



Submission of All Means All
Joint Parliamentary Committee on Human Rights
Inquiry into Australia's Human Rights Framework
Right to Inclusive Education

1 July 2023

Email: hello@allmeansall.org.au

Website: www.allmeansall.org.au

Overview

1. All Means All – The Australian Alliance for Inclusive Education (**All Means All**) is a nationwide multi-stakeholder organisation working towards the implementation of an inclusive education system and the removal of the legal, structural, and attitudinal barriers that limit the rights of some students, including students with disabilities, to access an inclusive education in regular classrooms in Australian schools.
 2. All Means All's stakeholders include people with disability and their families, educators, and academic and other experts in Australia.
 3. All Means All congratulates the Attorney General for Australia, the Honourable Mark Dreyfus, King's Counsel, Member of Parliament, for referring to the Parliamentary Joint Committee on Human Rights the matters being considered in this Inquiry into Australia's Human Rights Framework (**Inquiry**) and thanks the Parliamentary Joint Committee on Human Rights for the opportunity to make a submission to the Inquiry (**Submission**).
 4. This Submission primarily considers the importance of ensuring that Australia's human rights framework is effective to adequately protect the fundamental human right to education through the enactment of a national Human Rights Act that includes a provision in relation to the right to education that expressly recognises and incorporates each of the following:
 - the right to education in its general application, as guaranteed by Article 13 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
-



- the right to education as it applies to the situation of people with disability, being **the right to inclusive education** guaranteed by Article 24 of the United Nations Convention on the Rights of Persons With Disability (**CRPD**) and explained by the Committee on the Rights of Persons With Disabilities (**CRPD Committee**) in its 2016 General Comment No.4 (Right to Inclusive Education) (**GC4**);
 - **the right to culturally and linguistically appropriate education** for minority groups, which rights are recognised under a range of international human rights instruments such as the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities and the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**); and
 - **intersectionality**, being the experience by some Australians of multiple social categorisation or attributes, such as age, sex, gender, gender identity, sexual orientation, intersex status and ethnic origin or race, that may lead to multi-layered and cumulative discrimination or disadvantage and materially impact on their human right to education.
5. In addition, All Means All endorses the recommendations made by the Australian Human Rights Commission (**AHRC**) in its submission to this Inquiry (**AHRC Submission**), with the exception of the recommendation in its 'Free and Equal: A Human Rights Act for Australia'¹ position paper to include only a general right to education with the requirement that it be interpreted in light of Article 24. In our view this proposal is insufficient to guarantee the right of people with disability to inclusive education which should be explicitly incorporated into a national Human Rights Act.
6. In considering the matters set out in this Submission, we have had regard to the relevant treaty texts and works of the treaty monitoring bodies, such as General Comments, Concluding Observations, official statements, and decisions made in respect of complaints determined under applicable Optional Protocols, and have applied the rules of interpretation codified in the Vienna Convention on the Law of Treaties.
7. Our detailed Submission is set out below, including our Recommendations.

¹ Position Paper, December 2022.



Recommendations of All Means All to this Inquiry

8. **Recommendation 1:** That a national Human Rights Act is enacted.
9. **Recommendation 2:** That the enacted national Human Rights Act includes a right to education that explicitly references and incorporates the human right to inclusive education under Article 24 of the CRPD and the right to culturally and linguistically appropriate education under relevant human rights instruments applicable to Australia, such as the UNDRIP, and recognises intersectionality as a factor that may impact of the realisation of education as a human right.
10. **Recommendation 3:** That the enacted national Human Rights Act ensures effective and accessible mechanisms for resolving human rights complaints including access to accessible remedies.
11. **Recommendation 4:** That the recommendations made in the AHRC Submission, be adopted in full, except to the extent inconsistent with All Means All's Recommendation 2 in this Submission.

The human right to education in a national Human Rights Act

12. All Means All endorses the AHRC Submission's recommendations for a new National Human Rights Framework, including the enactment of a national Human Rights Act, subject to our Recommendation 4.
13. The realisation of the right to education on the basis of equality and non-discrimination is vital for prosperous, stable and inclusive societies. Education empowers individuals, promotes equality and social justice, improves health and well-being, fosters peace and stability, contributes to sustainable development, and drives economic growth. Participation in education leads to participation in all areas of life and to the extent that the participation in education is denied, constrained, or provided on a discriminatory basis, this impacts the realisation of all other human rights and leads to marginalisation and disadvantage.
14. The right to education has been recognised in a range of international human rights instruments applicable to Australia and its expression has, for important reasons, evolved in the 70 years since the Universal Declaration of Human Rights, adopted in 1948, first stated the universality of the right in Article 26:

Everyone has the right to education.



15. Subsequent international treaties have reaffirmed the right to education generally², with thematic treaties and other human rights instruments also addressing the right to education in relation to specific groups³.
16. The right to education was first made into a binding international legal obligation by the ICESCR, which entered into force in 1976 and recognises that everyone has the right to education directed towards the full development of the human personality and its sense of dignity, and to strengthening respect for human rights and fundamental freedoms. Article 13(1) provides:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
17. Article 13(2) of ICESCR provides some guidance on the realisation of the right to education and calls, among other things, for the provision of primary education that is 'compulsory and available free to all' and for secondary education to be 'made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education'.
18. The Committee on Economic, Social and Cultural Rights (**CESCR**) further explains the right to education in its General Comment No.13. Notably, paragraph 6 of General Comment No.13 states that education should be **available, accessible, acceptable, and adaptable**. These concepts are explained to encompass the accessibility of education to all learners, its provision on the basis of non-discrimination and its acceptability in form, content, curricula, and overall substance. Further, education has to maintain adaptability to adjust to the changing and diverse needs of students; because education is a right, it must adapt to the learning needs of students – not the reverse. Each of the critical elements of the human right to education for all should be included in a right to education provision in a national Human Rights Act.
19. While education is considered an economic, social and cultural right, it is also related to many other human rights because the enjoyment and realisation of

² International Covenant on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Economic Social and Cultural Rights (1966).

³ Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of their families (1990); Convention on the Rights of Persons with Disabilities (2006).



other rights is dependent on realisation of the right to education⁴. This relationship between the right to education and other rights illustrates the indivisibility and interdependence of all human rights and why it is important for governments to guarantee the right of education as a human right of all citizens:

*As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can ... obtain the means to participate fully in their communities.*⁵

The human right to inclusive education in the CRPD

20. In his report in 2017, the Council of Europe Commissioner for Human Rights, Nils Muižnieks, stated:

*[I]nclusive education encompasses the fight against segregation patterns that affect certain children in particular, but it also goes far beyond that. It is an approach that considers separation as a negative phenomenon for the right of all children to education. It rejects the notion of 'separate but equal' and aims to make societies open to sharing and learning from their diversity.*⁶

21. Article 24 of the CRPD, which was adopted by the United Nations in 2006 and ratified by Australia in 2008, provides the most up-to-date substantive expression of the right to education and the fundamental principles that underpin it. It is also the first international treaty Article to expressly recognise that **inclusive education is the means by which persons with disabilities realise their right to education**, and to impose a legal obligation on State parties to ensure an inclusive education system at all levels, with a correlative right to inclusive education.
22. Broadly, while the CRPD, including Article 24, draws on principles embodied in the earlier human rights instruments, it applies, clarifies and reframes existing human rights to the specific needs and concerns of people with disability.⁷
23. As Rosemary Kayess, the eminent Australian human rights scholar, current member of the CRPD Committee and the person appointed as the Ad Hoc

⁴ United Nations General Assembly, Human Rights Council Annual report of the United Nations High Commission for Human Rights and reports of the Office of the High Commission and the Secretary-General. Thematic study on the right of persons with disabilities to education. A/HRC/25/29 (18 December 2013), para. 9

⁵ Ibid.

⁶ Council of Europe, Commissioner for Human Rights, Fighting school segregation in Europe through inclusive education: A position paper (Report, 2017) 10-11.

⁷ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1, 25.



