



**Submission**

**Combined Second and Third Periodic Report of Australia – United Nations  
Convention on the Rights of Persons with Disabilities**

**26 July 2019**

**All Means All – The Australian Alliance for Inclusive Education**

Endorsed by Disabled People's Organisations Australia (DPOA), Children and Young People With Disability Australia (CYDA) and Inclusion International.



## INTRODUCTION

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1. [All Means All](#) is the Australian Alliance for Inclusive Education, a nationwide multi-stakeholder alliance working together for the implementation of an inclusive education system and the removal of the legal, structural and attitudinal barriers that limit the rights of some students to access full inclusive education. The Board of All Means All comprises a majority of members who are persons with disabilities or family members of persons with disabilities. All Means All is also a full member of [Inclusion International](#), the international network of persons with intellectual disabilities and their families advocating for the human rights of persons with intellectual disabilities worldwide.
2. All Means All thanks the Committee on the Rights of Persons with Disabilities (**Committee**) for the opportunity to make a submission on the Combined Second and Third Periodic Report – United Nations Convention on the Rights of Persons with Disabilities (**Australia Report**).
3. We note that the Australia Report has been prepared in response to 35 key issues identified by the Committee in its List of Issues Prior to Reporting (**LOIPR**). However, this submission addresses statements in the Australia Report in relation to the education of students with disability and the implementation of Article 24 of the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**), specifically issues 24 to 26, addressed in paragraphs 260 to 276 of the Australia Report.

## EXECUTIVE SUMMARY

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4. Australia's education of students with disabilities evidences serious systemic failures and substantive non-compliance with Article 24 of the CRPD. Australia lacks an overarching strategy for system-wide reform at national and federated State levels to ensure an inclusive education system that complies with Australia's obligations under Article 24.
5. In the absence of such a strategy, since the last reporting period there has been:
  - a significant increase in the segregation of students with disabilities in primary and secondary education;
  - a continued use of restrictive practices on students with disabilities;
  - a lack of improvement in the provision of reasonable accommodations to students with disabilities;
  - no significant improvement in the participation or completion rates of students with disabilities;
  - a failure to improve the collection of disaggregated data; and
  - no reform to the *Disability Discrimination Act 1992 (Cth)* (**DDA**) or the Disability Standards for Education (2005) (**DSE**).

## RECOMMENDATIONS

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6. The Australian Government work with State and Territory Governments to develop a national strategy for ensuring an inclusive education system at all levels in Australia that ensures a legislative and policy framework that fully complies with Article 24 and General Comment No.4 (including adoption of the clear definitions of “inclusive education”, “segregation”, “integration” and “exclusion” in General Comment No.4).
7. The Australian Government work with State and Territory Governments to urgently arrest and reverse the increasing rate of segregation of students with disabilities in primary and secondary education including by redirecting resources from segregated settings towards inclusive education.
8. The Australian Government implement the recommendations in the Senate Education and Employment References Committee’s 2016 report ‘Access to real learning: the impacts of policy, funding and culture on students with disability’.
9. The Australian Government implement the recommendations made in the 2015 review of the Disability Standards for Education (2005) and properly resource the 2020 review of the Standards.
10. The Australian Government review and reform the *Disability Discrimination Act 1992* (Cth) and the Disability Standards for Education (2005) to ensure that they align with Australia’s obligations under the CRPD, particularly Article 24.
11. The Education Council amend the Melbourne Declaration on Education Goals for Young Australians to address a critical gap in the original Declaration,<sup>1</sup> which is the subject of a current review, by explicitly identifying students with disabilities as a priority,<sup>2</sup> including a commitment to inclusive education at all levels of education and adopting the principles and definition of inclusive education consistent with the CRPD and General Comment No. 4.
12. The Australian Government, in consultation with Indigenous people and their representative organisations, establish culturally owned and operated programs and initiatives to increase the education retention rate of Indigenous students with disabilities.
13. The Australian Government fully implement Articles 24 and develop and implement a national framework to collect and publish disaggregated data on:
  - a. the enrolment, completion, attainment, suspension and exclusion (including the prevalence of gatekeeping); and
  - b. the use of restrictive practices, including seclusion,

in respect of students with disabilities in all education settings, which is also disaggregated by age, gender, location, ethnicity and disability type.

## ANALYSIS

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### Issue 24

14. Australia does not have a comprehensive framework to collect disaggregated data on the enrolment, participation (including suspensions and expulsions), completion, educational attainment or the use of restrictive practices<sup>3</sup> on students with disabilities in education settings.
15. Available data and evidence suggest alarming rates of suspensions, exclusions, bullying<sup>4</sup> and restrictive practices.<sup>5</sup>
16. The use of restrictive practices in schools is particularly pervasive. Children with disabilities are placed in cages or isolated in other inappropriate structures sometimes referred to as “withdrawal”, “time out” or “calm” rooms, locked in cupboards, tied to chairs with belts, deprived of water for long periods and degraded in front of classmates.<sup>6</sup> Human rights abuses of this nature were the subject of a formal complaint to the United Nations Special Rapporteur on the Rights of Persons with Disabilities in 2016.<sup>7</sup>
17. The use of restrictive practices in Australian schools is governed by a range of State-based regulatory frameworks that are not aligned with the CRPD or the United Nations Convention on the Rights of the Child,<sup>8</sup> which Australia has also ratified. Rather, these frameworks not only fail to protect the human rights of children with disabilities, but in fact permit violations of those rights.
18. There is also evidence of widespread “gatekeeping” - the formal or informal denial of access to, or discouragement of, students with disabilities attending mainstream schools. The significance of the issue of “gatekeeping” and its impact on students with disabilities and their families, was recognised in the 2016 report of the Australian Senate Education and Employment References Committee *Access to real learning: the impacts of policy, funding and culture on students with disability (2016 Senate Report)*.<sup>9</sup> It has led to increases in segregated education<sup>10</sup> and reported increases in home-schooling<sup>11</sup> of students with disabilities across Australia.
19. Further, the emergence of exclusionary discipline and “zero-tolerance”<sup>12</sup> approaches to “challenging behaviour” in schools and a range of recent reforms in relation to suspensions and exclusions, have given rise to new concerns, with evidence that such policies and approaches disproportionately impact children with disabilities (as well as Indigenous children and children in out-of-home care).<sup>13</sup>
20. While the introduction of the Nationally Consistent Collection of Data on School Students with Disability (**NCCD**) in 2013 means that the Australian Government now has access to important information in relation to students with disabilities, the data is limited and the model has weaknesses that may distort it.<sup>14</sup>
21. The NCCD provides for the collection of data on students receiving adjustments to access the curriculum and participate in learning, including the type and level of adjustments. This data is used to determine resource allocation to schools. This represents an important shift away from resource allocation based on

