



Submission to the Open-ended Intergovernmental Working Group on an Optional Protocol to the Convention on the Rights of the Child

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INTRODUCTION

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 Australian inclusive education system and the removal of the legal, structural, and attitudinal barriers that limit the rights of some students, including students with disability, to access an inclusive education in regular classrooms in Australian schools. Our work is guided by the human rights framework, including the principles embodied in the *Convention on the Rights of the Child (CRC)*¹, the *Convention on the Rights of Persons With Disabilities (CRPD)*² and other relevant international human rights treaties and instruments.
2. All Means All is a member and the Chair and national Co-convenor of the [Australian Coalition for Inclusive Education \(ACIE\)](#), an initiative that brings together organisations from around Australia that share a commitment to advance Inclusive Education in Australia. ACIE is a national coalition of 25 not-for-profit organisations that have a combined representative membership of over 1.2 million. We are also a member of [Inclusion International](#), the international peak body representing people with intellectual disability and their families, and the [Equitable Education Alliance \(EEA\)](#), an Asia-Pacific focussed community of practice for organisations, ministries, agencies and NGO's working towards more inclusive and equitable educational systems and the achievement of SDG4.
3. We commend the Human Rights Council for its adoption of resolution 56/5³, to establish an Open-Ended Intergovernmental Working Group (**Working Group**) with the mandate of exploring the possibility of elaborating and submitting to the Human Rights Council, a draft optional protocol to the Convention on the Rights of the Child (**CRC**) on the rights to early childhood education, free pre-primary education and free secondary education. We thank the Council for the opportunity to make a submission to this process (this **Submission**).
4. The development of an Optional Protocol presents a critical opportunity to clarify, strengthen, and modernise the normative content of the right to education in line with contemporary standards of international law, particularly the CRPD, which articulates the right to inclusive education of people with disability, including children with disability. In particular, we urge the Working Group to address in its draft Optional Protocol, the limitations of the original CRC framework with respect to children with disability, and articulate **the right to inclusive, free, quality education for all children without exception**, including those with disability, from early childhood through to the completion of secondary schooling.
5. This Submission outlines key priorities for the content of the proposed Optional Protocol, grounded in legal and human rights analysis having regard to the relevant treaty texts and works of relevant treaty monitoring bodies and applying the rules of interpretation codified in the Vienna Convention on the Law of Treaties. It draws, in particular, on the content and scope of the right to inclusive education guaranteed

¹ United Nations General Assembly, *Convention on the Rights of the Child*, 2 September 1990, United Nations, Treaty Series, vol. 1577, p.3

² United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, United Nations, Treaty Series, vol. 2515, p. 3.

³ A/HRC/RES/56/5.

by Article 24 of the 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)⁴.

6. While we note the questions outlined in the Call for Submissions for the Working group, our recommendations are specifically directed at ensuring that the Optional Protocol incorporates the right to **inclusive education for children with disability**.
7. **This Submission has been endorsed by the organisations listed in the Appendix.**

RECOMMENDATIONS

We make the following **RECOMMENDATIONS** in respect of the draft Optional Protocol that is prepared by the Working Group.

Recognise the right to early childhood care and education for all

8. We **RECOMMEND** that the Optional Protocol explicitly affirm that the right to education extends to early childhood care and education for **all children without exception**, including specifically children with disability and those who remain at greatest risk of being excluded (e.g. due to intersecting factors).

Affirm the obligation of States to ensure that public pre-primary education and secondary education are free to all

9. We **RECOMMEND** that the Optional Protocol explicitly state that, with a view to achieving the right to education, States must:
 - 9.1 make public pre-primary education **available and free to all children without exception**, including children with disability, beginning with at least one year;
 - 9.2 make public secondary education **available and free to all children without exception**, including children with disability.