Committee facilitator for the drafting of Article 24, notes, Article 24 of the CRPD recognises that all students, of all abilities, deserve to be taught within the same setting.⁸

24. In 2016, the CRPD Committee adopted GC4 on Article 24, acknowledging that despite progress achieved since the adoption of the CRPD a decade earlier, ‘profound challenges persist’⁹ for people with disability in realising their fundamental human rights to education and acknowledging those groups ‘more at risk of exclusion from education than others’, including people with intellectual or multiple disabilities, autistic people and people who are deafblind.¹⁰
25. GC4 provides critical guidance to States Parties, including Australia, about the interpretation of Article 24 of the CRPD – and what is and isn’t inclusive education and its core features and characteristics – and reflects the CRPD Committee’s jurisprudence over the previous decade¹¹ regarding the requirements that Article 24 places on education systems in light of the inclusive and participatory character of the right to education for people with disability.
26. Article 24 and GC4 were the subject of a detailed legal analysis prepared by eminent international human rights law expert and jurist Professor Andrew Byrnes for the Royal Commission into Violence, Abuse, Neglect and Exploitation (**DRC**), who was asked provide advice on the meaning and content of Article 24 and GC4. In his legal advice, Professor Byrnes describes GC4 as ‘a sound legally based working definition of inclusive education’ and states that the interpretation of Article 24 in GC4 is ‘the one that would be reached by the proper application of the accepted rules of treaty interpretation’. All Means All recommends that the Joint Parliamentary Committee on Human Rights consider this high-quality and detailed analysis.
27. The full text of Article 24 of the CRPD has been included in Schedule 1 to this Submission. In essence, the central obligation of States Parties under Article 24 of the CRPD is to ‘ensure an inclusive education system’ so that people with disability can realise their right to ‘full and equal participation in education’ ‘without discrimination and on the basis of equality of opportunity’¹², including by providing ‘reasonable accommodation’ and

⁸ Rosemary Kayess and Jennifer Green, ‘Today’s Lesson is on Diversity’ In Peter Blanck and Eilionóir Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (London: Routledge, 2016) 53–71.

⁹ CRPD/C/GC/4 at [3].

¹⁰ CRPD/C/GC/4 at [6].

¹¹ Maria Soledad Cisternas Reyes, ‘Perspectives from the UN Committee on the Rights of Persons with Disabilities’ In Gauthier De Beco, Shivaun Quinlivan and Janet E. Lord (eds), *The Right to Inclusive Education Under International Human Rights Law* (Cambridge, UK: Cambridge University Press, 2019), 421–422.

¹² CRPD art 24.1; CRPD/C/GC/4 at [1].



support measures ‘within the general education system’ and ‘consistent with the goal of full inclusion’. Further, Article 24 expressly prohibits ‘exclu[sion] from the general education system on the basis of disability’.

28. The related principles of ‘equality and non-discrimination’ and ‘full and effective participation’ that are at the core of Article 24 and the right to inclusive education must be understood by reference to the historic struggle by people with disability to end their marginalisation, and their claim, against the backdrop of that history, to their full and equal right and entitlement to be a part of society, a status that was long denied to them through severe forms of systemic exclusion and segregation.
29. Importantly, Article 24 of the CRPD not only prohibits discrimination and exclusion from education on the basis of disability, it complements this with a ‘positive philosophy’ for the right to inclusive education and envisages the positive actions required by States Parties to implement it.
30. In this regard, the right to inclusive education in Article 24 has sometimes been referred to as a ‘hybrid’ right; it incorporates some rights and obligations that are subject to progressive realisation and others, such as the right to equality and non-discrimination (including the right to be provided reasonable accommodation), that are civil and political rights and are therefore immediately realisable¹³. While each of these rights may be subject to immediate realisation or progressive realisation, as applicable, they are not intended to be disentangled and partially implemented and Article 24 should be referenced and incorporated in full into a national Human Rights Act.
31. Importantly, as explained by the CRPD Committee in GG4 ‘the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation’ (GC4, para 13), which is an immediately realisable right, and the obligation of States Parties to ensure an inclusive education system is ‘not compatible with sustaining two systems of education: mainstream and special/segregated education systems’ in the long term (GC4, para 39).
32. The CRPD Committee’s call to States Parties, including Australia, to commit to an end to the segregation of students with disability as a fundamental human rights issue under Article 24 of the CRPD has been resisted by Australian governments despite:
 - further recommendations by the CRPD Committee in its most recent ‘Concluding observations on the combined second and third reports of Australia (Advance Unedited Version) (CRPD/C/AUS/CO/23)’ adopted in September 2019;

¹³ Ibid at [12], [23], [41] and [42].



- recommendations by the UN Committee on Economic, Social and Cultural Rights which in its 2017 dialogue and 'Concluding Observations on the Fifth Periodic Report of Australia (E/C.12/AUS/CO/5)' which raised the segregation of students with disability in 'special' schools in Australia and formally recommended that Australia take effective steps to ensure that children with disabilities can access inclusive education;
- recommendations by the UN Committee on the Rights of the Child which in its 2019 'Concluding observations on the combined fifth and sixth reports of Australia (Advance Unedited Version) (CRC/C/AUS/CO/5-6)' that Australia 'ensure that all children with disabilities have access to inclusive education in mainstream schools, are provided with the support needed, and address cases of restraint and seclusion;'
- the March 2022 joint statement of the Committee on the Rights of the Child and the CRPD Committee on the rights of children with disability, affirming the right to quality inclusive education and stating that this right is 'not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system;'
- the adoption in 2019 by the UN Human Rights Council by resolution A/HRC/RES/40/14 of the Report of the UN High Commissioner for Human Rights titled 'Empowering Children with Disabilities for the Enjoyment of their Human Rights Including Through Inclusive Education' (A/HRC/40/27), which recognised the need to phase out segregated education for students with disability and specifically recommended the transfer of 'resources currently dedicated to special education' to be made available in the general education system 'as segregated settings are progressively replaced';
- the statements of UN Experts who gave evidence at DRC:
 - Professor Gerard Quinn, the UN Special Rapporteur on the Rights of Persons With Disabilities, about the importance of making a clear switch in public policy defaults, away from segregation and in favour of a policy of people with disability 'thriving in the community' (Statement, 12 December 2022, p.11);
 - Catalina Devandas-Aguilar the then UN Special Rapporteur on the Rights of Persons With Disabilities, who stated that segregated education is 'against, of course, the Convention' and 'segregation is a grave source of discrimination that we need to stop' (Transcript 19 Aug 2020, p.185); and



- Rosemary Kayess, current member of the CRPD Committee, who noted that ‘segregated parallel systems have been established because social structures and administrative structures are not inclusive for people with disability’ (Transcript 6 December 2019, p.394) and that ‘it’s important that we understand that the CRPD is about addressing segregation on the basis of disability’ (Transcript 6 December, p.395);
 - the advocacy of Disabled Persons and Representative Organisations – In a 2020 Position Paper which has been included in Schedule 3 to this Submission, Australia’s peak disabled persons and disability representative organisations, including People With Disability Australia, Women With Disability Australia, First People’s Disability Network, National Ethnic Disability Alliance, Children and Young People With Disability Australia, Inclusion Australia, the Australian Federation of Disability Organisations and the Disability Advocacy Network Australia, titled ‘Segregation of People With Disability is Discrimination and Must End’ stated they are ‘fighting to end the segregation of people with disability in Australian education, housing and workplaces’; and
 - the March 2020 report by the peak international organisation representing disabled persons and representative organisations, the **International Disability Alliance**, titled ‘What Inclusive, Equitable, Quality Education Means to Us’ which calls for the implementation of inclusive education and the phasing out of segregated settings.
33. Overall, Australian laws and policies do not establish sufficiently robust frameworks to support the realisation of the human right of inclusive education of students with disability and this has resulted in frequent and violation of those rights in multiple, individual and systemic ways. For example, as identified in the 2016 Report by the Education and Employment References Committee of the Australian Senate into ‘The impact of Policy, Funding And Culture On Students With Disability’, the discriminatory practice of ‘gatekeeping’ is widespread and operates to deny enrolment and attendance of students with disability in local mainstream schools. A study of over 900 families across Australia identified that a staggering 71% of those surveyed reported either “gatekeeping” or restrictive practices¹⁴.