“medical model” diagnosis and categorisation and has the potential to capture good practices already in place in many schools as well as improve the level of practice and compliance in others. However, the NCCD is open to distortion and misuse unless it is well explained, well understood, and enacted with fidelity.<sup>15</sup>

22. There is insufficient accountability to ensure that adjustments claimed by schools are appropriate and in fact being delivered. In particular, the fact that the NCCD is also a resource allocation tool makes it susceptible to “gaming”; the model embeds an incentive to inflate the adjustment level because higher levels of adjustment attract more funding. This also works as a disincentive for teachers to genuinely engage in quality differentiated teaching practice in the classroom. That is, if a student’s learning needs are met by general differentiated practice in the classroom (i.e. level “0” being “quality differentiated teaching practice”), there may not be a need for individual adjustments and therefore no basis to claim the individual disability funding that comes with providing those adjustments.<sup>16</sup>
23. Finally, like previous models, the NCCD still fails to provide much needed transparency about the implementation of inclusive education in Australia. Given the urgent issue of the increase in the segregation of Australian students with disabilities, the model should be expanded to include the collection of data that can provide ongoing accountability for progress in meeting the Australian Government’s obligations under Article 24 and also meet the requirements of Article 31 of the CRPD (Statistics and Data Collection).<sup>17</sup>

## **Issue 25**

24. We do not agree with the Australian Government’s representation<sup>18</sup> that it has implemented significant systemic reforms to improve the educational outcomes of students with disabilities over the past decade.
25. Australia has no national legislative or policy framework for inclusive education that fully, or even substantially, complies with Article 24 and General Comment No. 4 and the Australian Government has continued to avoid its responsibility to drive the coordinated systemic and cultural change needed to realise the rights of students with disabilities across Australia. This is notwithstanding the findings and recommendations of the 2015 review of the DSE<sup>19</sup> and 2016 Senate Report.<sup>20</sup>

## ***Senate Education and Employment References Committee’s 2016 Report***

26. While the Australian Government’s response<sup>21</sup> to the 2016 Senate Report committed to some positive steps to support students with disabilities, it was unsatisfactory in several material respects.
27. At a broad level, the Australian Government failed to commit to prioritising and advancing substantive policy to promote inclusive education, and did not acknowledge anywhere in its response its obligations under Article 24. This lack of commitment to inclusive education is also apparent in paragraph 275 of the Australia Report in relation to Issue 26, which seeks to reject Australia’s human rights obligations by purporting to request a “clarification” from the Committee in respect of General Comment No. 4.

28. Notably, the Australian Government has not adopted Recommendation 9 of the 2016 Senate Report, (which echoes paragraph 40 of General Comment No. 4) calling for the Australian Government to work with State Governments to establish a national strategy for the education of students with disabilities. This is despite ongoing advocacy by civil society and the prospect of national bipartisan support, with the major opposition political party promising to “develop an inclusive education strategy” as a policy commitment during its campaign in the 2019 federal election<sup>22</sup>.
29. Further, the Australian Government’s implementation of its limited commitments in response to the 2016 Senate Report has been substandard<sup>23</sup> or contested.<sup>24</sup>

### ***Disability Standards for Education***

30. The current legal framework under the DDA and the DSE enacted under it, has failed to achieve substantive systemic improvements for students with disabilities. Rather, it has overseen the growth of segregation in Australia, which has increased in particular over the last decade,<sup>25</sup> a period that coincides with Australia's ratification of the CRPD.
31. The increase in segregation of Australian students with disabilities was a matter of concern for the UN Committee on Economic, Social and Cultural Rights (**ICESCR Committee**) in the course of its consideration of the fifth periodic report of Australia on its implementation of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).<sup>26</sup>
32. A study published in June 2019 which analysed the impact of the DDA and DSE reforms concluded as follows:<sup>27</sup>

‘While the DDA and DSE reforms have both supported the general aim of increasing the access of students with a disability to the regular education system, the data presented here clearly demonstrates that these reforms have failed to bring about important improvements in access to regular schools and classes for students with a disability. Instead, special school placements have substantially increased following the introduction of the DDA and the DSE, meaning that, paradoxically, more students are segregated into these settings following legislative reforms designed to reduce this. Although both the DDA and the DSE have led to a reduction in the rate of exclusion for students with disabilities, this rate remains concerningly high and the reforms cannot be considered to have successfully addressed the persistent issue of exclusion for this reason.’

33. The above study also found that from 2009 to 2015, the inclusion of Australian autistic students in mainstream classes dropped from 18.8% to 3.3% while their proportion in special schools increased from 37% to 52%. The author of the study, which also provided an international comparison between Australia and the US, stated that ‘US students on the autism spectrum are about 13 times more likely to access their education within regular classrooms than their Australian counterparts’.<sup>28</sup>
34. The Australia Report references in paragraph 270 reviews of disability inclusion in Australian education systems. Indeed, over the last two decades, most

Australian States and Territories and the Australian Government have conducted inquiries or reviews relating to schooling for students with disabilities.<sup>29</sup> However, it is important to note that this has not resulted in adequate reforms to implement inclusive education. Indeed, at times the opposite has been an outcome of such inquiries or reviews.

