

Attorney-General's Department

Australia's Draft Combined Second and Third Periodic Report under the Convention on the Rights of Persons with Disabilities

**Children and Young People with Disability Australia
Submission – July 2018**

INTRODUCTION

Children and Young People with Disability Australia (CYDA) welcomes the opportunity to provide feedback on *Australia's Draft Combined Second and Third Periodic Report under the Convention on the Rights of Persons with Disabilities* (Draft Report).

As a State Party to the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), Australia has undertaken to uphold the human rights of children and young people with disability under international law. This is also reflected in Australia being a signatory to other United Nations Conventions which are of key relevance to the rights of children and young people with disability. *The Convention on the Rights of the Child* (CRC) is a key example of this.

Available statistics, the findings of numerous government reviews at national, state and local levels and consistent feedback from CYDA's constituency indicate that there is a wide chasm between Australia's formal commitment as a State Party to these international treaties and the commonly poor everyday experiences of children and young people with disability and their families.

Children and young people with disability face profound disadvantage across all life areas. The typical experience of many children and young people with disability involves missing out on many opportunities afforded to their peers without disability. Children and young people with disability are regularly denied social, educational, recreational and employment opportunities. Further, many of these circumstances mean that children and young people in Australia are denied their rights which are afforded to them in the CRPD and other relevant UN Conventions.

Many children and young people with disability are subjected to instances of abuse, violence or neglect which are not acted on or adequately addressed. In these instances it is often the case that the unacceptable is seen as acceptable or there are a range of barriers for the child or young person accessing justice. It is thus common that experiences of abuse and violence are not acknowledged and the opportunity to submit a complaint or seek a remedy can be inaccessible or denied.

This brief submission will focus on the implications of Australia's programs, policies and laws for children and young people with disability in view of the CRPD.

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. The organisation is primarily funded through the Department of Social Services and is a not for profit organisation. CYDA has a national membership of 5300 and a growing social media presence with 22 500 followers across the three major platforms of Facebook, Twitter and LinkedIn.

CYDA provides a link between the direct experiences of children and young people with disability to federal government and other key stakeholders. This link is essential for the creation of a true appreciation of the experiences and challenges faced by children and young people with disability.

CYDA's vision is that children and young people with disability living in Australia are afforded every opportunity to thrive, achieve their potential and that their rights and interests as individuals, members of a family and their community are met.

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 and it undertakes the following to achieve its purpose:

- **Listen and respond** to the voices and experiences of children and young people with disability;
- **Advocate** for children and young people with disability for equal opportunities, participation and inclusion in the Australian community;
- **Educate** national public policy makers and the broader community about the experiences of children and young people with disability;
- **Inform** children and young people with disability, their families and care givers about their citizenship rights and entitlements; and
- **Celebrate** the successes and achievements of children and young people with disability.

GENERAL COMMENTS

CYDA notes that in many instances the responses provided in the Draft Report to issues are lists of policies viewed as relevant in the area concerned. It is believed that the Final Report would be strengthened by the greater inclusion of actions and outcomes which have occurred due to the existence of the stated policies.

Similarly, some of the responses are statements about a particular issue and there is no indication provided as to how an issue is addressed, experienced or what actions have been taken by the government to progress the right concerned. For example paragraph 89 which states *“The Australian Government supports the right of children with disabilities to express their views on matters that concern them.”*

It is CYDA’s views that the Draft Report does not adequately represent the unique and specific barriers specifically confronting children and young people with disability. This is reflected in many discussions regarding the impact or experience of issues on people with disability but often there is no particular reference to the unique impact this may have on children. The discussion on access to justice is an example of this.

Additionally it is noted that there are many references to government policy and practice regarding children generically but in many instances there is no specific articulation as to how these policies and practices are accessible or accommodate the specific needs of children with disability. Examples include paragraphs 96, 97 and 99. It is CYDA’s experience that in many instances children with disability are not adequately considered in policy and it is believed that this should be reflected in the Final Report.

