:

- one policy is unavailable, as the link on the website was broken at the time of the review;
- two address only the situation of children on the PSD, and provide very limited (less than one page) guidance on PSD structures; and
- a further two policies, while addressing all children with disability and not only those who attract targeted funding, are very brief – less than one page – and provide no practical guidance.

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[144] Department of Education and Training, School Policy Advisory Guide, 'Information and Privacy' < http://www.education.vic.gov.au/school/principals/spag/governance/Pages/privacy.aspx> (accessed 16 Apr. 2018).

[145] See Appendix I for information on the review of school policies.

[146] However, it is worth noting that this does not appear to have been entirely effective in the case of the Department's Information and Privacy Policy. Despite making it mandatory for schools to include the policy (or a link to it on their website), only 26 of the 73 schools reviewed for this research had actually done so.

Only three of the policies could be described as meaningful. Each of these policies includes information on the establishment and conduct of Student Support Groups and Individual Learning Plans, reasonable adjustments and resourcing, and professional development for staff. They also include elements which reflect the school's individual understanding of, and commitment to, inclusion. For example, one school policy states explicitly that 'all students and/or families with a disability, whether they are funded under the Program for Students with Disabilities or not, are welcome at our school.' The same policy states that 'all students will have access to the same enrolment procedures, such as tours, meetings with the Principal, access to transition programs, etc.' Another policy makes it clear that 'adjustments must be made to all school activities to enable every child to access everything offered such as school camps, excursions, performances and specialist programs,' and in recognition of the intersectional nature of disability, states that the school will access support from Koori Education Officers.

Even among these cases of better practice however, there are examples of inconsistency which raise concerns regarding understanding of, and adherence to, Department policy and standards. For example, it is one school's policy that 'SSG groups [sic] will be established for students who require additional assistance or modified programs regardless of funding outcomes.' This represents best practice, and reflects the Department's position that SSGs for children with additional learning needs who are not receiving funding under PSD are strongly encouraged. However, all other policies refer to the establishment of SSGs only for students on the PSD.

It is well known that the mere existence of a rights-compliant policy does not guarantee respect for rights, nor fulfil a duty-bearer's obligations. The challenge is in ensuring that the policy is implemented on the ground in such a way that it produces positive human rights outcomes. The first step in operationalising a policy is ensuring that stakeholders are aware of and understand it, and their own responsibilities under it. At present, the system of devolution in Victorian schools is complicating this initial step. The nature of the relationship between Department and school policies is opaque, and the precise responsibilities of teachers and school leaders unclear. This is combining with weak accountability processes (discussed below) to greatly compromise the impact of the Department's reform agenda.

10. Monitoring and learning

Proper monitoring, through the appropriate collection and analysis of high-quality data, is a precondition to continuous improvement. Likewise, accountability is only achievable when information on compliance is available, and the systems enabling its analysis are in place. The inadequacy of monitoring processes relating to children with disability in the Victorian education system have been well-ventilated,[147] and acknowledged by the Department.[148] The lack of consistent data collection in relation to numbers of children with disability, their needs, adjustments, and achievements, has been especially problematic. The absence of common definitions and understandings of key concepts relating to inclusive education have also made it difficult to gather and use data effectively.

In recent years several positive steps have been made to improve monitoring. The most significant is the annual Nationally Consistent Collection of Data on School Students with Disability (NCCD), a nation-wide process which collects information about Australian school students who receive an adjustment to address disability. However, the data collected through the NCCD is basic, and is insufficient to provide an evidence-base for detailed policy. Better collection of high quality data relating to the enrolment experiences of children with disability, student outcomes (especially the adequacy of ILPs and students' achievement against their learning goals), and the use and impact of targeted funding, is necessary to provide a foundation for proper oversight. This data can be collected through a number of mechanisms, including enhanced harvesting of existing data sets, enhanced channels for students, family and staff feedback, and making submission of certain information to the Department by schools mandatory. The Department has begun a process enhancing linkages in data collection and reporting. This is a welcome step.