35. The Government of New South Wales, which operates Australia's largest State education system, has recently adopted a policy position to increase segregated classrooms for students with disabilities, at a greater rate than general enrolment growth.<sup>30</sup> This is not only inconsistent with Article 24 but amounts to a deliberate impermissible retrogressive measure that the Australian Government should immediately address.<sup>31</sup>
36. Unfortunately, Australia's disability discrimination laws fail to recognise segregation as a form of discrimination and to protect children with disabilities from it, despite clear statements made by the Committee in respect of the matter.<sup>32</sup>
37. The Committee's concerns about the effectiveness of the DDA and DSE has been communicated to Australia on previous occasions and in Australia's last periodic review by the Committee in 2013. A formal review of the DSE was undertaken in 2015 as required by the DDA. Notwithstanding the short time-frame given for consultation, it attracted significant participation.<sup>33</sup> The final report following the review made 14 recommendations to improve the operation of the Standards. To date, the majority of these recommendations have not been implemented and there has been no reform to the DSE. The DSE is due to be reviewed again in 2020. As part of this review, consideration ought to be given to how the monitoring, enforceability and implementation of the DSE can be strengthened.
38. In our view, the DSE must be updated to include explicit support for inclusive education as well as alignment of the DSE with Article 24 and General Comment No. 4. This would also require amendment to the definitions of "reasonable adjustment" in the DDA and the DSE, which are not only inconsistent with each other but also inconsistent with the equivalent concept in Articles 5 and 24 of the CRPD, as clarified in General Comment No. 4.<sup>34</sup>

### ***Melbourne Declaration***

39. The *Melbourne Declaration on Education Goals for Young Australians* (**Melbourne Declaration**) is currently under review in Australia. The Melbourne Declaration provides the national vision for education in Australia. It sets two broad goals, that (1) Australian schooling promotes equity and excellence; and (2) all young Australians become successful learners, confident and creative individuals, and active and informed citizens.
40. The current Melbourne Declaration, which was published in the same year as the CRPD, does not make express reference to students with disabilities, nor inclusive education. These critical omissions have contributed to many schools continuing to perceive students with disabilities as a liability, and to the failure to address the many barriers those students face in education.

41. We consider that an outcome of the current review must include express amendment to the text of the Melbourne Declaration to identify students with disabilities as a priority equity group (consistent with their identification as such in the National School Reform Agreement<sup>35</sup>) to which the principle of non-discrimination applies. It must be amended to include a commitment to inclusive education at all levels of education, adopting the principles and definition of inclusive education, consistently with the CRPD and General Comment No. 4.

### ***Funding for reasonable accommodations***

42. The allocation of funding to provide reasonable accommodations and support students with disabilities in Australian schools is not a straightforward matter. The DDA, supplemented by the DSE, imposes an obligation on education providers to provide “reasonable adjustments”.<sup>36</sup> The federal Australian Government also provides some funding for students with disabilities under the *Australian Education Amendment Act 2017* (Cth) using the NCCD to determine individual funding allocations (as discussed in paragraphs 20 to 23 above). However, the majority of the funding for education, including for reasonable adjustments for students with disabilities, is provided by State Governments.
43. At present, most States provide some “traditional” (i.e. “medical model”) individually targeted funding using impairment categories to determine student eligibility. Because each State jurisdiction adopts its own categorisations and diagnostic thresholds, different levels of funding may be available in different jurisdictions, to provide reasonable adjustments and supports for individual students with similar needs. Other sources of funding may also be available as part of the overall funding mix for each jurisdiction. This generally includes some additional funding based on school/system census data and which may attract different rules in respect of how that funding is to be used by schools.<sup>37</sup>
44. Insufficient and inadequate provision of funds to provide reasonable adjustments and support students with disabilities has been recognised in multiple reports and reviews across Australia,<sup>38</sup> as a barrier to equal access to education by students with disabilities and the effective implementation of inclusive education. As the 2016 Senate Report noted, while all schools in Australia are obliged to provide reasonable accommodations to students with disabilities “the evidence presented by witnesses and submitters demonstrated that far too often, this was not the experience for students with disability”.<sup>39</sup> The 2015 review of the DSE also found there was considerable divergence in the understanding of the duty to provide reasonable adjustments.<sup>40</sup>
45. This is of significant concern, given the provision of reasonable accommodations is a minimum core obligation of Article 24, which must be immediately realised.<sup>41</sup> Further, as stated in General Comment No. 4,<sup>42</sup> in implementing Article 24 State Parties must also “develop a funding model that allocates resources and incentives for inclusive educational environments to provide the necessary support to persons with disabilities”. We consider that the current funding practices at State and federal level do not meet the requirements of Article 24.

### **Accessibility of tertiary education**

46. Australia does not have a dedicated strategy or plan to increase the accessibility of tertiary education facilities and courses for all people with disabilities, consistent with Article 24 of the CRPD.

47. Tertiary education and life-long learning systems and programs in Australia do not provide the flexibility, reasonable adjustments and support needed by people with disabilities, particularly people with intellectual disabilities, people with psychosocial disabilities and deaf people, to gain tertiary qualifications. This makes it difficult for people with disabilities to gain the education and skills they need to obtain and retain meaningful employment.<sup>43</sup> In 2012, 15% of individuals with disabilities aged 15–64 years had completed a bachelor's degree or higher compared to 26% of people without disabilities.<sup>44</sup>

48. The 2015 review of the DSE noted that:

[w]ith post-compulsory settings, the application of the Standards to third party providers of practicums, industry placements and course materials are not addressed by the Standards, giving rise to uncertainty around responsibility for provision of adjustments (in the case of placements) or accessible formats (in the case of course materials).<sup>45</sup>

49. It also noted that a number of stakeholders discussed the exclusionary nature of the 'inherent requirements' for university courses.<sup>46</sup> The review recommended that:

'...the Australian Government work with State and Territory governments to improve the consistency of funded supports for people with disabilities in different post-compulsory educational settings to ensure equitable access across settings.'