There is little discussion or reference to intersectionality and the impact this has on the significant barriers people with disability experience in regards to affording of rights in Australia. For example the section on *Out of Home Care* should provide information on the high representation of children with disability and other intersectional areas.

CYDA acknowledges that the Draft Report is constrained due to the structural and length restrictions of the reporting process. It is however viewed as critical to acknowledge the profound multiple disadvantages experienced by many people with disability due to the complexity of their lives.

It is recommended that a statement be included which acknowledges the intersectional experience and discrimination which impacts on the lives of many people, including children, with disability.

CYDA notes the discussion of communications received under the Optional Protocol in paragraphs 9-12. A formal submission was made to Special Rapporteur on the Committee of the CRPD by a range of organisations, including CYDA, in 2016. It was reported that a number of human rights violations and abuse of children with disability had occurred in public and private educational institutions in Australia, particularly against those with Autism Spectrum Disorder. The allegations of violence and abuse, including sexual violence, which may constitute a form of torture or other ill-treatment, documented between 2008 and 2016, concerned fifty-five autistic children in six of Australia's eight States and Territories. Subsequent written communications occurred between the United Nations and the Australian Government in 2017 regarding these very serious allegations.

This action is not mentioned in the Draft Report. CYDA believes this specific investigation process, and any other like communications, should be reported in the Final Report as they provide important information which will inform this periodic review, demonstrate the accountability mechanisms available through the United Nations, and reflect how the Government is engaging in UN processes.

CYDA believes that the short time frame provided for comments and feedback on the Draft Report has not allowed for thorough consultation with stakeholders and denied many the opportunity to meaningfully contribute to this important process. Due to the limited timeframe, CYDA has been unable to comprehensively cover all issues relating to the human rights of children and young people with disability which are of relevance. CYDA is able to provide further information through direct discussion with the Attorney-General's Department.

SPECIFIC COMMENTS

INTRODUCTION TO DRAFT REPORT

Consultation on the report

Paragraph 7 refers to the consultation process to develop the report. CYDA is unclear whether it was one of the 36 non-government organisations referred to that was provided with the opportunity to provide a submission regarding the initial establishment of this report. It would appear that the consultation process requires review and adjustment given that only one submission was received through this process. It should not be seen as a lack of interest or willingness to contribute to the development of this report.

It is CYDA's view that it would be beneficial to review the initial consultation with the aim of strengthening input from civil society.

It is recommended that comment be added to the Final Report which reflects that typically there is significant input from civil society and that this limited response is atypical and possibly reflects limitations of the consultation process.

PART A: PURPOSE AND GENERAL OBLIGATIONS (ARTICLES 1-4)

Purpose, Definition and Principles

Issue 1

Incorporating the Convention into domestic law

Paragraph 14 states that the *Disability Discrimination Act 1992* (Cth) (DDA) is a key mechanism for affording people with disability their rights in an Australian context. It applies to the Commonwealth, states and territories and private sector bodies.

Since its introduction, legal interpretations of the DDA and consequent case law have made it clear that due to poor drafting of the substantive legislation and the sets of ‘standards’ that support it, the legislation is almost unusable.

For example, the recent 2018 decision in *Sklavos v Australasian College of Dermatologists [2017] FCAFC 128* reflects that the decision to place the requirement for respondents to make reasonable adjustments under s5, being the Direct Discrimination section, means that a complainant has to prove that a respondent refused to provide the adjustments because of the disability. This is almost impossible.

The comparator required in the same section (reasonable adjustments s 5 (2)) also creates numerous hurdles that at times cannot be overcome.

