

# **Committee on the Rights of Persons with Disabilities**

**Draft General Comment on the right of persons with  
disabilities to enjoy equality and non-discrimination  
(Article 5)**

**Children and Young People with Disability Australia  
Submission – November 2017**

## **INTRODUCTION**

1. Children and Young People with Disability Australia (CYDA) is the national representative organisation for children and young people with disability, aged 0 to 25 years.
2. CYDA's purpose is to advocate systemically at the national level for the rights and interests of all children and young people with disability living in Australia as individuals, members of a family and their community.
3. CYDA welcomes the opportunity to provide a submission about the draft General Comment on the right to enjoy equality and non-discrimination enshrined in Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD). CYDA commends the work of the Committee in developing guidance for States Parties on implementing obligations in relation to equality and non-discrimination at the domestic level. This submission focuses on the experiences, opportunities and challenges for children and young people with disability.

## **GENERAL FEEDBACK**

4. CYDA is concerned about the perpetuation of the medical model in relation to disability in Australia. This is evident in existing laws, policies and practices and is being resorted to in some new reform initiatives. Failure to change this approach is sustaining a damaging deficit view of disability. The impact of a deficit approach is reflected in reports CYDA has received of children and young people with disability and their families having to present the child or young person based on what they cannot do, rather than their strengths, preferences, priorities, skills and qualities, in order to secure rights protection including access to supports and services.
5. The General Comment could be strengthened by including a statement that States Parties should revise and change laws and policies which explicitly or implicitly uphold the medical model of disability in order to give effect to Article 5. Mention could be made of the need for standards regarding disability to be defined in a non-discriminatory, objective way in *all* laws and policies impacting people with disability. States Parties could be encouraged to place greater emphasis on a strengths-based approach to disability in laws and policies, focusing on individual strengths, preferences and support needs.
6. Guidance for States Parties on eliminating this aspect of disability-based discrimination could be provided in section III in connection with the human rights model of disability and/or section V(i) when discussing 'equality under the law'. Currently, positive measures States Parties can take in this regard are primarily referred to in paragraph 66 of the draft General Comment in relation to Article 19.

## **SPECIFIC COMMENTS ABOUT THE DRAFT GENERAL COMMENT**

### **Introduction**

7. Paragraph 2 draws attention to ongoing attitudinal barriers which hinder the enjoyment of the right of people with disability to equality and non-discrimination. CYDA views this discussion as an important element of the General Comment. The direct experiences reported to CYDA indicate that children and young people with disability must contend with pervasive discrimination connected to widespread negative attitudes and a culture of low expectations. Stereotypes and attitudes about disability are a key driver of ongoing segregation of children and

young people with disability in and from a range of settings, including segregation in schools, recreation and employment.

8. It could be useful at this point in the General Comment to include comment framed in positive terms which articulates how attitudes about people with disability can shift to acknowledge and respect people with disability as rights holders on an equal basis with others. Approaches to disability in laws, policies, the media and cultural practices should reflect an understanding that disability is part of the diversity of human experience. Diversity should be valued as a rich resource rather than a problem.<sup>1</sup> Countering entrenched ableism is vital to ensure that children and young people with disability can experience a sense of belonging and are respected as right holders.

### **Equality and non-discrimination for persons with disabilities in international law**

9. The current wording of Paragraph 8 implies that gross violations of the rights of people with disability have been more of a historical concern. This paragraph does not make clear enough that people with disability *continue* to experience severe violations of rights involving violence and abuse. Although 'violence' is mentioned in the quote from the Office of the United Nations High Commissioner on Human Rights, there is little elaboration on the nature and scope of ongoing violence against people with disability, other than the statement in that quote that 'women and girls with disability ... [are subject to] violence, abuse or neglect'.
10. Abuse of children and young people with disability is shamefully prevalent in Australia. CYDA receives consistent and increasing reports of abuse of students with disability in schools for example, incidents of restraint and seclusion. However, these incidents are often not considered to be abusive acts warranting a response from the criminal justice system. Restraint and seclusion that is frequently justified as 'behaviour management' is an example of this. CYDA is highly concerned about the abuse experienced by children and young people with disability.
11. Paragraph 8 could be broadened to emphasise the ongoing abuse and violence that people with disability continue to be subjected to on a regular basis across a range of settings. Responses from services, agencies, authorities and justice systems which reframe these abuses as lawful and acceptable behaviour should also be addressed in this paragraph and recognised as contravening Article 5.