Affirm that the right to education encompasses the right of all children to inclusive education at all stages

10. We **RECOMMEND** that the Optional Protocol explicitly affirm that the right to education for **all children** includes **'the right to inclusive education'** of students with disability **at all stages of learning**, in line with Article 24 of the CRPD and reflecting the principles and recommendations outlined in the [Joint Statement on the Rights of Children with Disabilities](#) adopted by the Committee on the Rights of the Child (**CRC Committee**) and the CRPD Committee on 23 August 2021 during their 26th session and 89th session respectively, which:
 - 10.1 noted that 'the CRPD refutes the medical and charity approaches to disability by adopting a human rights model based on the inherent dignity of persons with disabilities and the recognition that impairments must not be taken as a legitimate ground for the denial or restriction of human rights' (para 1);
 - 10.2 emphasised that 'high-quality inclusive education requires the education of all children on equal terms in the same general education system, adapting the educational system to the diverse educational requirements, abilities, potentials and preferences of each child' (para 9);
 - 10.3 reaffirmed that 'the right to quality inclusive education is not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system' (para 9)
 - 10.4 recommended that 'early intervention, accessible learning environments and individual support must be provided in all phases of education process for ensuring the inclusive education' (para 9); and
 - 10.5 called on 'States parties to guarantee that all children with disabilities can realize their right to

⁴ Committee on the Rights of Persons with Disabilities, *General Comment No 4: Article 24: Right to Inclusive Education*, 14th sess, UN Doc CRPD/C/GC/4 (2 September 2016).

education on the basis of equal opportunities, without discrimination, including the denial of reasonable accommodation' (para 9).

11. We note that the obligation to provide reasonable accommodation is an immediate and enforceable duty in accordance with Article 5 of the CRPD, and its denial constitutes discrimination under international law.
12. We also **RECOMMEND** that the Optional Protocol guide States to **adopt intersectional approaches** in the design and implementation of inclusive education policies and practices, ensuring the rights of all children, particularly those who experience multiple forms of exclusion, are protected and upheld. This requires acknowledgment that discrimination and exclusion in education are often compounded by intersecting factors (e.g. disability, race, indigeneity, gender, poverty and migration status) that disproportionately impact some children and increase the risk of segregation, 'gatekeeping', and unequal access to quality education for them.

Define inclusive education consistently with the CRPD

13. We further **RECOMMEND** that the Optional Protocol:

- 13.1 **define 'inclusive education'** in accordance with Article 24 of the CRPD and General Comment No. 4 (The Right to Inclusive Education) of the CRPD Committee which explains that 'inclusion' in education is distinct from:

'Exclusion occurs when students are directly or indirectly prevented from or denied access to education in any form.'

'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.'

*'Integration is a process of placing persons with disabilities in existing mainstream educational institutions, as long as the former can adjust to the standardized requirements of such institutions.'*⁵;

- 13.2 expressly recognise that segregated models of education for students with disability are a form of discrimination under international law and contravene Articles 5 (2) and 24 (1) (a) of the CRPD⁶; and
- 13.3 articulate that parental preference for segregation cannot override the child's fundamental human right to inclusive education⁷.

Non-retrogression and de-segregation

14. We **RECOMMEND** that the Optional Protocol impose positive obligations on States Parties to **progressively realise inclusive education for all children without exception**, while prohibiting retrogressive measures, such as the expansion or continued operation of segregated settings for students with disability. Key provisions reflecting General Comment No.4 to the CRPD should include:
 - 14.1 a prohibition on establishing or maintaining parallel systems of 'special' and 'mainstream' education;
 - 14.2 the requirement for national desegregation strategies with time-bound targets; and
 - 14.3 the reallocation of funding from segregated to inclusive settings in accordance with such desegregation strategies.
15. In Australia, children with disability in particular continue to face significant barriers in accessing early childhood care and education at all stages of learning, and are often segregated from their non-disabled peers at every stage of the education system. This was recognised by Australia's Royal Commission into Violence, Abuse, Neglect and Exploitation of People With Disability in its Final Report, which was handed down on 29 September 2023⁸ and had also been raised by the CRPD Committee in its

⁵ CRPD/C/GC/4 [11].