This recommendation has not been acted upon.

50. The Disability Support Program provides funding to universities to undertake activities that assist in removing barriers to access and participation in higher education for students with disabilities. There is no equivalent of the Disability Support Program in the technical and vocational education sector in Australia.

51. The Disability Support Program was reviewed and evaluated 2014-2015.<sup>47</sup> The evaluation found that:

'... while the [Disability Support Program] is supporting higher education providers to meet the needs of students, there are opportunities to improve the administrative efficiency of the program and consider whether it is still appropriate to target individual students or if the focus should be on applying universal design principles to curriculum design more broadly.'<sup>48</sup>

52. This indicates that there needs to be a broader strategy tackling the structural and systemic issues leading to inaccessible university education, as well as other forms of tertiary education, including technical and vocational education. To date, the Australian Government has not responded to the 2014-2015 review.

## Issue 26

53. The statements in paragraph 275 of the Australia Report purport to seek clarification from the Committee 'that State Parties may offer education through specialist classes or schools consistently with Article 24'. In doing so, the Australian Government is asking the Committee to state that Article 24 is compatible with segregation of students with disabilities, as a legitimate 'education modality' among 'a range of education options' within an inclusive education system. This is despite the Committee providing clear guidance to the contrary in General Comments No. 4 and No. 6, and in its concluding observations to a number of States.
54. Paragraph 275(a) of the Australia Report repeats verbatim the Australian Government's 2016 submission to the Committee on draft General Comment No. 4. Commenting on paragraph 71 of the then draft General Comment No. 4 (now reflected in paragraph 64 of General Comment No. 4 as adopted), the Australian Government stated:
- 'Australia's view is that a State Party will meet its obligations under Article 24 through an education system that allows for funding of different education modalities so students with disability are able to participate in a range of education options including enrolment in mainstream classes in mainstream schools with additional support, specialist classes or units in mainstream schools and specialist schools. A range of education options ensure that the best interests of the student are a primary consideration.'
55. This position in effect seeks to reject the universal character of the right to inclusive education as applying to *all* persons with disabilities, and is not compatible with the duty of non-discrimination in education, a minimum core obligation of Article 24 that is immediately realisable<sup>49</sup>.
56. Equally, it is also not compatible with a key dimension of Article 24, which requires State Parties to achieve progressively the full realisation of the right to inclusive education. As the Committee explained in General Comment No. 4 (para 40):
- 'Article 4.2 requires that States parties undertake measures to the maximum of their available resources regarding economic, social and cultural rights, and, where needed, within a framework of international cooperation, with a view to achieving progressively the full realisation of those rights. Progressive realization means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 24.'
57. The Committee clearly stated in General Comment No. 4 that the obligations under Article 24 are 'not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system'<sup>50</sup>. That is, Article 24 does not support the preservation of and continued investment in segregated education models.

58. Maria Soledad Cisternas Reyes, Special Envoy of the United Nations Secretary-General on Disability and Accessibility recently explained the transition to an inclusive paradigm in fulfilling the CRPD goal of an inclusive education system:

[The] fulfilment of this goal will entail the existence of only one education system, with no parallelism. In other terms, in the future, the distinction between mainstream and segregated education system will disappear.<sup>51</sup>

59. On segregation specifically, the Committee has stated:

- a. 'Segregation occurs when the education of students with disabilities is provided in separate environments designed or used to respond to a particular or various impairments, in isolation from students without disabilities';<sup>52</sup>
- b. 'The right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation',<sup>53</sup> and
- c. 'Segregated models of education, which exclude students with disabilities from mainstream and inclusive education on the basis of disability, contravene articles 5(2) and 24(1)(a)'.<sup>54</sup>

60. General Comment No. 4 in paragraph 12 further speaks of "ending segregation within educational settings by ensuring inclusive classroom teaching in accessible learning environments with appropriate supports" and calls for inclusive education to be "monitored and evaluated on a regular basis to ensure that segregation or integration is not happening either formally or informally".

61. Together, General Comments No. 4 and No. 6 stand in clear rejection of paragraph 275 of the Australia Report, and were issued subsequent to the Australian Government's earlier efforts to advance the same proposition.

62. In our view, the Australian Government's request for clarification fails to respect the clarity already provided by the Committee in General Comments No. 4 and No. 6. Despite its failure to act to reverse the growth of segregation of Australian students with disabilities and to undertake necessary reform of the national legislative and policy framework to ensure those students can fully realise their right to education, the Australian Government has instead elected to re-question the rights of students with disabilities.

63. We thank the Committee for its jurisprudence in relation to Article 24 and the clear guidance it has provided to State Parties on inclusive education, through General Comment No. 4 and General Comment No. 6. It is worth noting in this context that the definition of "segregation", as well as other key definitions and concepts outlined in General Comment No. 4, have since been adopted by the Queensland Government in its newly released *Inclusive Education Policy 2018*.<sup>55</sup> While this represents welcome progress in Australia's education policy discourse, it is too early to assess its impact and some concerns are emerging about its resourcing and implementation.