### **Normative Content**

#### Being equal before and under the law

12. Paragraph 16 states that there should be no laws that allow for specific denial, restriction or limitation of the rights of persons with disabilities and that disability should be mainstreamed.
13. This description of States Parties' obligations could be strengthened by including wording to indicate positive actions States Parties can take to achieve these outcomes, such as: 'States Parties are required to comprehensively review all legislation and policies and make changes to ensure that legislation and policies do not allow for specific denial, restriction or limitation of the rights of persons with disability, expressly, in purpose or in effect'. Stating that the prohibition extends to restrictions on the rights of people with disability 'in purpose or effect' would assist in

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<sup>1</sup> K Cologon 2013, Inclusion in education: towards equality for students with disability, Children and Young People with Disability Australia, Melbourne, p. 20.

ensuring that States Parties give consideration to the practical and structural implications of legislation and policies.

14. The obligation of States Parties to mainstream disability within laws and policies in all areas and at all levels could be expanded on and clarified, including by providing examples. In Australia, for example, considerations relating to children and young people with disability are often segregated from, or within, policy on the rights, protection and welfare of children and young people, rather than being integrated within these frameworks.

#### Prohibition of discrimination and equal and effective legal protection

##### *Harassment and bullying*

15. Paragraph 20(d) refers to harassment as a form of discrimination prohibited under Article 5(2), noting that bullying is a particularly violent and harmful form of harassment. CYDA supports this reference to bullying as a form of harassment and suggests adding comment on the heightened vulnerability of children and young people with disability in respect of harassment and bullying.
16. Bullying represents a persistent and chronic experience for many children and young people with disability, particularly in the school context. This is clearly illustrated in CYDA's 2016 survey of the education experiences of students with disability, which found that 52% of students with disability experience bullying nationally.<sup>2</sup> This is significantly higher than the 27% of the total student population who report bullying.<sup>3</sup>

##### *Migration policy and intersectional discrimination*

17. The descriptions of 'intersectional discrimination', 'indirect discrimination' and 'discrimination by association' from paragraphs 20 to 22 have particular relevance to Australian migration law and policy.
18. Certain visa applicants are required to meet a 'health test' which has been criticised for discriminating against people with disability and their families. Every year, people with disability and their families are deported because the person with disability is judged as failing to meet the applicable health requirements.<sup>4</sup> These requirements permit exclusion on the basis that a person has a 'disease or condition' likely to result in 'significant cost' to the Australian health system or to 'prejudice access' to health or community services.<sup>5</sup> The *Disability Discrimination Act 1992* (Cth) creates an exemption from anti-discrimination law for discriminatory provisions in the federal migration law framework.<sup>6</sup>
19. The Australian Government maintains that the health requirements do not discriminate on the grounds of disability because having a disability will not, in itself, result in a failure to meet the

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<sup>2</sup> Children and Young People with Disability Australia 2016, *CYDA Education Survey 2016 – National Summary of Results*, Melbourne.

<sup>3</sup> D Cross et al. 2009, *Australian Covert Bullying Prevalence Study: Executive Summary*, Child Health Promotion Research Centre, Edith Cowan University, Perth, p. xxi.

<sup>4</sup> L Murphy-Oates 2017, "'It's completely inappropriate": Australian Immigration deporting people with disabilities', *SBS, The Feed*, viewed 22 November 2017, <https://goo.gl/ZeEPbg>.

<sup>5</sup> *Migration Regulations 1994* (Cth), Schedule 4, 4005-07.