⁶ Committee on the Rights of Persons with Disabilities, *General Comment No 6: Article 5: Equality and Non-Discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) [64].

⁷ Committee on the Rights of Persons with Disabilities, *General Comment No 4: Article 24: Right to Inclusive Education*, 14th sess, UN Doc CRPD/C/GC/4 (2 September 2016) [10(a)].

⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (Report, 29 September 2023), see Volume 7.

Concluding Observations on Australia's periodic reports in 2019.⁹

16. The above recommendations are important to provide critical guidance to States Parties about their international legal obligations, including the provision of reasonable accommodation to students with disability in early childhood care and education in accordance with the CRPD.
17. The above recommendations will also assist to prevent discriminatory 'gatekeeping' that is recognised as a widespread practice in Australia¹⁰ and diverts students with disability from inclusive pathways beyond early childhood care and education, and restricts their transition to general education settings in schools. Having clear guidance on the right of **all children**, including children with disability, to early childhood care and education, and the obligations of States to give effect to this right through domestic law, policy, and practice, will not only reinforce the right of every child to access mainstream education from the earliest years, but also promote inclusion for children with disability in primary education and beyond at **all stages** of the education system.
18. We refer the Working Group to ['Driving change: A roadmap for achieving inclusive education in Australia'](#)¹¹ developed by the Australian Coalition for Inclusive Education (ACIE) and setting out clear goals and guidance for stakeholders across government and non-government education sectors, and identifying short, medium and long term outcomes as well as key levers that need to be activated to achieve inclusive education in Australia.

Scope of the right to inclusive education to extent to educational services

19. We **RECOMMEND** that the Optional Protocol recognise as falling within the scope of 'the right to inclusive education', those services that may be delivered outside the traditional education system but involve structured, formal, and non-formal learning designed to foster the full development of the human personality and strengthen human rights, consistently with the principles in Article 13 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). This will help to ensure that where such services are available, they **meet human rights standards**, including ensuring they are universally accessible and do not discriminate against students with disability who are often disadvantaged in accessing out-of-school care services and co-curricular programs and activities that their non disabled peers can access and which enhance their access to education.

Safeguards to protect children and prevent harm

20. We **RECOMMEND** that the Optional Protocol embed **safety as integral to the right to education**. This includes:
 - 20.1 the elimination of restrictive practices (e.g. restraint, seclusion);
 - 20.2 effective regulation and monitoring frameworks to protect children from abuse and exclusion (including bullying by teachers and peers); and
 - 20.3 participation of children, including those with disability, in decisions affecting their education including by ensuring States embed participatory mechanisms in education law and policy development (in line with Article 12 CRC, Articles 4(3) and 7(3) of the CRPD, and General Comment No.7¹² to the CRPD).

Data, monitoring and reporting

21. We **RECOMMEND** that the Optional Protocol require:
 - 21.1 **disaggregated data** collection and monitoring on enrolment, attendance, exclusion, restraint, and achievement by, at a minimum, disability, gender, race, and location; and
 - 21.2 integration of Optional Protocol **reporting** into CRC Article 44 reports.

⁹ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, October 2019, UN Doc CRPD/C/AUS/CO/2-3

¹⁰ Ibid

¹¹ This version is publicly available but ACIE is currently finalising an updated comprehensive Roadmap.

¹² Committee on the Rights of Persons with Disabilities, *General Comment No 7: Participation of Persons with Disabilities, Including Children with Disabilities, through Their Representative Organizations, in the Implementation and Monitoring of the Convention* (21 September 2018) UN Doc CRPD/C/GC/7.