64. It should also be noted, that even within a deficient systemic framework, there are examples of schools in Australia that not only evidence quality inclusive practices

at the whole school level but also demonstrate how a “dual” model can be merged into a single inclusive education model. One such example is Thuringowa State High School in Queensland<sup>56</sup> which undertook the journey of school transformation, closing its segregated unit for students with disabilities in a gradual roll out between 2015 and 2017, and successfully implemented school-wide inclusive reform for all students, guided by Article 24 and General Comment No. 4.<sup>57</sup>

65. One of the students who was formerly in the school’s segregated unit described his experience as follows:<sup>58</sup>

1 never enjoyed school until I was given the opportunity to be myself alongside everyone else. Yes, I know I am different, but I am not so different that I need to be kept separate or hidden. Inclusion at Thuringowa makes me beyond happy – I am equal, I am smart and now I have options.’ (*Will, aged 17*)

### ***Parental right to choose – Article 13 of ICESCR***

66. General Comment No. 4 specifies that inclusive education is to be understood as, amongst other things:

‘a fundamental human right of all learners – notably, education is the right of the individual learner and parental responsibilities in regard to the education of a child are subordinate to the rights of the child’.

67. However, in paragraph 275(b) of the Australia Report, the Australian Government seeks to invoke the religious and moral “parental choice” protections in articles 13(3) and (4) of ICESCR to justify its maintenance of segregated settings for students with disabilities, such as segregated classrooms or schools.

68. This is not supported by Article 13 of ICESCR or by international human rights law or its related jurisprudence.<sup>59</sup>

69. Relevantly, the segregation of students with disabilities is not in the nature of the limited religious or moral convictions sought to be protected by Article 13 (see paragraph 28 of ICESCR General Comment No. 13), such as, for example, the freedom of parents to choose education for their children within the framework of Catholic or Jewish beliefs. Rather, disability segregation in education is a discriminatory practice that reflects historical institutional practices that have contributed to the marginalisation of persons with disabilities as a group.

70. The following analysis of Article 13 of ICESCR is offered by human rights legal academic and Vice-Chair and Australian member of the Committee, Rosemary Kayess:

‘ICESCR Article 13 is perfectly specific in recognising a limited right of parents to choose alternative schools, where those schools are private and where the objective of the parents is to enable education to be provided in conformity with their religious and moral convictions [...] there is no comparable parental right in relation to disability, not would such a right (if it existed) be consistent with the international human rights law standards of equality and non-discrimination, directed as Article 13(3) is towards the preservation of difference.’<sup>60</sup>

71. Discussing the drafting of Article 24 of the CRPD and why it does not include a right to choose between the general education system and the segregated education system, Ms Kayess also notes:
- '[P]erhaps most fundamentally, to have enshrined choice would have been to work against the standard of discrimination, which is set out in Article 5 of the CRPD and is one of the core pillars of international human rights law more broadly.'<sup>61</sup>
72. Further, the right under Article 13(3) of ICESCR is one of non-interference by the State, recognising the right of parents to establish and manage their own *private* educational institutions in conformity with their religious and moral convictions, rather than one entitling parents to *demand State-funded, separate education* for their children<sup>62</sup>.
73. The Australian Government's refusal to alter its funding practices that maintain State-funded segregated education systems denies general education systems the resources that are much-needed to fully implement inclusive education.
74. It is also worth noting that it was in the context of the ICESCR Committee's consideration of Australia's report on compliance with ICESCR that Australia was asked to explain evidence of a rise in segregated education and recommended to take effective steps to ensure that children with disabilities can access inclusive education (as discussed above in paragraph 31).
75. Finally, the proposition that parents are "choosing" segregated education is deeply flawed. As an organisation of persons with disabilities and their families advocating for human rights, we find this proposition superficial at best, given especially the role that many parents have played in advocating for the realisation of their child's right to inclusive education.
76. As stated in paragraph 12 of this submission, the 2016 Senate Report as well as multiple State and Territory inquiries, reviews and research undertaken across Australia, have shown the widespread discrimination and gatekeeping<sup>63</sup> that students with disabilities and their families experience in trying to access and receive appropriate support in the general education system. Such "gatekeeping" compromises a parent's free and informed choice of schooling. The fact that students with disabilities and their families acquiesce to segregation in order to access accommodation and supports that should have been provided in the regular classroom at their local school, is itself a form of systemic coercion, not a "choice".
77. Indeed, these concerns were recognised during the negotiations for the CRPD and Article 24. Delegates to the Ad Hoc Committee, in rejecting "parallel" models of education in Article 24, noted that "choice" of segregated education "is in fact a false choice enforced by lack of resources and access to support".<sup>64</sup>
78. It is worth noting that during these the negotiations, Australia led the charge in calling for inclusive education without exception reflecting the standard of non-discrimination in human rights law.<sup>65</sup> During the final session of negotiations of Article 24, Australia submitted that there was no need to build in exceptions; rather, what was needed was a clear statement that persons with disabilities must

“receive the support required to facilitate their education within the general education system and the communities in which they live”.<sup>66</sup>

79. The current “dual” system across Australia, for the most part, only offers a choice between “integration” of students with disabilities in general education (as defined in General Comment No. 4 and colloquially referred to in Australia as “main-dumping”) and segregation in “special schools”, “special units” and “special classrooms”. The continued outflow of students with disabilities from the general education system to the alternate segregated “special” system or into home schooling reflects the Australian Government’s failure to progress inclusive education at a systemic and cultural level and to adequately support students with disabilities in the general education system.
80. The Australian Government cannot now characterise these systemic limitations and its failure to address them, as parent-driven “demand” for segregated schooling in justification of its intention to continue to invest its resources to maintain (and indeed grow) the parallel segregated system for students with disabilities.

