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Restrictive Practice in Education Settings: Institutional Violence, Disability and Law

Linda Steele

26.1 Introduction

All children with disabilities enjoy the fundamental right to inclusive education (CRPD 2008, Article 24; Committee on the Rights of Persons with Disabilities 2016, p. 3). One of the core features of 'inclusive education' is '[i]nclusive learning environments [which create] an accessible environment where everyone feels safe, supported, stimulated and able to express themselves' (Committee on the Rights of Persons with Disabilities 2016, p. 5). Despite this right and a broader shift in Australia towards desegregation of special education, children with disabilities are subjected to exclusion, segregation and violence within purportedly 'inclusive' mainstream settings (Poed et al. 2017; Senate Community Affairs Reference Committee 2015, pp. 57–58).

Violence against children with disabilities in schools takes many forms (Children with Disability Australia 2015). This chapter focuses on one specific category of violence: use of restrictive practices. Restrictive practices are non-consensual interventions directed towards restricting the movement of students with disabilities purportedly for their protection, and/or the protection of their peers and teachers (National Framework for Reducing and Eliminating the Use of Restrictive Practices cited in Senate Community Affairs Reference Committee 2015, p. 91). Restrictive practices can take the

L. Steele (✉)
University of Technology Sydney, Sydney, NSW, Australia
e-mail: Linda.Steele@uts.edu.au

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form of restraint (mechanical, physical or chemical) or seclusion (Senate Community Affairs Reference Committee 2015, pp. 91–92).

Recent media coverage and government inquiries have documented the extent of the widespread use of restrictive practices in schools (Senate Community Affairs Reference Committee 2015, pp. 101–114) and highlighted the harmful impacts of these practices (see e.g., Glanville 2017; Senate Community Affairs Reference Committee 2015). Restrictive practices in schools takes many forms including locking a child in a storage room, cupboard or cage, confining a child in a small fenced area within the playground, strapping a child to a chair or a pillow, and holding down a child (Children with Disability Australia 2015, pp. 11–14; Senate Community Affairs Reference Committee 2015, p. 103, see also p. 105). One particularly high profile example widely reported in the Australian media was of a ten year old boy diagnosed with autism being locked in a cage in a classroom in the Australian Capital Territory (Senate Community Affairs Reference Committee 2015, pp. 101–102; Macdonald 2016).

Restrictive practices in schools 'are often downplayed and justified as "behaviour management" and/or "behaviour modification" practices' (Disability Alliance in Senate Community Affairs Reference Committee 2015, p. 58). Yet, these practices are inherently harmful, posing risks of physical injury, trauma, death and suicide (Lyons 2015, pp. 202–203; see also Kaplan 2010, pp. 581–82). Indeed, in the context of the United States of America, it is estimated 'that there are eight to ten restraint-related deaths of children annually in the US' (Lyons 2015, p. 201). While there is no data on deaths from the use of restrictive practices in Australian school settings, the potential deadliness of their use in school settings is implicitly acknowledged in state and territory government documentation regulating their use (see e.g., the requirement to actively monitor children's breathing when using physical restraint (State of Victoria Department of Education and Training 2017a, p. 17)), and deaths have occurred from the use of restrictive practices in Australian mental health settings (McSherry 2016).

Recently, a series of Australian government inquiries have recommended a 'zero tolerance' approach involving the elimination of restrictive practices in schools (Senate Community Affairs Reference Committee 2015, p.xxi; Senate Education and Employment References Committee 2016, p. 72). While this chapter focuses on Australia, it is important to note that other countries are grappling with the use of restrictive practices in school settings (see e.g., in the US context National Disability Rights Network 2012; in the Canadian context Inclusion BC and Family Support Institute of BC 2013).

The current legal framework governing restrictive practices in schools is one of regulation as opposed to prohibition by reason of a combination of policies and guidelines, work health and safety laws, negligence law and the doctrine of necessity. Law is central to the enactment (rather than the prevention or prosecution of) this violence against students with disabilities. Importantly, while use of restrictive practices in schools remains lawful in many countries, New Zealand recently 'banned the use of seclusion in its schools, and issued guidance on behaviour management to minimise physical restraint' (NSW Ombudsman 2017, p. 26). This suggests that it is not absolute and natural that restrictive practices should remain lawful – other legal futures are possible. As such, the central aim of this chapter is twofold: (i) to provide an overview of the legal framework of the use of restrictive practices in schools, and (ii) to identify some critical entry points into questioning the self-evidence of this legal framework. Ultimately, it is hoped this chapter will encourage readers to engage with the broader debate around the prohibition of restrictive practices as violence.

In doing so, the chapter draws on critical disability scholarship on children with disabilities and education. Critical disability studies scholars have argued that a medical model of disability pervades legal, social welfare, educational and health service responses to disability. Instead critical disability studies scholars approach disability as socially constructed by reference to norms of ability reflecting what is socially, politically, and economically valued. Individuals are disabled when they do not meet these norms, a status which is determined through disciplinary processes of observation, testing, measurement and treatment (Goodley and Runswick-Cole 2012, p. 54). Some critical disability scholars have developed these ideas of disability and normalcy specifically in relation to children with disability (see, e.g., Chapman 2014; Cooper 2013; Erevelles 2000; Goodley and Runswick-Cole 2012, 2011a, b; Goodley et al. 2016; Kafer 2013; Karmiris 2016, 2017). For example, Karmiris argues that 'educational practices and policies … only include disability by conditional degrees and [in ways] that serve to safeguard normalcy. Normalcy as able-bodied, heteronormative, middle class, white, and male, remains the measure of conditional inclusion for other versions of being and becoming human' (2017, p. 107).