<sup>6</sup> B Saul 2010, 'Migrating to Australia with Disabilities: Non-Discrimination and the Convention on the Rights of Persons with Disabilities', Sydney Law School, Legal Studies Research Paper No. 10/109, p. 3, viewed 22 November 2017, <http://ssrn.com/abstract=1700922>; *Disability Discrimination Act 1992* (Cth), s. 52.

requirements.<sup>7</sup> The current approach, however, appears to entail a restriction which discriminates against migrants with disability *indirectly or in purpose or effect*, for example because it fails to consider the disproportionate impact of the health test on people with disability.<sup>8</sup> It is particularly detrimental for children and young people with disability, since the relevant ‘cost’ and ‘prejudice’ is calculated over a lifetime.<sup>9</sup>

20. Despite recent policy changes which decrease the likelihood that the health test will operate to exclude people with disability,<sup>10</sup> some of the most vulnerable migrants and refugees, including children and young people with disability, continue to be deported. In CYDA’s view, this is an example of indirect intersectional discrimination in contravention of Article 5. CYDA suggests specifically identifying migration policies which discriminate on the intersecting grounds of disability, health status, and migrant, refugee or asylum status in providing further guidance on the implementation of Article 5(2).

### Reasonable Accommodation

21. In outlining key elements that guide the implementation of the duty to provide reasonable accommodation at paragraph 27(a)-(b), the draft General Comment refers to ‘proving’ that an accommodation is feasible and relevant. This wording may create the impression that there should be an onus on the person with disability to ‘prove’ the need for reasonable accommodation before it will be provided.
22. The duty to provide reasonable accommodation, as stated in paragraph 25, needs to be negotiated with the individual in question and it should be up to the duty bearer to prove that a particular request cannot be reasonably accommodated. Whilst it is stated in paragraph 27(f) that the burden of proof in relation to whether the desired accommodation imposes a disproportionate or undue burden should rest with the duty bearer, paragraph 27 could be revised in its entirety to remove any implication that the person with disability should bear the burden of proof when it comes to providing and negotiating reasonable accommodation.
23. It may be useful to distinguish between requirements relating to reasonable accommodation: (a) in negotiations between the person with disability and the relevant agency, service or organisation; and (b) in legal determinations when a dispute arises. The ‘burden of proof’ issue could then be discussed specifically in relation to legal proceedings to avoid conflating these two contexts. Using this terminology to describe general implementation of the duty could inadvertently encourage an overly adversarial approach in everyday negotiations about reasonable accommodation.

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<sup>7</sup> Attorney-General’s Department 2017, *Australia’s draft report to the UN Committee on the Rights of the Child*, Australian Government, Canberra, p. 39.

<sup>8</sup> See B Saul 2010, ‘Migrating to Australia with Disabilities: Non-Discrimination and the Convention on the Rights of Persons with Disabilities’, Sydney Law School, Legal Studies Research Paper No. 10/109, pp. 8-10, viewed 22 November 2017, <http://ssrn.com/abstract=1700922>.

<sup>9</sup> R Balint 2017, ‘Australia has kept disabled migrant children out for decades – it’s time we gave them protection instead’, *The Conversation*, viewed 15 November 2017, <https://goo.gl/7dY5TZ>.

<sup>10</sup> M Crock et al. 2017, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible*, Edward Elgar Publishing, Cheltenham, p. 256