Clarify relationship between CRPD and CRC on education of children with disability

22. Finally, we also strongly **RECOMMEND** that the Option Protocol **explicitly address the relationship between Article 24 of the CRPD and Articles 23 and 28 of the CRC in the context of education of students with disability**¹³ and clarify that the formulation of the right to education in article 24 of the CRPD applies on the basis that it provides the strongest and most comprehensive expression of the right to education of children with disability in international human rights law. In this regard, both the CRC¹⁴ and the CRPD¹⁵ recognise the rule that rights holders are entitled to the full benefit of any provisions in other treaties that are more conducive to the realisation of their rights.
23. Kayess and French have pointed to the notion of children with disabilities receiving ‘special care’ in relation to their ‘special needs’ with a view to them ‘achieving the fullest possible social integration and individual development’ in Article 23, and note that this wording has ‘tended to be interpreted and applied as if it circumscribed State obligations to children with disability, inhibiting the mainstreaming of disability measures’¹⁶. While the CRC Committee appears to have sought to mitigate this tendency through its General Comment No. 9 on ‘The rights of children with disabilities’¹⁷, which references social model conceptualisations of disability and acknowledges that ‘measures taken for the implementation of the rights contained in the CRC regarding children with disabilities, for example in the areas of education and health, should explicitly aim for the maximum inclusion of those children in society’¹⁸, the Optional Protocol presents a valuable opportunity to address these provisions and their relationship to each other, and **emphasise the status of children with disability under international human rights law as equal rights holders**.

CONCLUDING REMARKS

24. The development of an Optional Protocol to the CRC in respect of education presents a critical and timely opportunity to **modernise and strengthen the international legal framework governing the right to education for all children**. In particular, it enables the alignment of the CRC with the CRPD, thereby affirming the right of all children, including children with disability, to fully accessible, quality, and inclusive education across all stages of learning.
25. As this Submission has outlined, the inclusion of a clear and consistent articulation of the right to inclusive education that is grounded in the CRPD and supported by the interpretive jurisprudence of the CRPD Committee, is essential to ensure that States understand and fulfil their obligations in law, policy and practice. Embedding **robust safeguards, comprehensive monitoring mechanisms, and express clarification on the relationship between overlapping treaty provisions**, will assist in dismantling discriminatory systems and guiding States in the necessary transformation of education systems to be inclusive by design.
26. We urge the Working Group to seize this moment to ensure that children with disability are visible, valued, and fully included in the future of education envisioned by this instrument, by affirming their status as equal rights holders. Their inclusion must be understood, not as an aspirational ideal, but as a core obligation under international law that is central to realising the right to education and to delivering on the global promise of **universally accessible, quality, and inclusive education for all children without exception**.

¹³ We note the thematic report *Empowering Children with Disabilities for the Enjoyment of their Human Rights, Including Through Inclusive Education*, requested by the Human Rights Council through resolution 37/20 and published by the United Nations High Commissioner for Human Rights on 22 January 2019 (HCHR Thematic Report), <<https://digitallibrary.un.org/record/3791961?ln=en>> explained at [39] that the right to inclusive education is recognised in the CRC, through Articles 28, 2 and 23 read together.

¹⁴ CRC, Article 41.

¹⁵ CRPD, Article 4.4.

¹⁶ 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, 2512-15.

¹⁷ CRC/C/GC/9

¹⁸ Ibid [11]

APPENDIX

This Submission has been endorsed by the following Australian disabled persons and civil society organisations.

1. [All Means All – The Australian Alliance for Inclusive Education](#)
2. [Australian Disability Clearinghouse on Education and Training \(ADCET\)](#)
3. [Autistic Self Advocacy Network of Australia and New Zealand \(ASAN AUNZ\)](#)
4. [Community Resource Unit \(CRU\)](#)
5. [Down Syndrome Australia](#)
6. [Inclusive Educators Australia](#)
7. [People With Disability Australia \(PWDA\)](#)
8. [Queensland Advocacy For Inclusion \(QAI\)](#)
9. [Sa4i – Student Alliance 4 Inclusion](#)
10. [Square Peg Round Whole](#)
11. [Starting With Julius](#)