The addition of “*behaviours that are a symptom or manifestation of the disability*” has become largely redundant due to the same barrier. In reality, people without disabilities do not display behaviours of concern. Despite that, a complainant must prove that a respondent has not provided a reasonable adjustment to someone demonstrating behaviours of concern, but would have done so to someone who did not have a disability displaying the same behaviours. Or a complainant must prove that they were treated less favourably than someone without a disability demonstrating similar behaviours of concern. On one hand the definition sets out clearly that the complainant has to prove that the behaviour is a symptom or manifestation of the disability, but on the other hand must put forward a comparator which many medical professionals would say cannot exist. A hypothetical comparator may assist a legal argument, but does not allow the law to be applied to the reality of discrimination against people on the basis of behaviours of concern. Again, the task of making the comparison is almost impossible and requires the court to draw inferences to find discrimination proven in most cases.

Due to the above, restraint and seclusion of people with disabilities, a significant ongoing widespread problem in Australia in the treatment of students with disability in schools, and adults with disability receiving disability services, is not able to be remedied through the DDA. Indeed there is no remedy as the evidence and data tell us that alternative remedies such as criminal proceedings are not viable due to the reluctance of State police forces to prosecute a person without a disability for subjecting people with disabilities to restrictive practices.

It is not possible to explain why the DDA has been drawn up in such a manner, when even state discrimination acts such as the *Victorian Equal Opportunity Act 2010* have the provision of reasonable adjustments as a stand-alone section in that legislation, and do not have the same reliance on comparators.

The *Disability Standards for Education 2005* have failed to offer students adequate protection from discrimination. In relation to consultation, which can be reflected in the Draft General Comment 7 to

the CRPD, soon to be finalised, the Standards do not comply with Articles 4 (3) and 33 (3) on consultation and participation as outlined in the Draft Comment.

It is recommended that the Final Report should include reference to the impact of case law interpretation of the DDA and how it has impacted on affording of rights to people with disability in Australia.

Additionally, it is recommended that the Final Report should reference the need for urgent law reform of the DDA.

Issue 2

Paragraph 32 states “*specifically, DROs can use their funding to promote an understanding of the lives of persons with disabilities*”. It is believed that this would be strengthened by including a specific reference to the direct experience of people with disability. The direct experience is a critical informant of policy and practice and should be specifically recognised.

It is therefore recommended that this statement be changed to “...lives and direct experiences of persons with disabilities”.

Issue 3

Paragraphs 36 to 44 concern the National Disability Strategy. This discussion is viewed as a description of the Strategy and the process for reporting what progress has occurred. CYDA believes analysis of the strategy, including its impact and effectiveness, should be incorporated into the Final Report.

Issue 4

The discussion of the National Disability Insurance Scheme which occurs in paragraphs 45-59 includes information on how monitoring and evaluation of the Scheme occurs. There is no reference to any of the parliamentary inquiries that have occurred, at both State and Commonwealth levels. The Joint Standing Committee on the National Disability Insurance Scheme being an important example. It is believed that the conducting of these inquiries have been a highly valuable mechanism for monitoring and evaluation of the Scheme which should be recognised and the findings of these inquiries should inform this review process.

PART B: SPECIFIC RIGHTS (ARTICLES 5-30)

Children with Disabilities (article 7)

Issue 7

National Framework for Protecting Australia’s Children 2009-2020

Paragraph 80 states “*The National Framework for Protecting Australia’s Children 2009-2020, developed by Australian governments under the ND Strategy, recognises childhood disability as a risk factor for abuse and neglect. Early intervention is a key strategy under its Third Action Plan 2015 2018, with actions focused on supporting families to address factors such that contribute to vulnerability, including disability*”.

By stating that the National Framework for Protecting Australia’s Children was developed under the National Disability Strategy appears to suggest that its establishment occurred as a consequence of this overarching policy. CYDA has been involved in the development of both policies. CYDA is of the view that the processes occurred in parallel and this statement misrepresents the relationship between these policies.

CYDA has been a member of the Coalition of Organisations Committed to the Safety and Wellbeing of Australia's Children since the commencement of this initiative. It was this initiative which led to the development of the National Framework for Protecting Australia's Children. The process occurred independent of the development of the National Disability Strategy.