¹⁴ Shiralee Poed, Kathy Cologon and Robert Jackson, ‘Gatekeeping and Restrictive Practices by Australian Mainstream Schools: Results of a National Survey’ (2020) *International Journal of Inclusive Education*.



34. There are many more examples of persistent and systemic violation of the right to education of students with disability considered in a range of State and Federal inquiries over the last 2 decades¹⁵ as follows:

- Review of the Disability Standards for Education (Commonwealth of Australia, Department of Education, 2020);
- Review of Education for Students with Disability in Queensland state schools (Deloitte Access Economics, 2017);
- NSW Parliamentary Inquiry into Students with a Disability or Special Needs in New South Wales schools (NSW Parliament Portfolio Committee No. 3, 2017);
- NSW Audit Office Supporting students with disability in NSW public schools (NSW Audit Office, 2016);
- Victorian Review of the Program for Students with Disabilities (Victoria Department of Education and Training, 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, Australian Senate Committee, 2016);
- Report of the Select Committee on Access to the South Australian Education System for Students with a Disability (Parliament of South Australia, 2015);
- ACT Report of the Expert Panel on Students with Complex Needs and Challenging Behaviour (Shaddock, Packer and Roy, 2015);
- Review of the Disability Standards for Education (Commonwealth of Australia, Urbis, 2015);
- Review of the Experiences of Students with Disabilities in Victorian schools (Victorian Equal Opportunity and Human Rights Commission, 2012);

¹⁵ Information derived primarily from Table 1.2 'Relevant government reviews and inquiries since 2000' as shown in Linda J Graham, 'Inclusive Education in the 21st Century Chapter 1' in Linda J. Graham (ed), *Inclusive Education in the 21st Century: Theory, Policy and Practice* (Sydney: Allen and Unwin, 2020).



- Review of the Disability Standards for Education (Commonwealth of Australia, Department of Education, Employment and Workplace Relations, 2012);
 - NSW Parliamentary Inquiry into the Provision of Education for Students with Disability or Special Needs (General Purpose Standing Committee No. 2, 2010); NSW Auditor-General's Report Performance Audit: Educating Primary School Students with Disabilities (NSW Audit Office, 2006); and
 - Australian Government Senate Inquiry into the Education of Students with Disabilities (Commonwealth of Australia, Senate Committee, 2002).
35. In All Means All's view, people with disability have been severely underserved by Australian education systems to the point of serious and significant denial of their human rights to education. A national Human Rights Act should include reference to, and reflect in full, the right of people with disability to inclusive education embodied in Article 24 of the CRPD to ensure that they too are able to realise their right to education. A reference to the general right only will not be sufficient, for the same reasons that Article 13 of ICESCR was recognised as not being sufficient to advance their human right to education. Importantly, Article 24 encompasses the CRPD's standard of equality and non-discrimination which has been described by the CRPD Committee in its General Comment No.5 (Right to Equality and Non-Discrimination) as 'inclusive equality' and encompasses important developments of the equality standard under international human rights law¹⁶.
36. Finally, All Means All has included in Schedule 2 to this Submission, the submission it made in relation to section 36 of the Queensland *Human Rights Act* 2010. We are concerned to ensure that any formulation of the right to education in a national Human Rights Act is accurate and consistent with the norms and principles under applicable international human rights treaties, and avoids potential distortion through the inclusion of unhelpful terms and concepts, as was unfortunately the case with section 36 of the Queensland Act.
37. In our view and consistently with the fundamental principles underlying the expression of the universal human right to education under international human rights law applicable to Australia, a national Human Rights Act should include a provision on the right to education that explicitly references and incorporates the full right to inclusive education of students with disability. In this respect and in light of our experience and expertise in this area and the experiences of our stakeholders, our view and recommendation differ from the AHRC Submission, in that we consider that there is a need to go beyond

¹⁶ Theresia Degener. Disability in a Human Rights Context. *Laws*. (2016) 5(3):35



merely requiring a general right to education that ought to be interpreted in light of Article 24 of the CRPD, given the risk that the specific rights to education of students with disability as one of the most marginalised and disadvantaged groups who nonetheless are estimated to comprise a significant proportion of all students, will continue to be overlooked. In addition, recognition of a right to inclusive education should enable people with disability to bring specific complaints related to the failure to access inclusive education.

Right to culturally and linguistically appropriate education and intersectionality

38. All Means All also considers that a right to education in a national Human Rights Act should reference and incorporate the rights to education of cultural and linguistic minorities, recognised under a range of international human rights instruments applicable to Australia, such as for example, the UNDRIP, which is relevant to First Nations people.
39. Article 14 of the UNDRIP not only reflects the right of indigenous people to education on the basis of non-discrimination, but it also further guarantees the right 'to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning' reflecting formulations in other human rights instruments on the education rights of cultural and linguistic minorities.
40. Further, a national Human Rights Act should also incorporate an approach to intersectionality that is underpinned by recognition of intersectional experiences and the impact of intersecting forms of marginalisation, on the realisation of the right to education for some Australians.
41. For example, First Nations students with disability have the right to inclusive education as well as a right to attend schools that provide for the transmission of their languages and culture alongside non-disabled indigenous peers. In effect this should mean that schools and other education settings established on the basis of Indigenous culture and language should also be inclusive of indigenous students with disability and should not be able to discriminate against them on the basis of their disability.
42. However, there is evidence of disproportionately higher numbers of children and young people with disability from racial and ethnic minorities being excluded from general education classrooms and placed in disability-based



segregated education settings, away from cultural education and indigenous peers, or being excluded from education altogether.¹⁷

43. In our view, a national Human Rights Act should seek to protect the human rights of all Australians, and also recognise the cumulative and multi-layered impact of the intersection of minority identities and attributes that may impact on the realisation of the human right to education for many Australians.

Conclusion

44. All Means All considers that the current mechanisms for the protection of the human rights of Australian citizens, including the right to education, have demonstrably been inadequate, especially in relation to the right to education of students with disability and First Nations students who continued to be some of the most marginalised and with the poorest outcomes within and beyond education systems.
45. Despite Australia's ratification of the CRPD, the reality for children with disability in Australia is that education systems remain resistant to recognising and accommodating their full and effective participation and inclusion, particularly for students with intellectual, cognitive, or sensory disabilities. These concerns are backed up by many Parliamentary and departmental inquiries across Australia over two decades.
46. It is critically important that a national Human Rights Act is enacted to provide robust and effective protection for the right to education, including specifically the right to inclusive and culturally and linguistically appropriate education.
47. We hope that the Joint Parliamentary Committee on Human Rights considers our Recommendations and the rationales set out in this Submission and recognises the urgent necessity of the reform that we are proposing in achieving an inclusive Australian society and addressing the deep and systemic disadvantage and inequality experienced by people with disability and First Nations people in particular, including First Nations people with disability.

For more information you can contact All Means All on: hello@allmeansall.org.au

¹⁷ Graham et al., Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian government schools: Final Report. The Centre for Inclusive Education (2020). QUT: Brisbane, QLD ; Linda J Graham, 'Questioning The Impacts of Legislative Change on the Use of Exclusionary Discipline in The Context of Broader System Reforms: A Queensland Case Study' (2018) *International Journal of Inclusive Education* 1–21 <<https://eprints.qut.edu.au/125844/>>; Linda J. Graham, 'Disproportionate Over-Representation of Indigenous Students in New South Wales Government Special Schools' (2012) *Cambridge Journal of Education* 42:2, 163-176. This 2012 study systematically analysed 13 years of enrolment data NSW and found stark, increasing differences in patterns of enrolment between Indigenous students, students from a language background other than English (LBOTE), and non-Indigenous English-speaking students; Naomi Sweller, Linda J. Graham, Penny Van Bergen, 'The Minority Report: Disproportionate Representation in Australia's Largest Education System' (2012).



Schedule 1 – Text of Article 24 of the CRPD

Article 24 – Right to Education (emphasis added)

24.1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right **without discrimination** and on the basis of **equal** opportunity, States Parties shall ensure **an inclusive education system** at all levels and lifelong learning directed to:

- (a) The full development of human potential and sense of **dignity** and self-worth, and the strengthening of respect for human rights, fundamental freedoms **and human diversity**;
- (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- (c) Enabling persons with disabilities to **participate effectively in a free society**.