The chapter begins by introducing restrictive practices in schools and then provides an overview of the current legal framework that regulates the use of restrictive practices, and ultimately positions these practices beyond legal definitions of unlawful violence and hence beyond legal liability. The chapter then discusses the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and recent Australian government inquiries which

provide a strong policy basis for viewing restrictive practices as violence in need of prohibition.

26.2 Regulation of Restrictive Practices

The use of restrictive practices in schools is currently legally sanctioned through a combination of a variety of different laws: education guidelines and policies, the doctrine of necessity, work health and safety law ('WHS') and law of negligence. The current framework is one of regulation as opposed to prohibition, despite the non-consensual and harmful nature of restrictive practices. Ultimately, this framework of regulation has the effect of locating restrictive practices outside of the limits of unlawful violence in criminal and civil law. The use of restrictive practices is incapable of being viewed as an injustice, and hence victims of these practices have no access to legal redress.

26.2.1 Guidelines and Policies

In Australia's federal system, each state and territory has legislative responsibility for regulating restrictive practices in schools. There is no uniform, national approach to this regulation. This can be contrasted with the disability service sector where governments have recently developed national standards (Senate Community Affairs Reference Committee 2015, p. 93; see similar disparity in the United States of America: Weissbrodt et al. 2012, p. 287). In the education context there is variation between each state and territory jurisdiction, notably in relation to the scope of what kinds of practices are regulated. For example, Victoria provides explicit guidance on physical and mechanical restraint and seclusion, but none on chemical restraint (McSherry 2016). Regulation 25 of the Education and Training Reform Regulations 2017 (Vic) provides that: 'A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour that is dangerous to the member of staff, the student, or any other person.' The Victorian Department of Education and Training's policy 'Restraint of Students' emphasizes the extreme and narrow circumstances in which restrictive practices should be used, stating that: 'Physical restraint and seclusion should not be used unless immediately required to protect the safety of the student or any other person' and must not be 'used as a routine behaviour management technique, to punish or discipline a student' (State of Victoria Department of Education and Training 2017b). The Department's guidelines on restrictive practices go on to state that:

> *Physical restraint or seclusion must not be used except in situations where the student's behaviour poses an imminent threat of physical harm or danger to self or others; where such action (i.e. to physically restrain or seclude) would be considered reasonable in all the circumstances; and where there is no less restrictive means of responding in the circumstances*. (State of Victoria Department of Education and Training 2017a, p. 5)

In contrast, in New South Wales 'there is no specific legislative framework regulating the use of restrictive practices, such as physical restraint or seclusion, in schools in NSW' (NSW Ombudsman 2017, p. 26). Instead, in New South Wales there is a collection of policies and guidelines that regulate various aspects of restrictive practices. For example, Guidelines for the Use of Time-out Strategies Including Dedicated Time-out Rooms provide that 'time-out strategies', which 'include isolation in the student's classroom, another teacher's room or with an executive member of staff, or the use of a dedicated time-out room', 'should be used only for the minimum period of time necessary for the student to regain enough composure to be able to return safely to class' (NSW Government Education and Communities 2011, pp. 3, 4). A bulletin issued by the Legal Services Directorate of the NSW Department provides that physical restraint may be required for school staff to meet their 'duty of care to students to take reasonable care to protect them against risks of not insignificant injury which are reasonably foreseeable', a duty that 'extends to taking reasonable care to prevent a student from injuring him or herself, injuring others or damaging property'. However, the Legal Services Directorate notes: 'Any decision taken by staff to physically restrain a student should be exercised only in those circumstances where there is a real and immediate threat of injury to a person or serious damage to property and there is no other practical way of preventing the likely injury or damage' (NSW Government Education and Communities 2012, p. 1).

There are four significant observations to be made of these guidelines and policies. The first is that ultimately, these state and territory policies and guidelines permit rather than prohibit the use of restrictive practices. As such, these policies and guidelines have the dual purpose of setting standards and safeguards for the enactment of restrictive practices which purportedly protect those subjected to them and protecting practitioners from criminal and civil liability for the use of these restrictive practices (Chandler et al. 2014, p. 97; see further Senate Community Affairs Reference Committee 2015, pp. 94–98). This means that a child with disabilities who is subjected to restrictive practices which are compliant with these policies and guidelines cannot seek criminal or civil legal recourse for unlawful violence.

The second observation is that while the state and territory policies and guidelines differ in relation to their precise form, wording and scope, ultimately they all share an approach to regulation that is focused on what is 'necessary' and 'reasonable' (McSherry 2016). I will return to this point below in my discussion of the doctrine of necessity.