Since that establishment of the Coalition of Organisations Committed to the Safety and Wellbeing of Australia's Children, CYDA has continually advocated for the need for specific consideration and focus on children with disability in the Framework's Action Plans and more widely in the work of the Coalition. CYDA also thinks it is critical that representation of children with disability also occurs within the Coalition Steering Group which has not occurred to date. Advocacy has included verbal and written representations to the Coalition, relevant Commonwealth Ministers and the Department of Social Services.

Currently, it is of significant concern to CYDA that the proposed Fourth Action Plan of the Framework has no specific consideration or mention of children with disability.

Further, CYDA is of the view that the intersectional nature of disadvantage should be strengthened in the Fourth Action Plan of the National Framework for Protecting Australia's Children as it does not capture the high prevalence of children with disability within the identified areas of disadvantage including Aboriginal and Torres Strait Islander children, children from a Non English Speaking Background, children in Out of Home Care and those who experience low socio-economic disadvantage.

CYDA recommends that the statement "*The National Framework for Protecting Australia's Children 2009-2020, developed by Australian governments under the ND Strategy*" be removed from the Final Report.

It also recommends that this section of the Draft Report be reviewed and amended so it reflects the need for this Framework to have a much stronger focus and consideration of children with disability.

National Disability Insurance Scheme

Paragraph 81 states "*The NDIS provides people with a permanent and significant disability, including children, with the reasonable and necessary supports they need to live an ordinary life*".

The National Disability Insurance Scheme (NDIS) represents a major reform of disability services, aiming to fulfil Australia's human rights obligations, including under the CRPD and the CRC. Whilst CYDA has received some positive feedback about the NDIS, a high number of reports of negative experiences have been received from children and young people with disability and families. Some of the key concerns include: denial of eligibility; extremely poor planning experiences; significant delays in accessing supports and services; the inclusion of inadequate or inappropriate supports in NDIS plans; and funding of support at inappropriate amounts.

According to available data, issues raised in recent Senate Committee inquiries and direct experiences reported to CYDA, some children have experienced significant delays accessing services through the Early Childhood Early Intervention (ECEI) Approach. Delays in the delivery of ECEI services significantly undermine the fundamental learnings and purpose of early intervention. Early childhood is a well-established pivotal time for development and it is critical that children and families have timely access to expertise, services and supports during this time.

CYDA acknowledges that the National Disability Insurance Agency has responded to feedback on poor experiences and undertaken significant reform and review in areas included very targeted reform of the NDIS planning process and the early intervention gateway. It is still critical to acknowledge the significant issues of concern and their impact which have occurred throughout the establishment and roll out of the NDIS.

While the individualised funding approach has to be seen as a strength in the design of the Scheme, this shift will on its own do little to confront and resolve the fragmentation that characterises our service system. Further, 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 has been only partially realised. Publicised 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. This approach risks perpetuating the siloing and marginalisation of children with disability.

CYDA is also highly concerned about the lack of attention to the protective and safeguarding needs of children with disability in the NDIS legal and policy framework. Standards and policies for safeguarding children are minimal and, in CYDA's view, need to be strengthened to ensure that children with disability are better protected against abuse.

Children with disability are over three times more vulnerable to experiencing abuse and neglect than their peers without disability. Since children who are NDIS participants will typically be accessing more services than others, this further increases their vulnerability to abuse. Further guidelines should be incorporated in the *NDIS Quality and Safeguarding Framework*, and regulations and standards relating to quality and safeguarding made under the *National Disability Insurance Scheme Act 2013*, to address the specific needs of children with disability.

It is recommended that the Final Report acknowledge the need to strengthen the NDIS quality and safeguarding framework specifically for children accessing the Scheme.