2. In realizing this right, States Parties shall ensure that:

- (a) Persons with disabilities are **not excluded from the general education system on the basis of disability**, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on **an equal basis with others** in the communities in which they live;
- (c) **Reasonable accommodation** of the individual's requirements is provided;
- (d) Persons with disabilities receive the support required, **within the general education system**, to facilitate their effective education;
- (e) Effective individualized support measures are provided in environments that maximize academic and social development, **consistent with the goal of full inclusion**.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate **their full and equal participation** in education and as members of the community. To this end, States Parties shall take appropriate measures, including:



(a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

(b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning **without discrimination** and **on an equal basis** with others. To this end, States Parties shall ensure that **reasonable accommodation** is provided to persons with disabilities.



Schedule 2 – Submission from All Means All to Queensland Parliamentary Inquiry

(see next page)



Submission
Human Rights Bill 2018
Section 36 - Right to Education

26 November 2018

By email: lacsc@parliament.qld.gov.au

All Means All – The Australian Alliance for Inclusive Education

Email: hello@allmeansall.org.au

Web: www.allmeansall.org.au

Introduction

1. All Means All is the Australian Alliance for Inclusive Education, a nationwide multi-stakeholder organisation working together to implement an inclusive education system and remove the legal, structural and attitudinal barriers that limit the rights of all students, including students with disabilities, to access full inclusive education in regular classrooms in Australian schools.
2. All Means All's stakeholders include children, families, educators and academic experts in Queensland and around Australia.
3. All Means All congratulates the Government of Queensland on the introduction of the *Human Rights Bill 2018* (the **Bill**) and thanks the Parliament of Queensland for the opportunity to make this submission.
4. This submission has been approved pursuant to board policy of All Means All.
5. It primarily considers the proposal by the Queensland government to protect the fundamental human right to education through proposed Section 36 of the Bill.
6. While we strongly support the express recognition of the human right to education in the Bill, in our view the proposed terms of Section 36 are insufficient and inappropriate and their application is likely to lead to perverse outcomes in violation of the human right to education for persons with disabilities.
7. In this regard, Section 36 of the Bill does not reflect the expression of the right to education as set out in relevant international treaties ratified by Australia, including Article 13 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), which is purported to be the source of the human right to education in Section 36 of the Bill (see Explanatory Note for the Bill).
8. Further, key elements of the right to education recognised and clarified in other relevant Conventions, namely the Convention on the Rights of the Child (**CRC**), and the Convention on the Rights of Persons with Disabilities (**CRPD**) aimed at ensuring the realisation of the right to education for vulnerable groups, including students with disabilities, have not been reflected in Section 36 of the Bill.
9. Finally, we believe that the proposed wording in Section 36 (1) and (2) may have the unintended consequences of increasing discrimination in education against persons with disabilities, including in breach of the Commonwealth's *Disability Discrimination Act 1992* (**DDA**), undermining the realisation of their right to education and leading to serious human rights violations.
10. Our detailed analysis is set out below.
11. In examining the relevant treaty texts and works of the treaty bodies, we have applied the rules of interpretation codified in the Vienna Convention on the Law of Treaties.

Recommendations

12. **Recommendation 1:** That proposed Section 36 of the Bill be replaced with the following provision reflecting the intent of applicable international Conventions and domestic disability discrimination laws:

36. *Right to education*

(1) *Every person has the right to education without discrimination and on the basis of equality of opportunity.*

(2) *To realise this right, every person has the right to access quality early childhood, primary and secondary school education, and further education and training that is accessible and inclusive of all.*
13. **Recommendation 2:** That the Bill include a stand alone cause of action so that breaches of human rights can be heard before QCAT or the Supreme Court
14. **Recommendation 3:** That the Bill ensure that people have access to an effective remedy, including by compensating them.

Overview of human right to education in international human rights law

15. The right to education has been recognised in a range of international human rights instruments applicable to Australia and its expression has evolved in the 70 years since the Universal Declaration of Human Rights, adopted in 1948, first stated the universality of the right in Article 26:

'Everyone has the right to education'
16. Subsequent international treaties have reaffirmed the right to education generally¹, with thematic treaties also addressing the right to education in relation to specific groups².
17. The right to education was first made into a binding international legal obligation by the ICESCR, which entered into force in 1976 and recognises that everyone has the right to education directed towards the full development of the human personality and its sense of dignity, and to strengthening respect for human rights and fundamental freedoms. Article 13(1) provides:

"The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."
18. Article 13(2) of ICESCR provides some guidance on the realisation of the right to education and calls, among other things, for the provision of primary education that is "*compulsory and available free to all*" and for secondary education to be "*made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education*".
19. The Committee on Economic, Social and Cultural Rights (**CESCR**) further explains the right to education in its General Comment No.13. Notably, paragraph 6 of General Comment No.13 states that education should be available, accessible, acceptable, and adaptable. These concepts are explained to encompass the accessibility of education to all learners, its provision on the basis of non-discrimination and its acceptability in form, content, curricula, and overall substance. Further, education has to maintain adaptability to adjust to the changing and diverse needs of students; because education is a right, it must adapt to the learning needs of students – not the reverse.
20. While education is considered a cultural right, it is also related to many other human rights because the enjoyment and realisation of other rights is dependent on realisation of the right to

¹ International Covenant on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Economic Social and Cultural Rights (1966).

² See Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of their families (1990); Convention on the Rights of Persons with Disabilities (2006).

education³. This relationship between the right to education and other rights illustrates the indivisibility and interdependence of all human rights:

“As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can ... obtain the means to participate fully in their communities.”⁴

21. Articles 28 and 29 of the CRC, which entered into force in 1989, reflect the ICESCR principles primarily through the concepts of “equal opportunity” (Article 28(1)), “accessibility” (Article 28(1)(a), (b) and (c)) and more broadly “non-discrimination” (Article 2). Further, the CRC is the first international human rights treaty to include disability as a prohibited ground for discrimination (Article 2) and to explicitly recognise education for children with disabilities (Article 23).
22. Article 24 of the CRPD, which came into force 17 years after the CRC in 2006, provides the most up-to-date expression of the right to education and the fundamental principles that underpin it, such as “equality of opportunity” and “non-discrimination” and “accessibility”. It is also the first international treaty to expressly recognise that inclusive education is the means by which persons with disabilities realise their right to education, and to impose a legal obligation on State parties to ensure an inclusive education system at all levels, with a correspondent right to inclusive education.
23. Article 24.1 of the CRPD provides as follows:

*“States Parties recognize the right of persons with disabilities to education. With a view to realizing this right **without discrimination** and on the basis of **equal opportunity**, States Parties shall ensure an **inclusive education system** at all levels and lifelong learning directed to:*

 - (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*
 - (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*
 - (c) Enabling persons with disabilities to participate effectively in a free society.”*
24. Article 24.2 of the CRPD requires that “reasonable accommodation of the individual’s requirements is provided” and that “persons with disabilities receive the support required, within the general education system, to facilitate their effective education”.
25. It is worth noting that the Queensland Government’s newly released *“Inclusive Education Policy”* adopts key concepts from General Comment No.4 (Right to Inclusive Education), the guidance text issued by the Committee on the Rights of Persons With Disabilities (CRPD Committee) explaining the requirements of Article 24.
26. In our view and consistently with the fundamental principles underlying the expression of the universal human right to education under international human rights law applicable to Australia, Section 36 of the Bill should incorporate the concepts of *freedom from discrimination, equality of opportunity, accessibility* and *inclusive education*. In this regard, section 22 of the DDA prohibits discrimination on the grounds of disability in the context of education.
27. The proposed qualification in Section 36 of the Bill to education being “appropriate to the child’s needs” is not present in the expression of the right to education under the applicable human rights instruments, whether generally or in the context of specific groups or themes.
28. Our strong concern is that this language is likely to encourage discrimination against students with disabilities in particular, and undermine the realisation of their human right to inclusive education. In our view, it is not appropriate to adopt this language in Section 36 of the Bill as there is nothing in Article 13 of ICESCR or beyond, that supports its use.
29. While we cannot be certain of the source of the term “appropriate to the child’s needs” and the wording in Section 36 of the Bill in general, we are concerned that this is intended to reflect the concept of “free and appropriate public education” (FAPE) under the domestic law of the United States of America, adopted by Section 504 of the 1973 Rehabilitation Act, Individuals with Disabilities Education Act and Americans with Disabilities Act.
30. It is worth noting that unlike Australia, the United States of America has never ratified the CRC or the CRPD and its domestic laws do not seek to adopt those treaties as part of its legal framework for education.