Better data collection is not enough on its own however. Effective monitoring also requires processes (and resourcing) to turn the data into learning. In other words, structures must be in place to analyse and make sense of data, and clear pathways drawn between evidence and action.

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[147] See e.g., VEOHRC, *Held Back,* above n 13; Department of Education and Training, *PSD Review,* above n 6.
[148] Department of Education and Training, *PSD Review Response*, above n 24, 18.

The government has committed to working with stakeholders to develop a plan to improve data quality and analysis.[149] However, the utility of such a process will be compromised if it takes place after the bulk of the reform agenda has been completed, as an afterthought. The present moment represents a critical opportunity to ensure that monitoring and learning are integrated into all aspects of the government's reform agenda, including in any new funding model. A key principle of best practice in monitoring is that it is embedded in the policy process from the outset, and that structures for data collection, analysis and learning are developed early and not 'retrofitted' later. In light of the present reform agenda, the moment is ripe for a comprehensive review – with community and stakeholder consultation – of all aspects of the Department's disability-related monitoring processes. This review should focus on creating the conditions for: enhanced oversight of school performance in relation to their students with disability; better linkages between policy and practice at the school level; generating information which sheds light on the disbursement and impact of targeted funding; and increased transparency.

11. Oversight and accountability

Accountability is a critical precondition of realising the benefits of devolution. As the Victorian Competition and Efficiency Commission has stated, 'put simply, if roles and accountabilities in the system are not appropriate and clear, and if the key actors are not held to account for their performance, the benefits of the new [school autonomy] regime will be significantly diminished.'[150] However schools and their leaders currently face few, if any, consequences for failing to properly implement Department policies in relation to students with disability.

The absence of any mechanism to hold schools and their leaders accountable for failing to respect and implement Department policies is deeply problematic. In law, it is an objective of schools councils to ensure compliance with any direction, guideline or policy issued under the *Education and Training Reform Act*.[151] However, in practice processes for systematically monitoring a school's compliance with Departmental

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[149] Department of Education and Training, *PSD Review Response*, above n 24, 18.
[150] *Making the Grade*, as above n 137, XLI.
[151] *Education and Training Reform Act,* s. 2.3.4(d).

policy are weak, and there are rarely consequences for school councils and leaders for failing to implement these policies or for failing to foster inclusivity.

According to the Department, accountability is meant to be achieved through the school performance and improvement regime.[152] This comprises self-assessment components (notably the Framework for Improving Student Outcomes (FISO)[153]), and the four-yearly school review process. However, compliance with Department policies (or indeed, legal requirements) relating to inclusive education is not expressly assessed under any of these processes. Disability is not mentioned in the FISO Continua of Practice for School Improvement,[154] or in the Essential Elements for School Improvement.[155] Similarly, the FISO Improvement Measures, which are 'a range of data sets across various aspects of schooling that provide schools with a reliable instrument to evaluate and monitor the effect of their self-improvement efforts on student outcomes',[156] do not deal with disability. Similarly, the minimum standards which form the basis of all school reviews in Victoria do not comprehensively address disability.[157] The minimum standards on enrolment do require schools to 'have a clearly defined enrolment policy that complies with all applicable State and Commonwealth laws', in order 'to ensure that a school's enrolment policy takes account of all laws including those relating to discrimination including the duty to make reasonable adjustments, equal opportunity, privacy and immunisation.' Schools must also be able to provide details of how their policy will be, or is being, implemented.[158] This however is the only mention in the minimum standards of schools' legal duties to students with disability, including their obligations to make reasonable adjustments.