Education and Early Childhood Care

It is of great concern to CYDA that discussion of education provision throughout the Draft Report appears to indicate that progress is occurring in affording children and young people with disability their rights to education, including an **inclusive** education, in Australia. In reality the direct experience of students with disability in accessing education is overwhelmingly poor. This is reflected by numerous inquiries, significant research findings, available statistics and an overwhelming body of direct experience.

There is an increase in access to segregated education during the reporting period, alarming evidence of gatekeeping, approximately 2/3 of students with disability experience bullying whilst at school and extremely disturbing rates of restraint and seclusion are being experienced by children and young people with disability. The denial of education rights to students with disability in Australia must be acknowledged and addressed. This needs to be reflected in the Final Report.

Early Childhood Education

Children with disability and their families in Australia face unique challenges in accessing and participating in early childhood education. CYDA is frequently informed of a range of poor experiences and barriers in relation to access, participation, resourcing, expertise and discrimination.

Statistics available on participation rates illustrate a disparity between the participation in early childhood education by children with disability compared to their peers without disability. The Productivity Commission's *Report on Government Services 2017* shows that children aged 3 to 5 years

with disability had a lower representation in preschool (5.8%) than their representation in the community (6.7%).

Markedly poorer experiences and lower participation rates place children with disability at a distinct disadvantage compared to their peers without disability as they enter primary education and beyond. Yet children with disability have not been a specific focus of the reform agenda to date.

CYDA recommends that the Final Report include recognition of the relevant discrepancy in participation rates and the need for dedicated reform measures.

School Years

The relevant sections of the Draft Report on inclusive education should be revised to include acknowledgment of the persistent disadvantage experienced by students with disability and the need for further action in response. CYDA regularly hears of experiences of discrimination and blatant dismissal of the educational rights and entitlements of students with disability. It is believed that additional strategies are needed to ensure realisation of the right of children with disability to a high quality education on an equal basis with others. CYDA is of the view that a national plan for students with disability should be developed which contains a blueprint for embedded and systemic reform, grounded in a strong evidence base and research regarding best practice.

CYDA acknowledged the development of the National Consistent Collection of Data on School Students with Disability as an important initiative which, although requiring refinement in the view of CYDA, should lead to better national data being available on the prevalence and level of need of school students with disability. It is critical however that further work is done to strengthen consultation with students and parents/caregivers around this initiative.

Inclusive Education

The discussion on inclusive of education throughout the Draft Report, with particular note regarding comment provided under Section 26, causes great concern to CYDA. Inclusive education is a right which is denied to most of the students with disability in Australia. It is CYDA's view that many of the reform initiatives which have occurred in the States do not reflect the definition and practices of inclusive education as outlined in the UN General Comment No. 4. In many instances a fundamental part of policy reforms and related initiatives have seen a focus on segregated education both within and separate to mainstream settings. CYDA concurs and endorses the discussion and analysis provided by All Means All in their submission, provided to this consultation in the section titled *Australian Government's request for clarity – Paragraph 278 of the Draft Report*.

Australian Government's request for clarity – Paragraph 278 of the Draft Report

10. We are especially concerned by the Australian Government's statements in paragraph 278 in relation to Issue 26, which suggest a fundamental lack of commitment to fully implement Article 24 and reflect its continued recalcitrance to ensure "progressive realisation" of the obligation to ensure an inclusive education system across Australia's jurisdictions.

11. In this regard, paragraph 278(a) repeats the Australia Government's 2016 submission to the CRPD Committee on the then draft General Comment No. 4, to the effect that Article 24 is compatible with segregated delivery of education to students with disability, as a legitimate "education modality" among "a range of education options" within an inclusive education system. Paragraph 278(b) further requests the CRPD Committee "clarify that States Parties may offer education through specialist classes or schools consistently with Article 24".

12. In our view, the CRPD Committee has already clarified the matter through General Comment No.4 and its construction of Article 24 as well as General Comment No.6 and its construction of Article 5 on equality and non-discrimination, which was issued on 26 April 2018. Together, these General Comments represent a clear and emphatic rejection of the position sought to be advanced by the Australian Government in paragraph 278.