The third observation is that the application of these policies and guidelines intersects with problematic ideas about children with disabilities' 'challenging behaviour'. For example, the Senate Inquiry noted 'Evidence to the committee indicates the conflation of disability and behaviour management within the school environment' (Senate Community Affairs Reference Committee 2015, p. 101). Some critical disability scholars have problematised the concept of 'challenging behaviour' on the basis that it pathologises individuals' legitimate resistance to authority and abuse and shifts attention away from problems and failures of institutions and the illegitimacy of their authority and practices (see e.g., Beaupert 2017; Dowse 2017; Goodley and Runswick-Cole 2011b; Nunkoosing and Haydon-Laurelut 2012; O'Connell K 2017, forthcoming; Spivakovsky 2017). Erevelles has argued that 'the disabled student invokes the "unruly" subject whose physiological excesses are seen as disrupting the disciplined control of schooling' (Erevelles 2000, p. 34, p. 42; see also Erevelles 2011; Watts and Erevelles 2004). Goodley, Runswick-Cole and Liddiard propose that in school settings children with disabilities are positioned as inherently deviant because they do not follow normative developmental progression and hence remain 'leaky, who fail to contain and control their unpredictable bodies and, who deviate from the normative trajectory, will remain monstrous, a ghostly spectre of the human' (Goodley et al. 2016, p. 776). Ultimately, restrictive practices can be more easily viewed as necessary and reasonable because of the pathologization and individualization of children with disabilities' behaviour which invokes the inevitably of their bodies as sites of intervention (Dowse 2017).

A fourth observation is that in policies focusing on the harms to be avoided through intervention in the bodies of children with disabilities, the harms to the bodies themselves shift from being part of the harms to be avoided to being merely harms to be managed. This shift is strikingly demonstrated by the Victorian principles which acknowledge the dangerousness of physical restraint and direct teachers to 'ensure the child is breathing and has not come to any harm' (State of Victoria Department of Education and Training 2017a, p. 17) – the child's safety is of concern only once the decision has been made to enact the restraint.

26.2.2 Necessity

Additional to any specific policies and guidelines, the use of restrictive practices in schools are also regulated by reason of the effect of the common law doctrine of necessity. Broadly speaking, the doctrine of necessity operates as a defence in relation to civil and criminal wrongs related to non-consensual interventions, where that conduct has occurred 'in urgent situations of imminent peril' to an individual or property (Southwark London Borough Council v Williams 1971). It is available where an individual's acts 'are reasonably necessary to protect life or property', notably overcoming the need to obtain an individual's consent to intervene in their bodies when this consent cannot be immediately obtained and there is an urgent need to act (e.g. medical surgery, personal care) (see e.g., Secretary, Department of Health and Community Services v JWB 1992, p. 310; Re F (Mental Patient Sterilisation) 1990, p. 75).

This doctrine does not provide a specific framework detailing when restrictive practices can occur (cf the policies and guidelines discussed above). Rather if a criminal or civil legal action is brought retrospectively against a teacher who has used restrictive practices, the doctrine can be relied upon in court as a defence to criminal and civil liability for assault, battery and false imprisonment. However, it has been noted that there is systemic reliance by medical and care workers on vague approximations of the doctrine of necessity to inform the use of non-consensual interventions in their service provision to people with disabilities. For example, Carter (2006) in his review of the use of restrictive practices in the Queensland disability service sector noted that there is a routine reliance on

> *irrelevant but nonetheless palatable legal clichés such as "the doctrine of necessity". Because it was necessary to protect others from the challenging behaviour of the disabled person, it was acceptable to restrain or detain, not only in the best interests of the person with intellectual disability but also of the community.* (p. 161, see also p. 83, p. 147)

Carter's observations suggest that the doctrine of necessity has taken on its own normative meaning amongst health care workers in such a way that justifies a broader range of interventions than what a court might interpret as technically fitting within the doctrine. A similar observation about more expansive interpretations of 'necessity' was made by the NSW Ombudsman in the school context: 'our work has identified matters in which physical restraint has been used at times when there was not a "real and immediate

threat" to the student or others, but was part of a broader response to the student's behaviours of concern' (NSW Ombudsman 2017, p. 32).

It is interesting to note that the concept of 'necessary' is present in various dimensions of the legal framework regulating restrictive practices. Elsewhere, the author has argued that while the concept of what is 'necessary', particularly at a time of acute crisis or emergency, might seem self-evident, an analysis of the leading decision on medical necessity (In re F) illustrates that there are different understandings based on dis/ability both of what constitutes an acute crisis and what is a legitimate response to this crisis (Steele 2016, 2017). On another level, reliance upon what is 'necessary' is problematic because this reliance involves a value judgement following the weighing of relative harms of intervening or not intervening. It follows that embedded within this reliance upon what is necessary is recognition that harm might occur but that this harm is of lesser significance than that which is avoided through the intervention. Thus, there is an implicit hierarchical valuing of bodies who might be justifiably harmed and it is proposed that hierarchy intersects with the broader sociocultural devaluation of the bodies of children with disabilities which has been explored by critical disability studies scholars.

26.2.3 Duty of Care and WHS Law

Restrictive practices might also be legally 'permissible' because of the effect of legal obligations on teachers to protect other students. Teachers owe a duty (and school authorities a non-delegable duty) to students to ensure their safety (Commonwealth v Introvigne 1982). Teachers and schools also have obligations under work health and safety law to ensure students are safe on school premises and that reasonable care is taken of them while they are attending school. Restrictive practices can be legal when done to protect the student or their peers pursuant to these obligations. (see e.g., WorkSafe Victoria undated; see also in the ACT context Shaddock et al. 2015, p. 49, p. 155, p. 156). While safety might seem to be self-evidentially of benefit to all students, children with disabilities are themselves positioned in the application of these laws as the site of risk and harm.