### ***Best interests of the student***

81. The Australia Report further contends in paragraph 275(a) that the “best interests” of students require it to continue to provide segregated education.
82. This statement is no more than the repetition of a widely held but unempirical belief based on habitual practice and misguided assumptions about disability. In fact, there is no credible body of evidence to support the notion that segregated education is beneficial for students with disabilities.
83. Indeed, the national Royal Commission into Institutional Responses to Child Sexual Abuse which began in 2013 and issued its Final Report in 2017, recognised that segregation, including in education, is a factor that heightens risk of abuse of children with disabilities.<sup>67</sup> A research project by that Royal Commission to consider the particular risk faced by children with disabilities in institutional contexts<sup>68</sup> found that:

‘Segregation and exclusion in closed institutional contexts away from public scrutiny leaves children (and adults) with disability at heightened risk of violence and harm including sexual abuse. Further, when children with disability are stereotyped as dependent and passive and unable to ‘speak up’, they are at heightened vulnerability to being segregated, abused, overlooked and not heard. The Royal Commission into Institutional Responses to Child Sexual Abuse recognised early on the likely particular vulnerabilities of children with disability and the institutional contexts which they encounter.’

84. The research identified disability segregation as a ‘setting-based risk factor’ and also noted that a series of key reports in the late 1970s in Australia had found ‘profound detrimental effects in segregating people with disability from the wider community.’

85. Research into social and academic outcomes for students with disabilities has also found no benefit from segregated education.<sup>69</sup> A 2008 comprehensive analysis of the comparative research over the previous four decades concluded that<sup>70</sup>:

‘No review could be found comparing segregation and inclusion that came out in favour of segregation in over forty years of research’.

86. A 2016 comprehensive review of research covering over 250 studies in 25 countries<sup>71</sup> that adopted the definition of inclusive education in General Comment No. 4 also found that academic and social outcomes for children with disabilities in fully inclusive settings are without exception better than in the segregated or partially segregated environments (e.g. “special classroom” or “special units”).

87. Further, the impacts of segregation or inclusion in education have been found to apply during and beyond schooling. A 2018 comprehensive review by the European Agency for Special Needs and Inclusive Education<sup>72</sup> of over 200 papers from a range of countries (including the United Kingdom, USA, Australia and continental Europe) into the relationship between inclusive education and social inclusion concluded that:

‘The research evidence presented in this review suggests that attending segregated settings minimises the opportunities for social inclusion both in the short term (while children with disabilities are at school) and the long term (after graduation from secondary education). Attending a special setting is correlated with poor academic and vocational qualifications, employment in sheltered workshops, financial dependence, fewer opportunities to live independently, and poor social networks after graduation.’

88. In our view, there is no legitimate basis for the assertion by the Australian Government that the practice of segregating students with disabilities is either in compliance with Article 24 or in the best interests of those students.

## Appendix 1:

Table 1.2 as shown in Graham, L.J. (2019, in press). *Inclusive Education in the 21<sup>st</sup> Century*. Chapter 1 in L.J. Graham (Ed). *Inclusive Education in the 21<sup>st</sup> Century: Theory, Policy and Practice*. Sydney: Allen and Unwin.

### *Relevant government reviews and inquiries since 2000*

Year	Review/Inquiry	Level of government
2002	Australian Government Senate Inquiry into the Education of Students with Disabilities (Commonwealth of Australia, 2002)	Federal
2006	NSW Auditor-General's Report Performance Audit: Educating Primary School Students with Disabilities (New South Wales Audit Office, 2006)	State
2010	NSW Parliamentary Inquiry into the Provision of Education for Students with Disability or Special Needs (General Purpose Standing Committee No. 2, 2010).	State
2012	Review of the Disability Standards for Education (Australian Government Department of Education, Employment and Workplace Relations, 2012)	Federal
	Review of the Experiences of Students with Disabilities in Victorian schools (Victorian Equal Opportunity and Human Rights Commission, 2012)	State
2015	Review of the Disability Standards for Education (Urbis, 2015)	Federal
	ACT Report of the Expert Panel on Students with Complex Needs and Challenging Behaviour (Shaddock, Packer, & Roy, 2015)	State
	Report of the Select Committee on Access to the South Australian Education System for Students with a Disability (Parliament of South Australia, 2015)	State
2016	Access to Real Learning: Current levels of access and attainment for students with disability in the school system, and the impact on students and families associated with inadequate levels of support (Commonwealth of Australia, 2016)	Federal
	Victorian Review of the Program for Students with Disabilities (Victoria Department of Education and Training, 2016)	State
	NSW Audit Office Supporting students with disability in NSW public schools (New South Wales Audit Office, 2016)	
2017	Review of Education for Students with Disability in Queensland state schools (Deloitte Access Economics, 2017)	State
	NSW Parliamentary Inquiry into Students with a Disability or Special Needs in New South Wales schools (Portfolio Committee No. 3, 2017)	State

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<sup>1</sup> Ministerial Council on Education, Employment, Training and Youth Affairs (December 2008) *Melbourne Declaration on Educational Goals for Young Australians* [http://www.curriculum.edu.au/verve/resources/National\\_Declaration\\_on\\_the\\_Educational\\_Goals\\_for\\_Young\\_Australians.pdf](http://www.curriculum.edu.au/verve/resources/National_Declaration_on_the_Educational_Goals_for_Young_Australians.pdf)

<sup>2</sup> Consistent with the [National School Reform Agreement](#) in which they are identified as a priority equity group for whom educational targets for improvement have been set.

<sup>3</sup> Understood as any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disabilities, with the primary purpose of protecting the person or others from harm. It includes physical restraints, chemical restraints, mechanical restraints and seclusion.

<sup>4</sup> See 2018 survey by Children and Young People With Disability Australia reported in: 'Action must be taken to stop bullying of children with disability', 21 May 2018, Probono News; see also Children and Young People with Disability Australia Media Release: '[Bullying and abuse of school students with disability at alarming levels](#)', Media Release 9 August 2016.

<sup>5</sup> See [2017 Survey by Children and Young People with Disability Australia](#).