³ United Nations General Assembly, Human Rights Council Annual report of the United Nations High Commission for Human Rights and reports of the Office of the High Commission and the Secretary-General. Thematic study on the right of persons with disabilities to education. A/HRC/25/29 (18 December 2013), para. 9

⁴ Ibid.

“Appropriate to the child’s needs” undermines right to inclusive education

31. We believe that the adoption of the term “appropriate to the child’s needs” in Section 36 of the Bill is likely to:
- (a) perpetuate discriminatory treatment and inequality based upon the segregation of students with disabilities; and
 - (b) “justify” explicit and implicit prejudice in educational administration in qualifying the concepts of “non-discrimination”, “full participation” and “equality of opportunity”,
- and thereby has great potential to undermine the right of children, particularly children with disabilities to education, which is to be understood as at right to inclusive education in regular (non-segregated) settings (see Article 24 of the CRPD and General Comment No. 4 - Right to Inclusive Education)⁵.
32. We note that following the public release of the Bill, we were contacted by many parents of children with disabilities in Queensland expressing serious concerns about the terms of Section 36 and the words “appropriate to the child’s needs” and urging us to make a submission to this process. Some of the comments we received were:
- *“‘Appropriate to your child’s needs’ is just another way we are told that they don’t want to meet our son’s needs in mainstream and that our son should be somewhere more ‘appropriate’ - in special school.”*
 - *“These are the words that people use against our children, to exclude them from mainstream.”*
 - *“We fought for a good Inclusive Education Policy and the government delivered it. These words go against that, some people will argue it gives them a right to segregate children.”*
 - *“If you don’t know how these words have been used to keep children with disabilities out of mainstream education then you don’t see the problem.”*
 - *“Our children have the right to be included and they have human rights. Let’s protect that by using the right words instead.”*
 - *“My child’s needs are your child’s needs. All children have the same fundamental human needs but those needs may be met in different ways for different kids because we all diverse. This is about making education that is accessible to everyone, so why aren’t we using the right words to say this?”*
 - *“Why are we even using American education laws for human rights?!! They haven’t even signed the human rights Conventions and they have huge problem of inequality. Thanks but no thanks.”*
 - *“My son has finished school now but speaking from experience, these words ‘appropriate to your child’s needs’ have never been our friends.”*
33. In particular, the denial to children with disabilities of their right to access general education and their placement in segregated educational settings is recognised by the CRPD Committee as a clear form of discrimination in education,⁶ one it has urged States Parties to immediately address in its anti-discrimination legislation.
34. This same concern was recognised by the CESCR on 31 May of 2017 in consideration of the fifth periodic report of Australia on its implementation of Article 13 of the ICESCR:
- “Rodrigo Uprimny, Committee Expert and Co-Rapporteur for Australia: “As for persons with disabilities and inclusive education, there was evidence of a rise in segregated education. What measures was the Government taking to ensure inclusive education across the country?”*

⁵ CRPD/C/GC/4, see

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en

⁶ Ibid, paragraphs 10, 12, 13 and 39. See also CRPD/C/GC/6 paragraph 64.

⁷ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21677&LangID=E>

35. Children with disabilities are a significantly marginalised group and despite the recognition of their fundamental human rights to education, including the right to inclusive education in the last decade, they continue to experience serious violations of their fundamental, consequent and associated human rights.
36. The reality of the experience for too many children with disabilities across Australia is that the education system remains resistant, both culturally and in terms of educational practice, to accommodating their full and effective participation and inclusion, particularly for students with intellectual, cognitive or sensory disabilities and for autistic students. This experience is due to discrimination and devaluation, isolation, lack of resources and supports and inflexible structures and approaches that operate as barriers for students with disabilities realising their right to inclusive education.
37. The proposed wording of “appropriate to their needs” in Section 36 of the Bill threatens to provide a qualification on the human right to education and thereby a justification for the adverse educational experiences of many Australian children, including in Queensland, and a basis for the persistence and growth of segregated settings.
38. These concerns are backed up by many Parliamentary and departmental inquiries across Australia, notably the 2017 review of education for students with disability in Queensland State schools by Deloitte Access Economics and the national 2016 Report by the Education and Employment References Committee of the Australian Senate into the impact of policy, funding and culture on students with disabilities.

Other issues

39. The specific wording “based on the person’s abilities” in sub-section (2) is also likely to lead to discriminatory outcomes for persons with disabilities potentially in breach of the DDA. Rather, access to further education should be guaranteed on the basis of equality of opportunity, without discrimination.
40. We also find the reference to “vocational”, as opposed to “further” education and training, to be outdated and inappropriate.



**Schedule 2 – Position Paper: Segregation of People With Disability Is
Discrimination and Must End**

(see next page)

SEGREGATION OF PEOPLE WITH DISABILITY IS DISCRIMINATION AND MUST END

POSITION PAPER

SEPTEMBER 2020





People with disability and our representative and advocacy organisations remain extremely concerned by existing law, policy and practice frameworks that maintain the segregation of people with disability from community life.

The everyday reality for many people with disability is one of inequality and discrimination that separates us from community life by preventing us from undertaking everyday activities, such as catching public transport, getting a job, going grocery shopping, eating out with friends and family, living in appropriate, accessible housing, accessing news and public information and participating in sport and recreation.

Many people with disability are separated from the rest of the community by law, policy and practice frameworks that directly and explicitly enable 'special', segregated arrangements, such as 'special' schools, institutional living environments and segregated workplaces. Very often, people with disability are unable to choose any other options but 'special', segregated arrangements as there are no other choices, the choices are limited, or the choice is made for us by others. This is particularly the case for people with intellectual disability, cognitive disability, psychosocial disability, as well as neurodiverse peoples, people with multiple impairments, and others who are warehoused in segregated settings and environments due to a lack of adequate services and supports.

It is imperative that the segregation of people with disability is recognised and conceptualised as discrimination and as not adhering to the United Nations Convention on the Rights of Persons with Disabilities (CRPD)¹ and other international human rights conventions to which Australia is a party.² The CRPD underpins the law, policy and practice frameworks for the development of the next ten-year National Disability Strategy (NDS),³ the ongoing implementation of the National Disability Insurance Scheme (NDIS),⁴ the implementation of the NDIS Quality and Safeguards Commission (NDIS Commission)⁵ and the work of the Royal Commission into Violence, Abuse, Neglect and Exploitation (Disability Royal Commission).⁶ It is essential that, consistent with Australia's international human rights obligations, concerted action to end the segregation of people with disability is incorporated within these critical disability reform processes.



Segregation is discrimination

The CRPD does not establish new human rights for people with disability but translates existing human rights to the specific situation of people with disability. The principles of equality and non-discrimination are foundational human rights contained in all the core international human rights conventions. In the CRPD, these principles affirm that people with disability are of equal worth and value in their humanness, and are entitled to the human rights and fundamental freedoms due to all human beings without discrimination on an equal basis with others.