13. In this regard, it is clear from General Comment No.4 that "specialist schools" and specialist classes" are regarded as "segregation" and are distinct from inclusive education. Relevantly, paragraph 11 of General Comment No.4 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 impairments, in isolation from students without disabilities." It is worth noting in this context that this definition of "segregation" as well as other key definitions and concepts outlined in General Comment No.4 are now part of the Queensland Government's newly released "Inclusive Education Policy"³.

³ <http://ppr.det.qld.gov.au/pif/policies/Documents/Inclusive-education-policy.pdf>

14. General Comment No.6 in relation to Article 5 of the CRPD further states in its paragraph 64 that "segregated models of education, which exclude students with disabilities from mainstream and inclusive education on the basis of disability, contravene articles 5(2) and 24(1)(a)".

15. It is also clear from the language of paragraph 11 of General Comment No.4 that the "transition from segregation to inclusion" is envisaged through compliance with Article 24. This is again reflected in paragraph 12 which speaks of "ending segregation within educational settings by ensuring inclusive classroom teaching in accessible learning environments with appropriate supports" and calls for inclusive education to be "monitored and evaluated on a regular basis to ensure that segregation or integration is not happening either formally or informally".

16. Importantly, when explaining in paragraph 39 of General Comment No.4 the obligation to ensure progressive realization of Article 24, the CRPD Committee makes it clear that the full realization of Article 24 "is not compatible with sustaining two systems of education: mainstream and special/segregated education systems" and consistently with this, it then calls in paragraph 68 for "a transfer of resources from segregated to inclusive environments".

17. Notably, "segregation" of students with disability is characterised in General Comment No.4 and in General Comment No.6 as a form of discrimination. Paragraph 13 of General Comment No.4 states that "the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation".

18. As such, the CRPD Committee has made it clear that the segregation of students with disability in "specialist classes or units in mainstream schools and specialist schools" are not legitimate education options within the terms of Article 24 and that progressive realisation of that Article does not support the preservation of and continued investment in segregated education models.

19. We also query the basis for the statement in Draft Report Paragraph 278(a) in defence of segregated education, that "a range of education options ensure that the best interests of the student are a primary consideration", given broad consensus that there is no evidence to support the belief that segregated education is beneficial for students with disability. In this regard, we refer you to several comprehensive reviews including the recent "A summary of the Evidence in Inclusive Education" (2016), by Dr Thomas Hehir, Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education and Abt Associates. A 2008 comprehensive analysis of the available research by Dr Robert Jackson, then Associate Professor at Edith Cowan University, "Inclusion or Segregation for children with an Intellectual Impairment: What does the evidence say?" in fact found that "no review could be found comparing segregation and inclusion that came out in favour of segregation in over forty years of research".

20. Further, a 2018 comprehensive review by the European Agency for Special Needs and Inclusive Education of over 200 papers from a range of countries (including the United Kingdom, USA, Australia and continental Europe) into the relationship between inclusive education and social inclusion, titled "Evidence of the Link Between Inclusive Education and Social Inclusion" concluded that:

"The research evidence presented in this review suggests that attending segregated settings minimises the opportunities for social inclusion both in the short term (while children with disabilities are at school) and the long term (after graduation from secondary education). Attending a special setting is correlated with poor academic and vocational qualifications, employment in sheltered workshops, financial dependence, fewer opportunities to live independently, and poor social networks after graduation." [p14]

21. In our view, there is no legitimate basis for the assertion by the Australian Government that segregation of students with disability is either in compliance with Article 24 or in the best interests of those students. Rather, the segregation of students with disability, similarly to the segregation of people with disability in other areas, is a historical practice that has never been supported by evidence. It is in effect a beliefs-driven service delivery model that is inherently discriminatory, not evidence based and in violation of the fundamental human rights of students with disability to equality and non-discrimination.