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[152] Email correspondence with the Department of Education and Training, 24 Apr. 2018 (on file with the authors).
[153] Department of Education and Training, 'Framework for Improving Student Outcomes', < http://www.education.vic.gov.au/school/teachers/management/improvement/Pages/FISO.aspx?Redir ect=2> (accessed 14 Jun. 2018).
[154] Department of Education and Training, *FISO Continua of Practice for School Improvement* (2018).
[155] Department of Education and Training, 'Essential elements for school improvement' < http://www.education.vic.gov.au/school/teachers/management/improvement/Pages/essentialelements .aspx> (accessed 14 Jun. 2018).
[156] Department of Education and Training, *2017 Guide to the Improvement Measures* (2017).
[157] See: Victorian Registration and Qualifications Authority, *Guidelines to the Minimum Standards and Other Requirements for Registration of Schools Including Those Offering Senior Secondary Courses* (2017). These are issued by the Victorian Registration and Qualifications Authority (VRQA) pursuant to ss. 4.3.8A(i) and 4.3.11(3) of the *Education and Training Reform Act*.
[158] Ibid., 16.

Similar requirements are missing from the minimum standards on (for example) curriculum and student learning, and student welfare.

This is not to say that the school performance and improvement regime cannot, or will not, produce positive outcomes for children with disability. The FISO Continua of Practice and other documents include measures which are clearly central to the fulfilment of the right to quality of education of children with disability, such as promoting an approach to curriculum planning which analyses and addresses the full range of learning needs of individual students.[159] However, as *the* mechanism for ensuring schools' compliance with the laws and policies designed to protect and fulfil the rights of students with disability, it falls short. The Department should articulate clearly *what* duties are imposed on *which* duty-bearers by Department policies, and should attach clear consequences for failure to fulfil these obligations.

This report has identified a number of issues which would benefit from specific, enhanced oversight by the Department, namely enrolment processes, disbursement and impact of targeted funding, and the implementation of learning supports (in particular SSGs and ILPs), and quality control of ILPs. Specific recommendations in relation to these issues are made below.

In addition to central oversight, accountability demands proper transparency. Access to information is a central component of the right to freedom of expression,[160] and transparency of information and processes empowers students, their families and the community to participate in the policy process, and to hold schools and the Department to account. The present level of disclosure of key information is inadequate for the public to play this vital role. As noted in the preceding section, school policies are rarely made available online. Department policies are easily accessed online, however without accountability processes their effect is diluted. Documents which are designed for school staff but which could be of interest to parents and others – such as tools for conducting functional assessments – are not available. The Department website is confusing and difficult to navigate. Basic statistics on children with disability in Victoria – including simple numbers on prevalence of disability and adjustments – are not

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[159] Department of Education and Training, *FISO Continua of Practice for School Improvement* (2018) 12.
[160] ICCPR, art. 19(2); UN Human Rights Committee, General comment no. 34 (2011) *Article 19, Freedoms of opinion and expression*, 12 Sep. 2011, CCPR/C/GC/34.

made public. The Department can, and should, do better. A core principle of the right to information is the presumption of maximum disclosure – that all information held by public bodies should be subject to disclosure and this presumption may be overcome only in very limited circumstances.[161] This is complemented by a second principle - the obligation to publish - which holds that public authorities should widely publish and disseminate documents of significant public interest, subject only to reasonable limits based on resources and capacity.[162] These principles should guide the Department's approach to providing access to information.

These gaps are consequential. Indeed, they raise the prospect that by applying an overarching policy of devolution without sufficient safeguards and accountability for the rights of students with disability, the Department may be failing to properly consider - or act in a way which is consistent with - human rights, as required by the Charter. The Department should carefully consider limits on local decision-making where this places rights at risk, and ensure that devolved decision-making relating to students with disability is accompanied by robust, centralised, monitoring and accountability processes.

Recommendations:

Regarding school leadership:

To the Department:

- **Include indicators of inclusion and compliance with anti-discrimination laws and the Charter as key performance indicators in Principals' professional development plans.**

Regarding the interaction between school and Department policies:

To the Department:

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[161] Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 4 Sept. 2013 (A/68/362) ¶ 76.
[162] Ibid,, ¶ 76.