As alluded to above in my discussion of challenging behaviour, it is important to note that achieving school safety through restrictive practices involves identifying the source of the safety risk and the site of risk prevention as the body of a child with disabilities (see also Spivakovsky's nuanced exploration of the use of WHS to legitimate restrictive practices in the context of disability group homes: 2017, pp. 377–379). This is noted by the Victorian Human rights and Equal Opportunity Commission in relation to the Victorian WHS

'conceptuali[sing] students with disability as a risk or hazard. It does not talk about the risks to the student if restraint or seclusion is used' (Victorian Equal Opportunity and Human Rights Commission (VEOHRC) 2012, p. 118; see acknowledgement that risks to child through restrictive practices should also be taken into account in Shaddock et al. 2015, pp. 155–156). This has the effect of reducing the child to a threat to the system (here the safety of the school) and in turn negates the violence done to that child via restrictive practices through framing the use of restrictive practices as a means of restoring the order (or safety) of the system (Goodley and Runswick-Cole 2011b, p. 610). Moreover, the application of WHS and duty of care implicitly segregates the child with disabilities within the space of the school because they are positioned as a risk to that space and legitimate expressions of 'resistance or protest to maladaptive environments' which could prompt '[c]hanging services, systems and environments' (Frohmader and Sands 2015, p. 46) instead further embed them within these environments.

26.2.4 Discrimination and Human Rights Protections

Technically, the use of restrictive practices might be limited by domestic anti-discrimination legislation and (in the two jurisdictions with such legislation: ACT and Victoria) contrary to human rights legislation (Shaddock et al. 2015, pp. 153–154). This is on the basis that students with disabilities are being treated less favourably because of behaviour associated with their disabilities.

Unfortunately, this is not the case. One reason is that the use of restrictive practices can be framed as related to the student's behaviour as opposed to their disability (Purvis v New South Wales (Department of Education and Training) 2003; O'Connell 2017). This signals a problematic (yet ultimately legally productive) contradiction where challenging behaviour is associated with a child's disabilities in order to necessitate restrictive practices which target the individualised and pathologised child's body at the same time that challenging behaviour is separated from disability in order to remove the ground for rights or legal protections on the basis of disability.

Another reason is that the use of restrictive practices is subject to various legislative exceptions to non-discrimination such as the balancing requirement in reasonable adjustments, the need to protect safety and the need to comply with work health and safety laws or other legal obligations (Shaddock et al. 2015, pp. 47–48, pp. 154–155; Victorian Human Rights and Equal Opportunity Commission 2012, p. 108; McSherry 2016). To the extent

that these draw on the very concepts of necessity and safety and the very legislation that permits restrictive practices, these more progressive promises of human rights and anti-discrimination can fold back into the permissibility of restrictive practices.

A further reason why the use of restrictive practices is not limited by anti-discrimination law is that specific policies and guidelines on restrictive practices (discussed above) do not generally identify human rights as relevant considerations in assessing what is 'necessary' and 'reasonable' in the circumstances, such that any consideration of human rights is external to the core assessment of whether to use restrictive practices. Even the recently revised Victorian guidelines that contain references to human rights legislation do not provide any explicit guidance as to how these human rights are relevant to restrictive practices, notably whether human rights actually provide a basis for the absolute impermissibility of restrictive practices (Victorian Human Rights and Equal Opportunity Commission 2012).

26.3 Restrictive Practices as Disability-Specific Lawful Violence

The above overview of the legal framework regulating the use of restrictive practices in relation to students with disabilities highlights that restrictive practices are permitted rather than prohibited. This suggests that the use of restrictive practices in schools is a form of 'disability-specific lawful violence' (Steele 2014, 2015; Steele and Dowse 2016; see also consideration in law reform context in Senate Community Affairs Reference Committee 2015, pp. 71–115). 'Disability-specific lawful violence' are interventions (including sterilisation, mental health treatment and detention, and restrictive practices) that are not consented to by the individuals subjected to them but are nevertheless lawful because other individuals (e.g. courts, doctors, parents, guardians) have the legal authority to decide when these interventions should occur and they are 'disability-specific' because the legitimacy of granting this authority to third parties is by reason of medicalised assumptions about the lack of capacity and rationality of persons with disabilities to themselves make these choices coupled with their innate needs for protection, treatment and/or control.

In legal terms, disability-specific lawful violence is possible by reason of how criminal and civil law defines unlawful violence. For example, absence of consent is typically a defining element of unlawful violence (e.g. criminal offences of assault, or torts of battery and false imprisonment). In very general

terms, criminal law defines assault and civil law defines battery in terms of non-consensual interpersonal physical contact or the non-consensual threat of such contact (R v Brown 1994, p. 231, see also pp. 244–245), (although consent does not always negate assault where the contact occasions actual bodily harm or greater (R v Brown 1994, pp. 231–234)). Despite these legal principles, certain defences to criminal responsibility and tortious liability operate to exclude certain conduct from liability, including the doctrine of necessity (discussed earlier), consent including third party consent for an individual lacking mental capacity (Secretary, Department of Health and Community Services v JWB 1992) and lawful authority (see e.g., Coco v R 1994; Cowell v Corrective Services Commission of New South Wales 1988). The legal framework for the regulation of restrictive practices in education settings, discussed above, inserts restrictive practices in this gap of exclusions to liability. And it does so in a way that is 'disability-specific' because of the associations between disability, risk and harm that simultaneously position children with disabilities as more violent and harmful and less worthy of protection from violence and harm (Dowse 2017).