<sup>6</sup> See also: Senate Community Affairs References Committee (November 2015) '[Final Report: Violence, abuse and neglect against people with disability in institutional and residential settings](#)'; Senate Education and Employment References Committee (2016) '[Final Report: Access to real learning: the impact of policy, funding and culture on students with disability](#)'.

<sup>7</sup> Sydney Morning Herald (11 August 2016) '[Autism cage details emerge as United Nations investigates abuse of children](#)'; [Communication letter](#) dated 22 March 2017, sent by the Special Procedures to the Australian Government by José Guevara, Vice-Chair-Rapporteur of the Working Group on Arbitrary Detention, Catalina Devandas-Aguilar, Special Rapporteur on the rights of persons with disabilities, Maud de Boer-Buquicchio, Special Rapporteur on the sale of children, child prostitution and child pornography, Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and Boly Barry Koumbou Special Rapporteur on the right to education.

<sup>8</sup> McCarthy, Tony (2019) '[Regulating Restraint and Seclusion in Australian Government Schools: A Comparative Human Rights Analysis](#)' QUT Law Review, 18, 194.

<sup>9</sup> Senate Education and Employment References Committee (n 6) 16-19.

<sup>10</sup> Kate de Bruin (2019). '[The impact of inclusive education reforms on students with disability: an international comparison](#)'. International Journal of Inclusive Education, 23:7-8, 811-826.

<sup>11</sup> The Conversation (15 April 2019) [Homeschooling is on the rise in Australia. Who is doing it and why?](#).

<sup>12</sup> A new longitudinal study from the USA examining the role of school suspensions in the school-to-prison pipeline, found that every suspension weakens the connection of students to school and increases their odds of committing theft, assault, and other crimes: Thomas J. Mowen, John J. Brent, John H. Boman IV (2019) [The Effect of School Discipline on Offending across Time](#), Justice Quarterly

<sup>13</sup> Linda J Graham (2018) [Questioning the impacts of legislative change on the use of exclusionary discipline in the context of broader system reforms: A Queensland case study](#). International Journal of Inclusive Education 1–21

<sup>14</sup> Kate de Bruin, Linda Graham, Jeanine Gallagher (2019, in press) 'The Nationally Consistent Collection of Data on School Students with a Disability (NCCD): Implications for Practice' Chapter 6 in Linda Graham (Ed). *Inclusive Education in the 21<sup>st</sup> Century: Theory, Policy and Practice*. Sydney: Allen and Unwin.

<sup>15</sup> de Bruin, Graham and Gallagher (n 14).

<sup>16</sup> de Bruin, Graham and Gallagher (n 14).

<sup>17</sup> de Bruin, Graham and Gallagher (n 14) 17.

<sup>18</sup> Australia Report, paragraph 264.

<sup>19</sup> Urbis Australia (17 July 2015). [Final Report: 2015 Review of the Disability Standards for Education 2005](#).

<sup>20</sup> Senate Education and Employment References Committee (n 6). For example, recommendation 9 provides that 'the Australian Government work with states and territories, experts, stakeholders, school systems, parents and students to establish a national strategy to improve the education of students with disabilities, aimed at cultural change particularly at a school leadership level and which would define goals and priorities, set clear timelines and report publicly on progress, increase school participation and access rates, ensure all students with disabilities can access adjustments and benefit from evidence-based best practices, improve accountability, support schools, teachers and principals to close the gap between research and classroom practice, establish best-practice ongoing professional development for school staff, include students with disabilities and their families in the development of the educational plan for their child and encourage the meaningful ongoing engagement of parents, establish a national inclusion measure for schools and establish independent review and complaints mechanisms.'

<sup>21</sup> Australian Government (March 2017) '[Australian Government Response to the Senate Education and Employment References Committee Report: Access to real learning: the impacts of policy, funding and culture on students with disability](#)'.

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<sup>22</sup> [Speech](#) delivered by Andrew Giles MP, Shadow Assistant Minister for Schools, in Tasmania on 8 May 2019.

<sup>23</sup> For example, the Leading Learning 4 All online resource which was funded by the Australian Government and aimed at school principals. This resource which was developed by the Australian Special Education Principals Association (ASEPA) without consultation with disability groups, was the subject of a widely endorsed [Open Letter](#) dated 12 October 2017 and signed by all the peak national disabled persons organisations, and [questions](#) in the Australian Parliament by the Australian Senate Education and Employment Legislation Committee in October 2017.

<sup>24</sup> For example, whether the funding provided to students with disabilities is adequate. Australian Education Union: Media Release (19 February 2019) '[Morris on Government funding cuts hit Students with Disability](#)'; ABC News (20 May 2017) '[Students with disability lack government funding to excel at school, statistics show](#)'.

<sup>25</sup> Australian Bureau of Statistics (2013) '[Schools Australia](#)', showing that between 1999-2013, there was an increase in special schools in proportion to overall growth of schools.

<sup>26</sup> Committee on Economic, Social and Cultural Rights (31 May 2017) [Committee on Economic, Social and Cultural Rights reviews the report of Australia](#).

The ICESCR Committee asked Australia on 31 May of 2017, to explain the 'evidence of a rise in segregated education' and to show the measures it was taking 'to ensure inclusive education across the country'. In the Concluding Observations, the ICESCR Committee recommended as follows:

*'Inclusive education*

*55. While noting with appreciation that all state and territory jurisdictions have developed policies that support inclusive education practices, the Committee is concerned that many children with disabilities are in reality placed in special schools (arts. 2, 13 and 14).*

*56. The Committee recommends that the State party take effective steps to ensure that children with disabilities, including those with cognitive impairments, can access inclusive education. In that regard, the State party is encouraged to implement the 2016 report of the Senate Education and Employment References Committee "Access to real learning: the impacts of policy, funding and culture on students with disability".*

<sup>27</sup> de Bruin (n 10).

<sup>28</sup> EducationHQ Australia (21 June 2019) '[Australia now less inclusive of students with a disability than the US, study finds](#)'.