- **Make explicit the nature of the obligation placed on schools by each Department policy. The School Policy and Advisory Guide should clarify the nature of schools' duties under the Guide, and identify the specific duty-bearers under each policy.**
- **Require schools to make all their policies available online.**
- **Incorporate into the FISO practices and measures specifically designed to improve outcomes for students with disability, and to help schools realise their legal and policy obligations to students with disability.**

Regarding monitoring, oversight and accountability:

To the Department:

- **Conduct a comprehensive review into all aspects of the Department's disability-related monitoring and data-collection processes. The review should adopt a human rights-based approach, and should ensure that monitoring and learning are integrated into all aspects of the government's reform agenda. The review should focus on creating the conditions for: enhanced oversight of school performance in relation to their students with disability; better linkages between policy and practice at the school level; generating information which shed light on the disbursement and impact of targeted funding; and increased transparency.**
- **Periodically audit schools' policies for compliance with Department requirements, and where the policies do not reflect Department policy or legal obligations, or do not reach minimum standards, support the School Council to revise the policies accordingly.**
- **Develop an Access to Information policy, which enshrines the principle of maximum possible disclosure, and provides guidance to Department personnel (and to the public) on the permissible bases for not disclosing information.**

To the Victorian Registration and Qualifications Authority (VRQA):

- **Reiterating the recommendation of the VHREOC's 2012 Held Back report, the VRQA should examine in school registrations, reviews, and inspections:**
  - **a sample of ILPs and SSG minutes;**
  - **data on educational outcomes for students with disability enrolled at the school;**
  - **evidence of whole-of-school compliance with anti-discrimination laws and the Charter;**
  - **restraint and seclusion incident records; and**
  - **complaint data.[163]**

  The VRQA should also examine enrolment and refusal data.

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[163] VHREOC, *Held Back*, above n 13, 16.

APPENDIX I.

Methodology for review of school policies

In March 2018, the Castan Centre conducted a review of Victorian government school policies using systematic sampling. The review used the Victorian Schools July 2017 Summary Statistics, which lists in alphabetical order ever government school in Victoria (from primary to secondary, including mainstream and specialist schools). Every 20th school was selected and its website reviewed.

In reviewing the websites, the following questions were posed:

- Does the website include a school complaints policy for parents?
- If so, does the complaints policy explain how parents can escalate a grievance beyond the school?
- Does the website include a school inclusion or disability policy?
- Does the website include a student engagement policy which meaningfully addresses disability? (A 'meaningful' policy was taken to be one in which Student Support Groups and Individual Learning Plans were mentioned).
- Does the website include a privacy policy which is consistent with the Department's privacy policy, or does it provide a link to the Department's privacy policy?

APPENDIX II.

Cohorts interviewed about the education of students with disability in Victoria

Cohort	Number of Interviewees
Students and Parents	**47**
Students with disability currently enrolled at a Victorian university	13
Parents of current and former students with disability	34
Staff at mainstream government schools	**24**
Principals or assistant principals	6
Leading teachers, wellbeing coordinators and school psychologists	4
Teachers	10
Aides	4
External stakeholders	**22**
Principals and teachers of special schools who work to support mainstream schools	4
Organisations supporting the needs of students with disability through specialist services and teacher training	10
Organisations providing individual/systemic advocacy for students with disability	4
Organisations representing the interests of education institutions and personnel	4
Total	**93**

Interviews with stakeholders were conducted face-to-face or over the phone, and ranged from thirty to ninety minutes in duration. Where participants agreed, interviews were digitally recorded and transcribed verbatim. Where consent to record the interview was not established, detailed notes were taken during or immediately following the conclusion of the interview. All interviews were conducted by Dr Claire Spivakovsky except one which was conducted by her research assistant, Mr Ross Anderson.

Interview transcripts were coded to identify content and themes, and common experiences in participants' accounts were further extrapolated. Interviews were also sorted into four sub-groups: parents of students with disability; young people with disability; school personnel; and other organisations involved in supporting the inclusion of students with disability in mainstream education settings. This grouping occurred because the perspectives of participants differed according to their circumstances and role in delivering, receiving or supporting the education of students with disability in mainstream government school environments.