22. Finally, as to the Australian Government's efforts to use "parental choice" to justify its failure to move towards an inclusive education and discard segregated models for the delivery of education to students with disability in

reliance on Articles 13(3) and (4) of ICESCR, we again note the clear statement in paragraph 10 of General Comment No.4 that inclusive education is to be understood as, amongst other things:

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

23. It is also worth noting again that it was in the context of the ICESCR Committee's consideration of Australia's report on compliance with ICESCR that Australia specifically was asked to explain evidence of a rise in segregated education and what measures it is taking to ensure inclusive education across the country (see paragraph 6 above).

24. In any event, while it is recognised that it is parents who should determine, in the first instance, what is in their child's best interests, the "parental choice" recognised in Article 13(3) and (4) of the ICESCR does not in our view extend to segregation, a discriminatory mode of delivering education to students with disability, just as the "parental choice" argument could not be relied upon to support the decisions of some parents not to educate girls or to choose that girls should not be taught academic subjects, even though these beliefs by parents were once not uncommon and parents did exercise educational choices between girls and boys in that way. Nowadays, we would see it for what it is – impermissible educational discrimination.

25. Further, the segregation of students with disability is not in the nature of the legitimate religious or moral convictions sought to be protected by Article 13 (see paragraph 28 of ICESCR General Comment No. 13), such as for example the liberty to choose education within the framework of Catholic or Jewish beliefs.

26. Rather, segregated education is at best a model for the delivery of education to students with disability, separately to non-disabled students, whereas the concept of "inclusion" embodies the commitment to address the historical denial to people with disability of access to the general education system and to end educational discrimination against them, including by undertaking the systemic changes that are required to be implemented to remove the barriers that continue to result in the exclusion and segregation of students with disability. Paragraph 6 of ICESCR Committee's General Comment 13 recognises accessibility as a critical element of the right to education without discrimination.

27. It is also worth noting that paragraph 5 makes it clear that the right to education in Article 13 of ICESCR is to be interpreted in light of other international instruments that "further elaborate on the objectives to which education should be directed" including any "elements which are not expressly provided for in article 13 (1)", with gender equality provided as an example.

28. As such, the principle of "parental choice" must be applied within, and not in spite of, the human rights framework including the CRPD – a framework that recognises that it is through an inclusive education that the fundamental right to education is realised by people with disability.

29. We also note that Article 13 of ICESCR is expressly qualified by minimum schooling standards, which themselves must be determined in light of Australia's obligations under Article 24 to provide non-discriminatory and inclusive education. Again, we urge the Australian Government to amend the DSEs promptly to incorporate the requirements of Article 24.

30. As a broader matter, the Australian Senate's review, the various State and Territory reviews as well as research undertaken across Australia and in Victoria, have shown the widespread discrimination and gatekeeping⁴ that students with disability and their families experience in trying to access and receive appropriate support in the general education system. Such "gatekeeping" – the usually informal discouragement by mainstream school administrators of enrolment of students with disability in regular classrooms - is an unconscionable practice and, whether deliberate or not, it compromises a parent's free and informed choice as to educational setting.

31. The continued "leakage" of students with disability from the general education schooling system to the alternate segregated "special" system and home schooling is reflective of the Australian Government's failure to progress inclusive education and to adequately support students with disability in the general education system. It cannot now be characterised as legitimate parent-driven "demand" for segregated schooling, thereby releasing the Australian Government from its obligation to fully implement Article 24 and justifying the continued investment of valuable resources to maintain a parallel segregated system for students with disability.

32. We submit that paragraph 278 of the Draft Report should be deleted in its entirety and replaced with an unqualified commitment to the full implementation of Article 24, including to immediately undertake all necessary actions to ensure its progressive realisation.

CYDA endorses all the recommendations in the section of the All Means All submission listed above.

It is recommended that the Final Report acknowledge the need for urgent and critical review and reform of the education system in relation to the provision of education to students with disability.

Freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15)

CYDA suggests that this section, or alternatively the section on children with disability, should incorporate discussion of the pervasive abuse, violence and mistreatment experienced by children and young people with disability, which has been recognised in Federal Senate inquiries as requiring attention. Two key issues identified in the Senate Committee's recommendations relating to children with disability were: restrictive practices against children; and mistreatment of students with disability in schools in contravention of the CRPD and CRC. The actions the government is taking in response could also be outlined.

Experiences of abuse, including restraint and seclusion, are now shamefully common for students with disability in education settings. There are increasing incidents of restraint and seclusion coming to public attention and reported to CYDA, which are seen as a clear consequence of a system in crisis. A 2017 New South Wales Government report, for example, found that there were unacceptable levels of allegations of ill-treatment of children and associated reportable incidents in NSW schools.

The seclusion of students with disability is often justified as 'behaviour management' and it is also often reported to CYDA that it is used as a punishment. For some students with disability the experience of seclusion has involved: isolation for long periods which have been reported to range from one hour to most of the school day; being exposed to weather without reasonable protection provided; denial of food; and denial of access to a toilet. Restraint involves restricted movement and in some cases leads to injury. Students and families have reported to CYDA that children have experienced high levels of distress, including anxiety and other negative psychological impacts, as a result of being subject to restraint and/or seclusion.

CYDA believes that the mistreatment of students with disability in schools frequently constitutes torture or other cruel, inhuman or degrading treatment or punishment.

Presently, there is no timely, independent mechanism for students and families to pursue complaints regarding education experiences. A range of different child protection and disability oversight bodies exist at the state, territory and Commonwealth levels, each with different powers of investigation. There is significant variation regarding the powers for investigation and intervention between these bodies. A key concern raised to CYDA relates to organisations having insufficient powers to address complaints and enforce sanctions, or compliance not being mandatory.

Specific and focused actions at the systemic level to counter the persistent abuse of students with disability within schools settings are needed, including the development of a nationally consistent approach to complaints mechanisms.

CYDA recommends that the Final Report include discussion of the issue of abuse, violence and neglect experienced by children and young people with disability, with a specific focus on students with disability and the use of restrictive practices, seclusion and restraint.

Protecting the integrity of the person (article 17) Issue 20

Forced sterilisation of children with disability

The sterilisation of children with disability, in particular girls and young women with disability, is recognised at international law as an issue of disability discrimination and systemic violence. *Non-therapeutic* sterilisation of girls with disability persists in Australia, a practice that was recently condemned by the UN Special Rapporteur on the Rights of Persons with Disabilities. The way in which this issue is framed and positioned should reflect the fact this is not a health issue. This issue could additionally be discussed in a section on violence against women and children.

It is recommended that the Final Report also discuss the forced sterilisation of children with disability referred to in the 'children with disability' section, in recognition that this is an issue of disability discrimination and systemic violence.

CONCLUSION

CYDA has suggested that the Draft Report be revised and expanded in a number of areas to better reflect specific considerations and concerns for children and young people with disability. Key issues which could be incorporated in the Report relate to inclusion of more information regarding: the abuse, violence and neglect experienced by children and young people with disability; the NDIS and the quality and safeguarding framework specifically for children; the sterilisation of children with disability; and the poor experiences of children accessing and participating in the school system and early childhood education. The discussion on inclusive education of the Draft Report is viewed as needing significant review.

CYDA believes that the short time frame provided for comments and feedback on the Draft Report has not allowed for thorough consultation with stakeholders and denied many the opportunity to meaningfully contribute to this important process. Due to the limited timeframe, CYDA has been unable to comprehensively cover all issues relating to the human rights of children with disability which are of relevance to Australia's joint fifth and sixth report under the CRC. CYDA would welcome an opportunity to provide further information through direct discussion with the Attorney-General's Department.



The discussion and recommendations included in this submission are supported by Disability Discrimination Legal Service.

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