In sitting outside of legal categories of unlawful violence, restrictive practices do not attract liability under civil or criminal law: there is no access to remedies under tort law, no possibility of perpetrators being punished under criminal law and no possibility of accessing victims compensation statutory schemes because these define violence by reference to criminal law. While there might be scope for imposing liability where the restrictive practices are enacted negligently or contrary to law, this does not unsettle the fundamental legality of these interventions per se. Moreover, there is a large grey zone between lawful and unlawful interventions which serves to further expand the legality of this violence. There is a lack of knowledge of teachers on the ground as to what is permissible in part because of the lack of legal guidance and the lack of senior training and advice (NSW Ombudsman 2017, p. 32; Shaddock et al. 2015, pp. 46 & 170; see in the context of restrictive practices more broadly, Australian Law Reform Commission 2014, p. 249). There is a lack of external oversight and accountability by reason of a lack of reporting and independent monitoring (NSW Ombudsman 2017, p. xi, p. 32; Victoria Human Rights and Equal Opportunity Commission 2012, 105) and complaints mechanisms (NSW Ombudsman 2017, pp. xii–xiii, 64–86). Thus, any limitations on the use of restrictive practices and any associated opportunities for recognition and redress when teachers act beyond these limitations is largely ineffectual due to the lack of practical application of and oversight of the regulatory framework.

In building on the idea of disability-specific lawful violence, this chapter proposes that because the violence of restrictive practices in sitting at a very specific intersection of the institution and 'challenging behaviour' the use of restrictive practices might also be understood as 'systemic violence'. In their research on violence against children with disabilities, Goodley & Runswick-Cole draw on Žižek's notion of 'systemic violence' to argue that violence against children with disabilities is enabled and negated by reason of its assumed necessity for the functioning and preservation of a system of order that is threatened by 'disabled, disruptive, unruly and different children' (Goodley and Runswick-Cole 2011b, p. 611). Goodley and Runswick-Cole argue that the categorisation of children with disabilities' behaviour as 'challenging behaviour' and the related interventions this permits can be viewed as 'systemic violence' because these interventions constitute 'violence as part of the maintenance of the system' (Goodley and Runswick-Cole 2011b, p. 610).

26.4 Momentum Towards Prohibition?: International Human Rights and Domestic Law Reform

Some recent developments in international human rights law and domestic law reform signal greater recognition of the violent and discriminatory status of the use of restrictive practices, and provide a basis for working towards prohibition.

26.4.1 Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 ('UNCRPD') was opened for signature on 13 December 2006 and came into force in 2008. UNCRPD's approach to disability indicates a shift from a medicalised approach to disability as an internal, individual pathology epitomized by diagnostic definitions of particular impairments. Instead disability is viewed as a form of social and political difference, and there is an appreciation of the role of stigma and social barriers in the inequality experienced by people with disabilities.

Article 24 of the UNCRPD provides the right to inclusive education and that '[e]ffective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of

full inclusion'. Article 24 should be read in the context of the UNCRPD's approach to violence, notably obligations on states parties to protect people with disability from violence (Article 16). In its recent General Comment on Article 24, the Committee states:

> *Persons with disabilities, particularly women and girls, can be disproportionately affected by violence and abuse, including physical and humiliating punishments by educational personnel, for example, the use of restraints and seclusion … . Article 16 requires that States parties take all appropriate measures to protect from and prevent all forms of violence and abuse towards persons with disabilities, including sexual violence. Such measures must be age, gender and disability sensitive. The Committee strongly endorses the recommendations of the CRC, the Human Rights Committee and CESCR that States parties must prohibit all forms of corporal punishment, and cruel, inhuman and degrading treatment in all settings, including schools, and ensure effective sanctions against perpetrators*. (Committee on the Rights of Persons with Disabilities 2016, p. 17)

The Committee has also expressed concern about Australia's use of restrictive practices in schools (Committee on the Rights of Persons with Disabilities 2013, para. 35). It is important to note that the CRPD marks a significant shift from the earlier Convention on the Rights of Children which was more ambivalent about restrictive practices (Lyons 2015).

26.4.2 Government Inquiries

In 2015 the Senate Community Affairs Reference Committee ('the Committee') conducted an inquiry into institutional violence against people with disabilities. Its inquiry considered 'disability-specific interventions', including restrictive practices in schools. The Committee was particularly concerned with the lower safeguards available to people with disabilities in prisons and schools, as compared to disability service settings (Senate Community Affairs Reference Committee 2015, pp. 100–114). It concluded that: 'The committee is highly disturbed at the evidence presented of restrictive practice. Clearly, in many cases what is deemed to be a necessary therapeutic or personal safety intervention is in fact, assault and unlawful deprivation of liberty' (Senate Community Affairs Reference Committee 2015, p. 115). The Committee also stated that: 'Many of the systemic problems that lead to the use of restrictive practices actually reinforce an attitude that facilitates the mistreatment of children with disability because they are viewed as different' (Senate Community Affairs Reference Committee 2015, p. 114).