## Relationship with other specific articles of the Convention

### Article 7 – Children with disabilities

24. Paragraph 43 states that '[g]eneral laws concerning childhood rarely consider children with disabilities'. The draft General Comment could also refer at this point to the need to ensure that general policies and administrative arrangements concerning children, including child protection and welfare mechanisms, incorporate specific considerations relating to children with disability.
25. CYDA strongly supports the statement in paragraph 43 that violence and institutionalisation of children with disability must be addressed as a matter of discrimination. This section could refer to the heightened vulnerability of children with disability to abuse and neglect, not only in disability support settings but also in mainstream settings, institutions and services. It could mention the need for children with disability to be afforded a level of attention and protection commensurate with this known level of increased vulnerability, consistent with the new model of equality underpinning the CRPD.
26. At paragraph 43 it is stated that States Parties should adopt age-appropriate support measures to enable children with disability to exercise their right to be heard in all procedures that affect them. Legal proceedings could be included in the non-exhaustive list of applicable proceedings that follows. CYDA suggests including further guidance on what is involved in the provision of age-appropriate support, such as: providing information in a manner that takes account of children's developmental stage; taking positive action to enable children to express their views; and engaging children using their preferred mode of communication.
27. The statement regarding States Parties' obligation to provide accessible means, modes and formats of communication could be worded more strongly to convey the fundamental importance of this duty. A possible revision would be: 'States Parties *must* provide accessible means, modes and formats of communication to ensure that children with disability can participate in all procedures that affect them, in order to facilitate the non-discrimination and equality rights of children with disability.'

### Article 9 – Accessibility

28. Paragraphs 46 and 47 refer to 'accessibility of the built environment, public transport, as well as information and communication services' in outlining States Parties obligations under Article 9. This section could be expanded to explicitly refer to requirements relating to people for whom accessibility involves the provision of social and communication support, which is not necessarily covered by the term 'communication services'.

### Article 13 – Access to justice

29. It is critical for States Parties to implement procedural accommodations which will ensure access to justice on an equal basis by implementing measures to facilitate the participation of people with disability in legal proceedings. The section on Article 13 from paragraphs 58 to 64 articulates comprehensively practical considerations regarding this obligation. However, the absolute nature of this obligation as a mechanism to protect the equality and non-discrimination rights of people with disability could be further emphasised.

30. Further, this section does not in the view of CYDA sufficiently address the persistent negative effects of ableism, which frequently prevent people with disability from participating in the justice system.
31. CYDA has received reports of police refusing to take statements from children and young people with disability and lawyers viewing cases as ‘too difficult’. The stereotype that people with disability make ‘poor witnesses’ is one example of the negative attitudes that continue to inform hesitance to proceed with charges and prosecution of crimes against children and young people with disability. The curtailed opportunity to demonstrate credibility as a witness in a court of law further perpetuates this stereotype.<sup>11</sup>
32. Paragraph 62 could refer to ongoing discriminatory denial of access to justice for people with disability connected to attitudinal discrimination and the need for training for those working in the field of administration and justice in order to counteract this practice.

#### Article 19 – Living independently and being included in the community

33. CYDA strongly supports the statement in paragraph 66 that ‘[e]ligibility criteria and procedures for accessing support services need to be defined in a non-discriminatory, objective way, and focus on the requirements of the person rather than the impairment, following a human rights-based approach.’
34. In the Australian context the National Disability Insurance Scheme (NDIS) provides an example of one mechanism for giving effect to Article 19 of the CRPD which is inconsistent with this requirement in a number of respects. The NDIS represents a major reform of disability services, aiming to fulfil Australia’s human rights obligations and enable people with disability to exercise choice and control in relation to supports received.<sup>12</sup> However, the intention to shift from a medical model of disability to an approach of providing supports on the basis of the functional impact of disability on a person’s life has been only partially realised to date.
35. Publicised and promoted NDIS policies and practices display an undue focus on impairment and diagnostic groups as pivotal to decision-making processes and the insurance approach underpinning the Scheme. Quarterly reports on the Scheme include data disaggregated according to ‘level of function’ (‘high’, ‘medium’ or ‘low’).<sup>13</sup> CYDA has received ongoing and consistent feedback from NDIS participants about decisions being inappropriately based on diagnostic assumptions and assessments.
36. CYDA is concerned that these combined laws, policies and practices contribute to sustaining a deficit view of disability. The approach being taken undermines equality before the law and involves denial of the right to independent living under Article 19.
37. CYDA recommends expanding paragraph 66 to provide further guidance on framing laws, policies and practices in a non-discriminatory, objective way. For example, rather than relying on standards such as ‘reduced functional capacity’,<sup>14</sup> States Parties could be encouraged to define the functional impact of disability according to a person’s ‘support needs’, ‘preferences’ and

<sup>11</sup> Australian Human Rights Commission 2014, *Equal before the law: Towards disability justice strategies*, Sydney, pp. 23-24.