<sup>29</sup> Linda Graham (2019, in press) 'Inclusive Education in the 21st Century', Chapter 1 in L.J. Graham (Ed). *Inclusive Education in the 21st Century: Theory, Policy and Practice*. Sydney: Allen and Unwin, table reproduced in Appendix 1 to this Report.

<sup>30</sup> NSW Government (2018) [Response to the report of the Legislative Council Portfolio Committee No.3 – Education – Education of students with a disability or special needs in New South Wales](#).

<sup>31</sup> Emily Cukalevski and Cátia Malaquias (2019) 'A CRPD analysis of NSW's policy on the education of students with disabilities – a retrogressive measure that must be halted' *Australian Journal of Human Rights*. DOI: 10.1080/1323238X.2019.1609720

<sup>32</sup> CRPD/C/GC/4 [13]; CRPD/C/GC/6 [64], [73].

<sup>33</sup> Urbis Australia (n 19).

<sup>34</sup> CRPD/C/GC/4 [27].

<sup>35</sup> Commonwealth of Australia (2018). [National School Reform Agreement](#). Canberra: Department of Education and Training.

<sup>36</sup> *Disability Discrimination Act 1992* (Cth) sections 5 and 6; *Disability Standards for Education* (2005) Part 3.

<sup>37</sup> de Bruin, Graham, Gallagher (n 14) 1-3.

<sup>38</sup> de Bruin, Graham, Gallagher (n 14) 4.

<sup>39</sup> The issue of funding is discussed in Chapter 5 of the 2016 Senate Report.

<sup>40</sup> Urbis (n 19) ii, v, 17-18, 38.

<sup>41</sup> CRPD/C/GC/14 [31].

<sup>42</sup> CRPD/C/GC/4 (2016, para 68).

<sup>43</sup> Australian Human Rights Commission (2016) [Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability](#).

<sup>44</sup> Australian Bureau of Statistics (2013) [Disability, Ageing and Carers, Australia: Summary of findings, 2012](#), cat. no. 4430.0.

<sup>45</sup> Urbis (n 19) p iii.

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- <sup>46</sup> Urbis (n 19) 21-22.
- <sup>47</sup> KPMG (2015) '[Evaluation of the Disability Support Programme Final Report](#)'.
- <sup>48</sup> KPMG (n 47) 41.
- <sup>49</sup> Cukalevski and Malaquias (n 31).
- <sup>50</sup> CRPD/C/GC/4 [40].
- <sup>51</sup> Cisternas Reyes, Maria Soledad (2019). Perspectives from the UN Committee on the Rights of Persons with Disabilities. In *The right to inclusive education under international human rights law*, ed. G. De Beco, S. Quinlivan, and J. Lord, 15–57. Cambridge, UK: Cambridge University Press, 421-422
- <sup>52</sup> CRPD/C/GC/4 [10].
- <sup>53</sup> CRPD/C/GC/4 [13].
- <sup>54</sup> CRPD/C/GC/6 [64].
- <sup>55</sup> Queensland Government (25 June 2018). [Inclusive Education Policy](#).
- <sup>56</sup> School Inclusion – From Theory to Practice (accessed July 2019). [Case Study: Inclusive School Reform](#).
- <sup>57</sup> See [video](#) of Thuringowa State High School discussing school reform and UN guidance.
- <sup>58</sup> The Post Newspaper (2 June 2018) These Classes Are Best For All, reproduced in [Inclusive Schools Do Not Separate Students with Disabilities in Order to Support them Properly](#).
- <sup>59</sup> Kayess, Rosemary (2019) 'Drafting Article 24 of the Convention on the Rights of Persons with Disabilities'. In *The right to inclusive education under international human rights law*, G. De Beco, S. Quinlivan, and J. Lord (eds), 15–57. Cambridge, UK: Cambridge University Press, 122-140.
- <sup>60</sup> Kayess (n 57).
- <sup>61</sup> Kayess (n 57).
- <sup>62</sup> Kayess (n 57) 135.
- <sup>63</sup> Shiralee Poed, Kathy Cologon and Robert Jackson '[Gatekeeping and restrictive practices with students with disability: results of an Australian survey](#)', delivered at the Inclusive Education Summit, Adelaide, October 2017; see also Eleanor Jenkin, Claire Spivakovsky, Sarah Joseph and Marius Smith (June 2018) '[Improving Educational Outcomes for Children with Disability in Victoria](#)'.
- <sup>64</sup> Kayess (n 57) 139.
- <sup>65</sup> Kayess (n 57) 134
- <sup>66</sup> UN General Assembly, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 2006, [Daily Summary of Discussion at the Seventh Session](#) (24 January 2006) 8(7).
- <sup>67</sup> Royal Commission into Institutional Responses to Child Sexual Abuse (2017) '[A brief guide to the Final Report: Disability](#)'.
- <sup>68</sup> Wayland, Sarah & Llewellyn, Gwynnyth & Hindmarsh, Gabrielle (2016). '[Disability and child sexual abuse in institutional contexts, Royal Commission into Institutional Responses to Child Sexual Abuse](#)'.
- <sup>69</sup> National Council on Disability (USA, independent federal agency) (2018) '[The Segregation of Students with Disabilities](#)' 9.
- <sup>70</sup> Robert Jackson (2008) '[Inclusion or Segregation for children with an Intellectual Impairment: What does the evidence say?](#)'
- <sup>71</sup> Todd Grindal, Thomas Hehir, Brian Freeman, Renee Lamoreau, Yolanda Borquaye, Samantha Burke (2016) '[A Summary of the Research Evidence on Inclusive Education](#)'.
- <sup>72</sup> European Agency for Special Needs and Inclusive Education (2018) '[Evidence of the Link Between Inclusive Education and Social Inclusion: A Review of the Literature](#)' 14.