Ultimately the Committee recommended that Commonwealth and state governments 'implement a national zero-tolerance approach to eliminate restrictive practice in all service delivery contexts', and recommended that 'the use of restrictive practice against children must be eliminated as a national priority' (Senate Community Affairs Reference Committee 2015, p. xxi). The Committee also urged 'a national approach with regard to regulation' and that 'states and territories need to establish and implement enforceable policies and guidance for school teachers and principals that eliminates the use of 'restrictive practices" (Senate Community Affairs Reference Committee 2015, p. 114). The Committee also made some headline recommendations, including 'a Royal Commission into violence, abuse and neglect of people with disability be called, with terms of reference to be determined in consultation with people with disability, their families and supporters, and disability organisations' (Senate Community Affairs Reference Committee 2015, p. xv, pp. 267–268).

The Committee reiterated its approach to restrictive practices and institutional violence in its subsequent report on its inquiry into indefinite detention of people with cognitive and psychiatric impairment (Senate Community Affairs Reference Committee 2016), although it did not explicitly address education settings (Senate Community Affairs Reference Committee 2016, pp. 162–169). Also in 2016, the Senate Education and Employment References Committee's report on its inquiry into access to education for students with disability recommended: 'the government works with states and territories to end restrictive practices in schools, consistent with the recommendations of the 2015 [Senate institutional violence inquiry]' (Senate Education and Employment References Committee 2016, p. 72).

This momentum towards elimination of restrictive practices has not trickled through to state and territory education inquiries, which is unfortunate given that these jurisdictions are ultimately responsible for legislative reform in this area (Deloitte Access Economics 2017; NSW Ombudsman 2017; NSW Parliament Legislative Council 2017; Shaddock et al. 2015, Victoria Ombudsman 2017, Victorian Human Rights and Equal Opportunity Commission 2012). One notable exception is a Victorian Human Rights and Equal Opportunity Commission recommendation to prohibit seclusion (Victorian Human Rights and Equal Opportunity Commission 2012, p. 14). Rather, the state and territory inquiries focus on improving the regulation of restrictive practices through better on the ground support and training, greater transparency and accountability in relation to the use of restrictive practices by teaching staff, introduction of senior figures (e.g. Senior Practitioner) to lead oversight and training in relation to restrictive practices, and a greater focus on positive approaches to student behaviour and

individualised behaviour support planning. There is a notable absence of discussion of restrictive practices in terms of violence, crime, liability and police, and the absence of considerations of justice, compensation and reparations. Indeed, quite disturbingly, the report which was prompted by the ACT caging incident makes no mention of this specific example nor does it refer to seclusion in terms of 'caging' or by reference to the aforementioned terms. These reports continue to rely on notions of 'necessary' and 'reasonable' as the central factor (see e.g., Deloitte Access Economics 2017, p. xiii; Shaddock et al. 2015, p. 168). Also, in Australian state and territory reports published after the Commonwealth Senate inquiries it is notable that there is no adoption of the Committee's recommendation for a 'zero tolerance' approach to restrictive practices.

26.5 Conclusion

This chapter began by identifying a fundamental 'tension' in contemporary school settings – children with disabilities have been included in mainstream schooling at the same time that they are subjected to disproportionate rates of violence. The discussion of the legality of one form of violence – restrictive practices – suggests that violence against children with disabilities has been accepted as a 'necessary' and 'reasonable' means of inclusion (Steele 2016). As such, the current use of (and legal support for) restrictive practices might reflect critical disability scholars Snyder and Mitchell's notion of 'inclusionism', a government rights rhetoric that prioritises 'inclusion' of people with disabilities in ways that ultimately continues to exclude and degrade. They state: '[i]nclusionism requires that disability be tolerated as long as it does not demand an excessive degree of change from relatively inflexible institutions, environments, and norms of belonging' (Mitchell and Snyder 1997, p. 14; see also Karmiris 2017, pp. 107–108).

International human rights law and recent government inquiries signal a greater willingness to engage with restrictive practices as forms of violence and to recognise and address law's complicity in these practices. However, in ultimately achieving the 'zero tolerance' elimination of these practices, we must tackle the concepts of 'necessary', 'reasonable', and 'safety' that pervade the current legal framework in order to make apparent the extent to which they are implicitly informed by hierarchies of ability and problematic assumptions about disability that simultaneously position children with disabilities as more violent and harmful and less worthy of protection from violence and harm. We must 'deconstruct[ ] and reform[ ] the very cultural [and legal] norms that legitimise violence against disabled people in the first place' (Goodley and

Runswick-Cole 2011b, p. 614). Once we do this we might move closer towards realising what Karmiris refers to as the 'hopeful possibility that teaching and learning might be otherwise than the continued perpetuation of hierarchies of exclusion' (2017, p. 102).

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References

Beaupert, F. (2017). *Freedom of opinion and expression: From the perspective of psychosocial disability and madness*. (Unpublished paper).

Carter, W. J. (2006). *Challenging behaviour and disability: A targeted response*. Report to Honourable Warren Pitt MP, Minister for Communities, Disability Services and Seniors. https://www.communities.qld.gov.au/resources/disability/centre-of-excellence/carter-report-full.pdf

Chandler, K., Willmott, L., & White, B. (2014). Rethinking restrictive practices: A comparative analysis. *QUT Law Review, 4*(2), 90–122. https://doi.org/10.5204/qutlr.v14i2.568.

Chapman, C. (2014). Becoming perpetrator: How I came to accept restraining and confining disabled Aboriginal children. In B. Burstow, B. A. LeFrancois, & S. Diamond (Eds.), *Psychiatry disrupted: Theorizing resistance and crafting the (r) evolution* (pp. 16–33). Montreal/Kingston: McGill-Queen's University Press.