<sup>12</sup> *National Disability Insurance Scheme Act 2013* (Cth), s. 3(1).

<sup>13</sup> For example, Disability Reform Council 2017, *Quarterly Performance Report*, National, June 2017, Council of Australian Governments, Canberra, p. 11, viewed 15 November 2017, <https://goo.gl/9pZyMN>.

<sup>14</sup> For example, *National Disability Insurance Scheme Act 2013* (Cth), s. 24(1)(c).

‘strengths’. Mechanisms for accessing support services should develop an understanding of the specific person and their individual support needs and circumstances rather than depending primarily upon diagnostic group assumptions.

#### Article 24 – Education

38. National data evidence a disturbing trend *towards* attending special schools in Australia.<sup>15</sup> Further, policies and practices in some Australian jurisdictions position segregated settings such as special schools and special classes as ‘inclusive education’. The Victorian Government, for example, is developing new segregated schools, stated to be ‘inclusive new schools’, as part of inclusive education policies.<sup>16</sup>
39. This reflects a fundamental misunderstanding about how to realise equality and non-discrimination in the education system and is perpetuating segregation of students with disability and discriminatory practices. Segregated education arrangements should not be considered part of ‘inclusive education’ in any circumstances. Given the above trends and practices, CYDA considers this section of the General Comment to be a critical means of promoting understanding of the rights of students with disability.
40. Paragraphs 70 and 71 do not cover the breadth of exclusion and segregation frequently experienced by students with disability in education. In addition to segregation *from* mainstream education settings, Australian students with disability are frequently segregated *within* mainstream education settings, such as by being allocated to separate classes and locations, being assigned different tasks or being excluded from activities.
41. It is believed that the description of discriminatory barriers to inclusive education could be broadened to include these forms of discrimination and refer to definitions of both macro exclusion and micro exclusion. In an education context, macro-exclusion refers to a child being segregated into a special school or a special class or unit within a mainstream school.<sup>17</sup> The presence of students within a mainstream education setting, but without being included, is referred to as micro-exclusion.<sup>18</sup>
42. Inclusion is a frequently misunderstood term and it is therefore highly important that it is clearly defined. It may assist to refer to research evidence demonstrating that inclusive education produces better academic, social and economic outcomes.<sup>19</sup>

#### Article 27 – Work and employment

43. Paragraph 73 could include mention of measures needed to assist students to transition from school to work and/or study, as part of States Parties’ obligations to prevent discrimination on the grounds of disability connected to work and employment.

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<sup>15</sup> Australian Institute of Health and Welfare 2017, *Disability in Australia: changes over time in inclusion and participation in education*, Australian Government, viewed 15 November 2017, <https://goo.gl/doqiKc>.

<sup>16</sup> Department of Education and Training, State Government of Victoria 2017, ‘Planning and building inclusive new schools’, viewed 15 November 2017, <https://goo.gl/Ku36CJ>.

<sup>17</sup> Children and Young People with Disability Australia 2013, *Inclusion in Education: Towards Equality for Students with Disability*, Melbourne, p. 14.

<sup>18</sup> *Ibid*.

<sup>19</sup> For example, Children and Young People with Disability Australia 2013, *Inclusion in Education: Towards Equality for Students with Disability*, Melbourne, pp. 23-27.

44. Paragraph 75 lists requirements regarding data collection and analysis ‘to monitor anti-discrimination policy and laws’. It could be made clear that data collection requirements to enable States Parties to accurately assess whether they are complying with Article 5 extend to collecting and analysing data about discriminatory practices pursuant to a range of laws and policies across different life areas, including education, employment, welfare and health among others. These requirements should not be confined to formal legal complaints pursuant to anti-discrimination laws.

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