Equality and non-discrimination in international human rights law incorporates the principle that segregation is inherently unequal and discriminatory. The Universal Declaration of Human Rights (1948) (UDHR) stipulates that everyone is entitled to all human rights and fundamental freedoms without distinction of any kind, such as distinctions based on “race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status”.⁷ This is specifically elaborated in the context of race in the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD), which prohibits racial discrimination, including racial segregation and apartheid, and requires its prevention and eradication.⁸ ICERD rejects the ‘separate but equal’ standard that was the longstanding justification for segregated education on the basis of race, and which was found discriminatory by the US Supreme Court in 1954.⁹

The prohibition of ‘separate’ standards for ‘separate’ groups is reinforced in the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR). In its general comments, or guidance papers on interpretation and implementation of ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR Committee) outlines that disability-based discrimination includes segregation, isolation and separation based on impairment.¹⁰

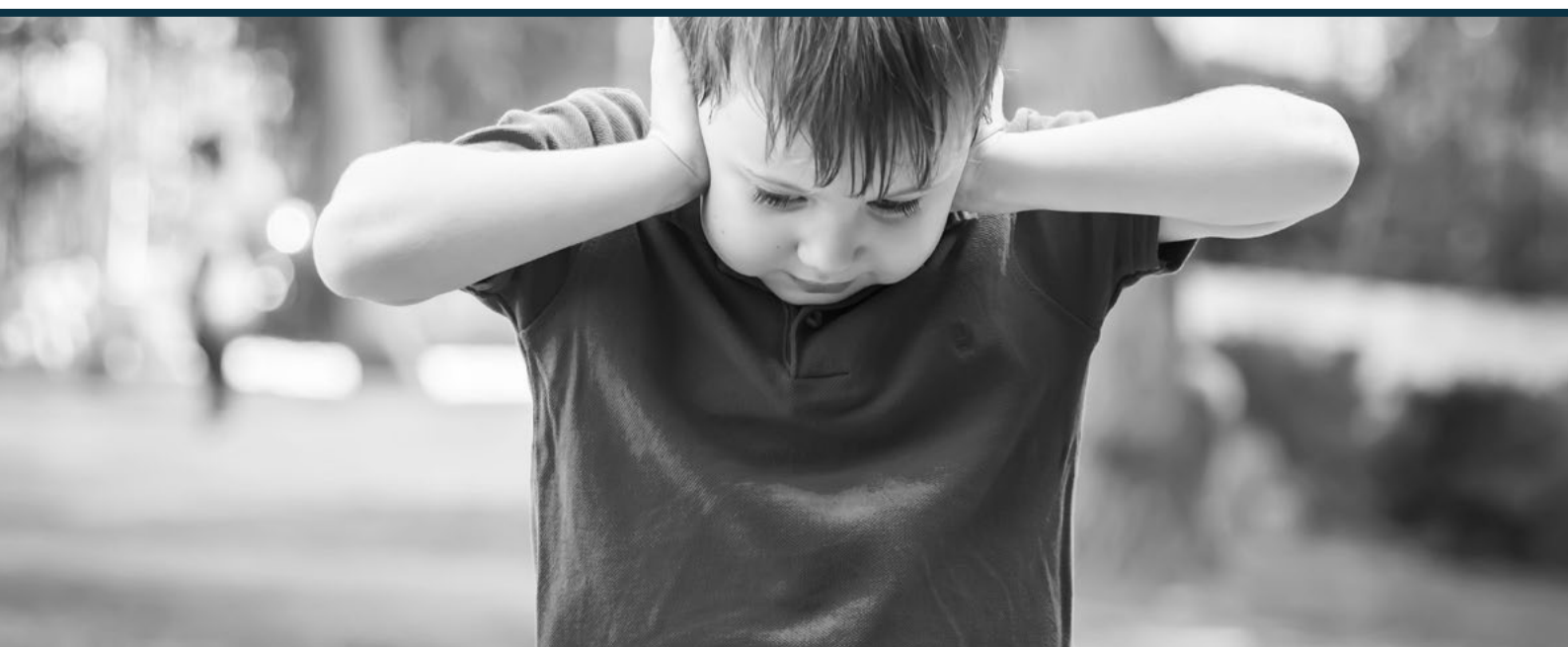
In the context of education, the CESCR Committee stipulates that segregated educational systems breach the ICESCR.¹¹ Although ICESCR recognises that parents have a right to choose the schools that their children attend, this right is limited to a choice between public and private education where the objective of the choice is to ensure religious and moral education that conforms with parental convictions.¹² This limited right does not extend to disability-based segregation, as this would be inconsistent with the international human rights standard of equality and non-discrimination.¹³

In the context of the right to live independently in the community, a well-known 1999 decision by the US Supreme Court found that the institutionalisation of people with disability constituted discrimination under the Americans with Disabilities Act (ADA).¹⁴ Along with international human rights law and other authoritative court decisions from other jurisdictions, this decision was influential during the drafting of the CRPD, reflecting the legal norm that segregation is a form of discrimination.¹⁵

Article 5 of the CRPD Equality and non-discrimination affirms the established principle in international human rights law that segregation is inherently unequal and discriminatory. Legitimising segregated systems for people with disability is a direct contravention of the CRPD and the human rights normative standard of equality and non-discrimination. This normative standard means that a key purpose and objective of the CRPD is to undo the legacy of inequality and discrimination, including the segregation of people with disability. This requires reviewing existing practices of segregation and eliminating them.¹⁶

The Committee on the Rights of Persons with Disabilities (CRPD Committee) has provided guidance on the interpretation and implementation of article 5 through its General comment No. 6 (2018) on equality and non-discrimination.¹⁷ It makes clear that the segregation of people with disability is discrimination and that measures must be taken to end this discrimination.¹⁸ This is reinforced by the CRPD Committee in its general comments specifically relating to the right to inclusive education,¹⁹ which includes a definition of segregation,²⁰ and the right to live independently and be included in the community.²¹

While the CRPD allows for specific measures to achieve equality for people with disability, these measures must be positive and affirmative measures that must not result in the maintenance of segregation, isolation and stigmatisation.²² Segregation and segregated facilities cannot be justified as a specific measure to meet higher support, complex, 'challenging behaviour' needs or any other needs of people with disability. The ongoing investment in segregated facilities, such as special schools, units or classrooms, group homes and other institutional living settings and segregated workplaces, including Australian Disability Enterprises (ADEs), cannot be justified as transitional measures to achieve equality. Investment in segregation and segregated facilities is discrimination under the CRPD.²³



Ableism, segregation and disability reform

The long history of the segregation of people with disability in residential institutions, special schools, sheltered workshops (now known as ADEs), psychiatric facilities & forensic disability units, aged care facilities and other settings is underpinned by ableism - the harmful social norms and beliefs that devalue people with disability as 'less than', as 'deficient', as 'other'. Ableism underpins the inequality and discrimination experienced by people with disability and ableism is an enabler of violence, abuse, neglect and exploitation. Ableism appears neutral, benign and natural,²⁴ and the ableist response to disability appears self-evident - the establishment of 'special' laws, policies and programs to provide care, treatment, medical interventions and protection for people with disability.

The legacy of this history is embedded in existing systems that segregate us from others in the community, deny our autonomy and prevent our full participation and inclusion in society. Many people with disability remain indirectly segregated from community life by pervasive environmental, communication, attitudinal and systemic barriers that law, policy and practice frameworks have failed to remove - such as inaccessible housing, transport, information and communication systems, voting; non-inclusive violence prevention and response services; barriers in accessing justice and legal systems; and employment and health discrimination. Many people with disability remain directly segregated by law, policy and practice frameworks that continue to establish, maintain and fund segregated settings - such as special schools, units and classrooms; institutional accommodation settings; and segregated employment - as well as through substitute decision-making arrangements that limit our autonomy, such as guardianship, financial management and involuntary mental health systems.

The ableism that is inherent to the segregation of people with disability is further compounded and has multiple effects when it intersects with sexism, ageism, racism and other forms of inequality. This intersectional discrimination means that segregation is underpinned by and results in multiple and unique forms of disadvantage for different groups of people with disability, including children with disability, older people with disability, women and girls with disability, First Nations people with disability, culturally and linguistically diverse (CALD) people with disability, and people with disability from the LGBTIQ+ communities.

For over sixty years, people with disability have challenged the ableist approaches to disability that have legitimised our segregation. Not only does this segregation expose the "social apartheid"²⁵ experienced by people with disability, it also significantly increases the experience of violence, abuse, neglect and exploitation in our daily lives.²⁶

In response to these challenges, Australia has gradually shifted to a rights-based approach to disability, including through the establishment of disability rights advocacy programs,²⁷ the closure of many large residential institutions²⁸ and the introduction of the Disability Discrimination Act 1992 (DDA).²⁹ Over the last decade, Australia has ratified the CRPD, implemented the National Disability Strategy 2010-2020 (NDS),³⁰ introduced the NDIS, established the NDIS Commission and established the Disability Royal Commission.