Children with Disability Australia. (2015). *Submission to inquiry into violence, abuse and neglect against people with disability in institutional and residential settings*. Collingwood: Children with Disability Australia. http://www.cyda.org.au/cdasubmissions#section5

Coco v R 1994 179 CLR 427 (Austl.).

Committee on the Rights of Persons with Disabilities. (2013, October 21). *Concluding observations on the initial report of Australia*, 10th session. CRPD/C/AUS/CO/1. http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsnzSGolKOaUX8SsM2PfxU7tjZ6g%2FxLBVYsYEv6iDyTXyNk%2BsAB%2FHgrVpAKHcEYTB%2B1t%2FH3HX1F%2F%2Bo%2Bk3O4KhxfhPoTQZ3LeS75n8PHidYHE3

Committee on the Rights of Persons with Disabilities. (2016, September 2). *General comment no 4 (2016): Article 24: Right to inclusive education*. CRPD/C/GC/4. http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx

Commonwealth v Introvigne. (1982). 150 CLR 258.

Cooper, H. (2013). The oppressive power of normalcy in the lives of disabled children: Deploying history to denaturalize the notion of the 'normal child'. In

T. Curran (Ed.), *Disabled children's childhood studies* (pp. 136–151). Houndmills/New York: Palgrave Macmillan.

Cowell v Corrective Services Commission of New South Wales 1988 13 NSWLR 714 (Austl.).

Deloitte Access Economics. (2017). *Review of education for students with disability in Queensland state schools*. Brisbane: Department of Education and Training (Queensland). http://education.qld.gov.au/schools/disability/docs/disability-review-report.pdf

Dowse, L. (2017). Disruptive, dangerous and disturbing: The "challenge" of behaviour in the construction of normalcy and vulnerability. *Continuum, 31*(3), 447–457. https://doi.org/10.1080/10304312.2016.1275148.

Erevelles, N. (2000). Educating unruly bodies: Critical pedagogy, disability studies, and the politics of schooling. *Educational Theory, 50*(1), 25–47. https://doi.org/10.1111/j.1741-5446.2000.00025.x.

Erevelles, N. (2011). *Disability and difference in global contexts: Enabling a transformative body politic*. New York: Palgrave Macmillan.

Frohmader, C., & Sands, T. (2015). *Australian Cross Disability Alliance (ACDA) submission to the Senate inquiry into violence, abuse and neglect against people with disability in institutional and residential settings*. Sydney: Australian Cross Disability Alliance. http://www.pwd.org.au/issues/violence-inquiry.html

Glanville, B. (Reporter). (2017, October 9). Hundreds of complaints of abuse of disabled children. In *7.30 Report*. [Television broadcast]. Sydney: Australian Broadcasting Corporation.

Goodley, D., & Runswick-Cole, K. (2011a). Problematising policy: Conceptions of 'child', 'disabled' and 'parents' in social policy in England. *International Journal of Inclusive Education, 15*(1), 71–85. https://doi.org/10.1080/13603116.2010.496197.

Goodley, D., & Runswick-Cole, K. (2011b). The violence of disablism. *Sociology of Health & Illness, 33*(4), 602–617. https://doi.org/10.1111/j.1467-9566.2010.01302.x.

Goodley, D., & Runswick-Cole, K. (2012). Reading Rosie: The postmodern disabled child. *Educational & Child Psychology, 29*(2), 53–66.

Goodley, D., Runswick-Cole, K., & Liddiard, K. (2016). The DisHuman child. *Discourse: Studies in the Cultural Politics of Education, 37*(5), 770–784. https://doi.org/10.1080/01596306.2015.1075731.

Lyons, D. (2015). Restraint and seclusion of students with disabilities: A child rights perspective from Victoria, Australia. *International Journal of Children's Rights, 23*, 189–239. https://doi.org/10.1163/15718182-02301009.

Kafer, A. (2013). *Feminist, queer, crip*. Bloomington: Indiana University Press.

Kaplan, A. (2010). Harm without recourse: The need for a private right of action in federal restraint and seclusion legislation. *Cardozo Law Review, 32*(2), 581–614.

Karmiris, M. (2016). Breaks and ruptures: Cripping the reading of resistance. *Canadian Journal of Disability Studies, 5*(4), 205–222. http://cjds.uwaterloo.ca/index.php/cjds/article/view/319

Karmiris, M. (2017). De-centering the myth of normalcy in education: A critique of inclusionary policies in education through disability studies. *Critical Disability Discourses, 8*, 99–199. https://cdd.journals.yorku.ca/index.php/cdd/article/view/39722

Macdonald, E. (Reporter). (2016, August 11). Autism cage timeline: From Canberra classroom to the United Nations. *Canberra Times*. http://www.canberratimes.com.au/act-news/autism-cage-timeline-from-canberra-classroom-to-the-united-nations-20160811-gqqnjm.html

McSherry, B. (2016, November 29). Breaking bad: Regulating the responses of teachers to students' 'behaviours of concern', paper delivered at *Dean's Lecture Series*. Melbourne. http://education.unimelb.edu.au/news_and_activities/events/event/2016/breaking-bad-regulating-the-responses-of-teachers-to-students-behaviours-of-concern

Mitchell, D. T., & Snyder, S. L. (1997). Introduction: Disability studies and the double bind of representation. In D. T. Mitchell & S. L. Snyder (Eds.), *The body and physical difference: Discourses of disability* (pp. 1–31). Ann Arbor: University of Michigan Press.

National Disability Rights Network. (2012). *School is not supposed to hurt: The U.S. Department of Education must do more to protect school children from restraint and seclusion*. Washington, DC: Author. http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf

New South Wales Government Education & Communities. (2011). *Guidelines for the use of time-out strategies including dedicated time-out rooms*. https://education.nsw.gov.au/policy-library/associated-documents/timeout_gui.pdf

New South Wales Government Education & Communities. (2012). Physical restraint of students. *Legal Services Bulletin, 9*. Reviewed June 2012. https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_09.pdf

New South Wales Parliament Legislative Council. (2017). *Education of students with a disability or special needs in New South Wales*, Report no. 37, Portfolio Committee No. 3 – Education. Sydney: Author. https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6114/170921%20-%20Final%20report.pdf

NSW Ombudsman. (2017). *NSW Ombudsman inquiry into behaviour management in schools*. Sydney: Author. https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/community-and-disability-services/nsw-ombudsman-inquiry-into-behaviour-management-in-schools-august-2017

Nunkoosing, K., & Haydon-Laurelut, M. (2012). Intellectual disability trouble: Foucault and Goffman on 'challenging behaviour'. In D. Goodley, B. Hughes, & L. Davis (Eds.), *Disability and social theory: New developments and directions* (pp. 195–211). Basingstoke: Palgrave Macmillan.

O'Connell, K. (2017). Should we take the 'disability' out of discrimination laws? Students with challenging behaviour and the definition of disability. *Law in Context, 35*(2), 108–128.

Poed, S., Cologon, K., & Jackson, R. (2017, October). Gatekeeping and restrictive practices with students with disability: Results of an Australian survey, paper delivered at *Inclusive Education Summit*. Adelaide. http://allmeansall.org.au/wp-content/uploads/2017/10/TIES-4.0-20172.pdf

Purvis v New South Wales (Department of Education and Training) 2003 217 CLR 92 (Austl.).

R v Brown 1994 1 AC 212 (United Kingdom).

Re F (Mental Patient Sterilisation) 1990 2 AC 1 (United Kingdom).

Shaddock, A., Packer, P., & Roy, A. (2015). *Report of the expert panel on students with complex needs and challenging behaviour*. Canberra: Authors. https://www.education.act.gov.au/__data/assets/pdf_file/0003/856254/Attach-4-Expert-Panel-Report-Web.pdf

Southwark London Borough Council v Williams 1971 Ch 734 (United Kingdom).

Spivakovsky, C. (2017). Governing freedom through risk: Locating the group home in the archipelago of confinement and control. *Punishment & Society, 19*(3), 366–383. https://doi.org/10.1177/1462474517703968.

State of Victoria (Department of Education and Training). (2017a). *The principles for reduction and elimination of restraint and seclusion in Victorian government schools*. East Melbourne: Author. http://www.education.vic.gov.au/Documents/school/principals/participation/15Principals.pdf

State of Victoria (Department of Education and Training). (2017b). *Restraint of students policy*. East Melbourne: Author. http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx

Steele, L. (2015). *Submission to Senate Community Affairs References Committee Inquiry into 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*, submission no. 94. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Submissions

Steele, L. (2016). Court-authorised sterilisation and human rights: Inequality, discrimination and violence against women and girls with disability? *UNSW Law Journal, 39*(3), 1002–1037. http://www.unswlawjournal.unsw.edu.au/sites/default/files/393-4.pdf

Steele, L. (2017). Temporality, disability and institutional violence: Revisiting In re F. *Griffith Law Review, 26*(3), 378–400. https://doi.org/10.1080/10383441.2017.1436368.

Steele, L., & Dowse, L. (2016). Gender, disability rights and violence against medical bodies. *Australian Feminist Studies, 31*(88), 117–124. https://doi.org/10.1080/08164649.2016.1224054.

Victorian Equal Opportunity & Human Rights Commission (VEOHRC). (2012). *Held back: The experiences of students with disabilities in Victorian schools*. Retrieved from http://www.humanrightscommission.vic.gov.au/media/k2/attachments/1404-VEOHRC_HeldBack_-_StudentwithDisabilityReportW3.pdf

Victorian Equal Opportunity and Human Rights Commission. (2017). *Held back: The experiences of students with disabilities in Victorian schools: Analysis paper*. Carlton: Victorian Equal Opportunity and Human Rights Commission. https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/1602-held-back-the-experiences-of-students-with-disabilities-in-victorian-schools-analysis-paper

Victorian Ombudsman. (2017). *Investigation into Victorian government school expulsions*. Melbourne: Author. https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Investigation-into-vic-gov-school-expulsions

Watts, I. E., & Erevelles, N. (2004). These deadly times: Reconceptualizing school violence by using critical race theory and disability studies. *American Educational Research Journal, 41*(2), 271–299.

Weissbrodt, D., Maderia, W., Stewart, D., & Dikel, W. (2012). Applying international human rights standards to the restraint and seclusion of students with disabilities. *Law and Inequality, 30*, 287–307. http://scholarship.law.umn.edu/faculty_articles/365?utm_source=scholarship.law.umn.edu%2Ffaculty_articles%2F365&utm_medium=PDF&utm_campaign=PDFCoverPages