Despite these important disability reforms, ableism remains entrenched in existing Australian law, policy and practice frameworks. These frameworks often reference the CRPD and aim to implement human rights obligations to ensure the inclusion of people with disability in all aspects of community life. However, this has not always translated into action to achieve genuine human rights for people with disability. In many cases, it has only resulted in action to enhance existing systems, rather than challenging the ableism at the core of these systems. The reform of existing systems only serves to normalise, legitimise and reinforce the continuation of segregation of people with disability.

Support for segregated systems is too often justified by ableist assertions and cloaked by the language of 'benevolent paternalism', such as being 'in our best interests', for 'our safety and protection', to address 'high support and complex needs', to respond to 'severe and profound impairment', to manage 'challenging behaviours', to prevent 'risk of harm to self and others' and to address the lack of alternative options and resources. Segregated systems are often supported by well-established funding and vested interests in disability, education, mental health, aged care and other service systems, with the purpose, existing financial arrangements and status of these systems privileged over the rights of people with disability.



Ending segregation

The CRPD provides the principles and standards to undertake the social transformation required to end segregation of all people with disability. The CRPD negates ableism by embedding the human rights model of disability. This model affirms that human rights apply to all people with disability on an equal basis with others; it recognises our inherent dignity along with all other human beings; it frames disability as a social construct and impairment as one aspect of human diversity; and it asserts that human rights cannot be limited or taken away because of the existence or degree of impairment. No longer can impairment or diagnosis or disability be used to justify segregation and exclusion from community life or be used to limit human rights protections for people with disability. Importantly, the CRPD reflects international human rights law, which affirms that segregation and segregated facilities are a *prima facie* form of discrimination.³¹

The CRPD Committee reviewed Australia's progress in implementation of the CRPD in 2013 and in 2019. Following these reviews, the CRPD Committee issued its recommendations, or concluding observations to Australia.³² On both occasions, these recommendations included a focus on ending segregation and segregated facilities, particularly in relation to 'special' education, institutional living arrangements, and segregated employment.³³ The recommendations also called for an end to substitute decision-making arrangements,³⁴ which undermine autonomy, enable forced treatments and medical interventions and facilitate forced placement of people with disability in segregated facilities, such as institutional living arrangements, psychiatric facilities and segregated employment.

The CRPD Committee has elaborated on interpretation and implementation of the CRPD through its general comments, including those relating to autonomy and decision-making,³⁵ equality and non-discrimination,³⁶ inclusive education,³⁷ and living independently in the community.³⁸

Both the CESC Committee and the Committee on the Rights of the Child (CRC Committee) have made recent recommendations to Australia focused on ensuring the right of people with disability to inclusive education;³⁹ and the CESC Committee has issued a general comment that reaffirms that segregated employment for people with disability is not in compliance with ICESCR.⁴⁰

It has been twelve years since Australia ratified the CRPD, and despite CRPD Committee and other UN treaty body recommendations and guidance through numerous general comments, Australia continues to conceptualise segregated settings and substitute decision-making arrangements as consistent with the CRPD. It continues to support, maintain and fund substitute decision-making arrangements, and segregated settings and facilities through its law, policy and practice frameworks. Australia is yet to make a serious investment in supported decision-making mechanisms and the absence of these mechanisms continues to enable the segregation of people with disability to continue.

Disability reform processes are not supported by a national disability research agenda based on disability inclusive research principles and underpinned by the CRPD. Such an agenda would deliver a comprehensive evidence base informed by rigorous disability inclusive research and data that incorporates the views of those subjected to segregation and substitute decision-making.

Disability reform processes continue to focus on improvements to existing ableist systems, which prevents implementation of actions to end segregation and achieve the social transformation required by the CRPD. The principles and standards of the CRPD must underpin disability reform processes, rather than disability reform processes continuing to maintain and justify ableist standards and principles.



PRINCIPLES TO END SEGREGATION MUST INCLUDE:

Human rights cannot be limited or denied, and segregation cannot be justified based on the existence or degree of impairment, diagnosis or disability.

Segregation and segregated facilities for people with disability need to be recognised and conceptualised as inherently unequal and discriminatory.

Full and effective participation and inclusion in society for people with disability is dependent on the end of segregation and upholding individual autonomy.

The individual autonomy, will and preferences of people with disability must be respected and upheld by replacing substitute decision-making arrangements with fully supported decision-making arrangements.



Actions to end segregation must include:

1. In line with the CRPD and the general comments from the CRPD Committee, ensure that the human rights model of disability and the principle and standard of equality and non-discrimination underpin the development, implementation and review of law, policy and practice frameworks, including by providing training and guidance to policy makers and legislators at all levels of government and within all portfolio areas, to law reform bodies, to the Parliamentary Joint Committee on Human Rights and to the National Disability Insurance Agency (NDIA), the NDIS Commission and the Disability Royal Commission.
2. In all areas of its work, the Disability Royal Commission must explicitly recognise and conceptualise the segregation of people with disability as discrimination, that segregation is an underpinning enabler of violence, abuse, neglect and exploitation, that segregation constitutes systemic neglect and exploitation; and the Disability Royal Commission must hold governments and other stakeholders to account for supporting, maintaining and funding segregated systems.
3. In line with the CRPD and the general comments from the CRPD Committee, and in close consultation and active participation of people with disability through their representative organisations, Australia should review and amend existing law, policy and practice frameworks for potential or actual support and/or funding of the segregation of people with disability or limitations on their autonomy, including mental health laws and systems, guardianship laws and systems, the NDS, the NDIS Act, NDIS policy and practice and NDIS Commission policy and practice.
4. In line with the CRPD and other international human rights treaties to which Australia is a party, and in close consultation and active participation of people with disability through their representative organisations, Australia should recognise the legacy of inequality and discrimination, including the segregation of people with disability, by reviewing and taking action to eliminate this segregation, including by developing and implementing:
 - a national, time bound Disability Employment Strategy aimed at the transition of workers with disability from segregated employment to open, inclusive and accessible forms of employment and that ensures equal remuneration for work of equal value; that incorporates recommendations from previous employment inquiries, such as the Willing to Work Inquiry;⁴¹ and that contains targeted gender, age and culturally specific measures to increase workforce participation and address structural barriers.

- a national, time bound Deinstitutionalisation and Disability Housing Strategy aimed at closing institutional living arrangements for people with disability; preventing the building of new institutional living arrangements, including the building of new group homes through NDIS Specialist Disability Accommodation (SDA); repurposing existing group homes into genuine community-based housing options; providing resources to increase the supply and range of accessible social and public housing stock; and amending the National Construction Code to mandate minimum universal accessible housing design standards for all new and extensively modified housing.
 - a national, time bound Action Plan for Inclusive Education aimed at establishing a nationally consistent legislative and policy framework that fully complies with the CRPD; that adopts a definition of inclusive education consistent with general comment No.4; that reverses the increasing rate of segregated education; that redirects resources to an inclusive education system; that recognises the denial of reasonable adjustment as unlawful discrimination; that contains measurable actions and accountability mechanisms for transition from segregated education to inclusive education; and that prohibits the use of restrictive practices in schools.
5. In line with the recommendations made to Australia since 2013 by the CRPD Committee and the general comment on article 12, Equal recognition before the law,⁴² Australia needs to accept that formal and informal substitute decision-making mechanisms are not compliant with the CRPD and that these mechanisms must be replaced with fully supported decision-making mechanisms. To this end, Australia should withdraw its interpretative declaration⁴³ on article 12 that maintains that the CRPD allows supported or substituted decision-making,⁴⁴ and implement a nationally consistent supported decision-making framework.
 6. The National Disability Research Partnership (NDRP) must ensure that the development of a national disability research agenda is strongly underpinned by the CRPD, including explicit recognition of segregation as a form of discrimination and substitute decision-making as a denial of individual autonomy; and provide a comprehensive agenda that is not limited to existing service system improvement.



CONTACTS

Carolyn Frohmader

CEO
Women with Disabilities Australia
(WWDA)
E: carolyn@wwda.org.au

Mary Sayers

CEO
Children and Young People with
Disability Australia (CYDA)
E: marysayers@cyda.org.au

Damian Griffis

CEO
First Peoples Disability Network (FPDN)
E: damiang@fpdn.org.au

Romola Hollywood

Director Policy and Advocacy
People with Disability Australia (PWDA)
E: romolah@pwd.org.au

Dwayne Cranfield

CEO
National Ethnic Disability Alliance
(NEDA)
E: ceo@neda.org.au

Mary Mallett

CEO
Disability Advocacy Network Australia
(DANA)
E: ceo@dana.org.au

Ross Joyce

CEO
Australian Federation of Disability
Organisations (AFDO)
E: ceo@afdo.org.au

Catherine McAlpine

CEO
Inclusion Australia
E: catherine.mcalpine@inclusionaustralia.org.au

ENDNOTES

- 1 United Nations (2006), Convention on the Rights of Persons with Disabilities, United Treaty Series (UNTS), vol. 2515, p. 3 (entered into force 3 May 2008).
- 2 Australia has ratified seven of the nine core international human rights treaties: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); and Convention on the Rights of Persons with Disabilities (CRPD).
- 3 Department of Social Services, '[A new National Disability Strategy – Stage 2 consultations](#)'.
- 4 In 2013, the National Disability Insurance Scheme Act 2013 (Cth) came into effect, along with the National Disability Insurance Agency (NDIA) and the introduction of the Scheme. Information on the NDIS is available at: <https://www.ndis.gov.au>
- 5 The NDIS Commission commenced operating in NSW and SA from 1 July 2018, in the ACT, NT, WLD, TAS and VIC from 1 July 2019, and it will commence in WA from 1 December 20230. More information on the NDIS Commission is available at: <https://www.ndiscommission.gov.au>
- 6 After decades of disability advocacy, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was established in April 2019. Information on the Disability Royal Commission is available at: <https://disability.royalcommission.gov.au>
- 7 Universal Declaration of Human Rights, art 2.
- 8 International Convention on the Elimination of All Forms of Racial Discrimination, arts 2 and 3.
- 9 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
- 10 Committee on Economic, Social and Cultural Rights, 'General comment No. 5: Persons with disabilities', eleventh session (1994), UN Doc E/1995/22 (9 December 1994) para 15.
- 11 Ibid para 35; Committee on Economic, Social and Cultural Rights, 'General Comment No. 13 - The right to education (article 13 of the Covenant)', twenty-first session 1999, UN Doc E/C.12/1999/10 (8 December 1999) para 32.
- 12 International Covenant on Economic, Social and Cultural Rights, art 13(3) and 13(4).
- 13 Rosemary Kayess, 'Drafting Article 24 of the Convention on the Rights of Persons with Disabilities' in Gauthier De Beco, Shivaun Quinlivan and Janet E. Lord (eds), *The Right to Inclusive Education Under International Human Rights Law* (Cambridge University Press, Cambridge UK 2019), 122-140.
- 14 Olmstead v L.C. 527 U.S. 581 (1999).
- 15 Prof. Gerard Quinn, Prof. Grainne de Búrca, Prof. Lisa Waddington, Prof. Mark Bell, Prof. Anna Lawson, Prof. Michael Stein, Prof. Titti Mattsson and Prof. Luke Clements, op. cit., p. 9.
- 16 Ibid p. 8.
- 17 Committee on the Rights of Persons with Disabilities, 'General comment No. 6 (2018) on equality and non-discrimination', UN Doc: CRPD/C/GC/6 (26 April 2018).
- 18 Ibid paras 30, 57, 58, 64, 67(a), 73(c) and (d).

- 19 Committee on the Rights of Persons with Disabilities, 'General comment No. 4 (2016) on the right to inclusive education', UN Doc CRPD/C/GC/4 (25 November 2016).
- 20 Ibid para 11, provides that "Segregation occurs when the education of students with disabilities is provided in separate environments designed or used to respond to a particular or various impairment, in isolation from students without disabilities".
- 21 Committee on the Rights of Persons with Disabilities, 'General comment No. 5 (2017) on living independently and being included in the community', UN Doc: CRPD/C/GC/5 (27 October 2017).
- 22 Committee on the Rights of Persons with Disabilities, 'General comment No. 6 (2018) on equality and non-discrimination', op. cit., para 29.
- 23 Prof. Gerard Quinn, Prof. Grainne de Búrca, Prof. Lisa Waddington, Prof. Mark Bell, Prof. Anna Lawson, Prof. Michael Stein, Prof. Titti Mattsson and Prof. Luke Clements, op. cit., p. 15.
- 24 See Fiona Kumari Campbell, 'Exploring internalised ableism using critical race theory', *Disability and Society*, (2008) 23 (2), p. 151; Martha Minow, *Making All the Difference: Inclusion, exclusion, and American Law* (Cornell University Press, 1990), Chapter 2, pp 70-76.
- 25 Gerard Goggin and Christopher Newell, *Disability in Australia - Exposing a Social Apartheid* (University of New South Wales Press Ltd, 2005).
- 26 See e.g., Community Affairs References Committee, [Violence, abuse and neglect against people with disability in institutional and residential settings](#), including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability, November 2015, Commonwealth of Australia.
- 27 Disability Services Act 1986 (Cth).
- 28 For example, in 1979 deinstitutionalisation became Victorian policy, although the closure process has been extremely slow with the last large-scale institution closing in November 2019; the 1983 Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled led to the closure of many large-scale institutions in NSW, although a number are yet to be closed. The shift from large-scale institutional settings in Australia has led to the establishment of small institutional settings, predominately group homes.
- 29 Disability Discrimination Act 1992 (Cth).
- 30 Council of Australian Governments, *National Disability Strategy 2010-2020* (Commonwealth of Australia, 2011).
- 31 Prof. Gerard Quinn, Prof. Grainne de Búrca, Prof. Lisa Waddington, Prof. Mark Bell, Prof. Anna Lawson, Prof. Michael Stein, Prof. Titti Mattsson and Prof. Luke Clements, '[Segregation and segregated facilities as a prima facie form of discrimination. The Impermissibility of using the ESIF to invest monies in long term care residential institutions for persons with disabilities](#)' (Legal Memo, 17 March 2018).
- 32 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013), tenth session, UN Doc CRPD/C/AUS/CO/1 (21 October 2013); Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Australia, twenty-second session, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019).

- 33 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013), op. cit., paras 41, 42, 45 and 46; Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Australia, op. cit., paras 37, 38, 45, 46, 49, 50.
- 34 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013), op. cit., paras 24, 25, 26, 33, 34; Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Australia, op. cit., paras 23, 24.
- 35 Committee on the Rights of Persons with Disabilities, 'General comment No. 1 (2014) - Article 12: Equal recognition before the law', UN Doc CRPD/C/GC/1 (19 May 2014).
- 36 Committee on the Rights of Persons with Disabilities, 'General comment No. 6 (2018) on equality and non-discrimination', UN Doc: CRPD/C/GC/6 (26 April 2018).
- 37 Committee on the Rights of Persons with Disabilities, 'General comment No. 4 (2016) on the right to inclusive education', UN Doc CRPD/C/GC/4 (25 November 2016).
- 38 Committee on the Rights of Persons with Disabilities, 'General comment No. 5 (2017) on living independently and being included in the community', UN Doc: CRPD/C/GC/5 (27 October 2017).
- 39 Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fifth periodic report of Australia', UN Doc E/C.12/AUS/CO/5 (11 July 2017) paras 55 and 56; Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Australia', UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) para 43(c).
- 40 Committee on Economic, Social and Cultural Rights, 'General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc E/C.12/GC/237 (April 2016) para 47(c).
- 41 Australian Human Rights Commission (2016) [Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability](#), AHRC, Sydney.
- 42 Committee on the Rights of Persons with Disabilities, 'General comment No. 1 (2014) - Article 12: Equal recognition before the law', UN Doc CRPD/C/GC/1 (19 May 2014).
- 43 An interpretative declaration is a unilateral statement made by a State Party to a Convention to clarify how a specific article or articles is interpreted by that State Party at a given time. Australia made three interpretative declarations at the time it ratified the CRPD in 2008, on article 12 Equal recognition before the law, article 17 Protecting the integrity of the person and article 18 Liberty of movement and nationality.
- 44 The interpretative declaration on article 12 states: "Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards."