



Submission of All Means All
Review to Inform a Better and Fairer Education System

9 August 2023

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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 disability, 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 Minister for Education, the Honourable Jason Clare, Member of Parliament, for establishing the *Review to Inform a Better and Fairer Education System* (**Review**) regarding the next National School Reform Agreement (**NSRA**) and the Expert Panel that will oversee the Review (**Expert Panel**). We thank the Minister and the Expert Panel for opportunity to make a submission to the Review (**Submission**).
4. All Means All would like to acknowledge the traditional custodians of the land on which we live and work, and to pay respects to Elders, past and present, across the many Aboriginal and Torres Strait Islander nations.
5. We also wish to recognise the efforts of generations of people with disability and their families in advancing the understanding and realisation of human rights, equality, and inclusion for all. We honour and respect their vision and legacy.



6. This Submission:

- (a) endorses the recommendations and content of 'CYDA's submission to the Review to Inform a Better and Fairer Education System' made by Children and Young People With Disability Australia (**CYDA**) to this Review (**CYDA Submission**); and
 - (b) makes further recommendations about the NSRA as a key lever to drive systemic reform to ensure the human rights of students with disability to inclusive education (**Inclusive Education**) in accordance with the United Nations Convention on the Rights of Persons With Disabilities (**CRPD**) that was ratified by Australia, and implement the obligation of the Australian and State and Territory governments, to ensure an Inclusive Education system.
7. 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.

RECOMMENDATIONS

- 1. **Recommendation 1:** That the recommendations made in the CYDA Submission be adopted in full and are reflected in the NSRA.
- 2. **Recommendation 2:** That the NSRA:
 - (a) explicitly refer to the right of people with disability to Inclusive Education and the obligations of governments across Australia to ensure Inclusive Education systems;
 - (b) is directed to ensuring systemic reforms to implement Inclusive Education as a fundamental right of all students including students with disability; and
 - (c) impose specific requirements and limitations on the use of Commonwealth funding by States and Territories, directed to ensure that students with disabilities have access to quality, universally accessible and Inclusive Education systems across Australia consistently with Australia's obligations under the CRPD.



RATIONALE FOR RECOMMENDATION 2

Inclusive education is a human right of people with disability

1. 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.
2. 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.

3. Subsequent international treaties have reaffirmed the right to education generally¹, with thematic treaties and other human rights instruments also addressing the right to education in relation to specific groups².
4. 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.³

5. 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

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

² 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).

³ Council of Europe, Commissioner for Human Rights, Fighting school segregation in Europe through inclusive education: A position paper (Report, 2017) 10-11.



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.

6. 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'⁴, including by providing 'reasonable accommodation' and 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'.
7. As Rosemary Kayess, the eminent disabled Australian human rights scholar, current member of the CRPD Committee and the person appointed as the Ad Hoc 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**.⁵
8. In 2016, the United Nations treaty monitoring body for the CRPD, the Committee on the Rights of Persons With Disabilities, adopted General Comment No.4 (Right to Inclusive Education) on Article 24 (**GC4**), acknowledging that despite progress achieved since the adoption of the CRPD a decade earlier, 'profound challenges persist'⁶ 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.⁷
9. 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

⁴ CRPD art 24.1; CRPD/C/GC/4 at [1].

⁵ 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.

⁶ CRPD/C/GC/4 at [3].

⁷ CRPD/C/GC/4 at [6].



Committee's jurisprudence over the previous decade⁸ 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.

10. Importantly the CRPD Committee has defined the following as being distinct from inclusion (GC4, para 11):

- **'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.'

11. In contrast, **'Inclusion'** is defined as involving 'a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences.'

12. 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, 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'**.

⁸ 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.



Segregation is a discriminatory practice and a marker of systemic inequality

13. The 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 of students with disability must be understood by reference to the historic and ongoing 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.
14. 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).
15. The CRPD Committee has specifically stated that 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).
16. The [Australian Coalition for Inclusive Education \(ACIE\)](#) of which All Means All is a member, has developed **'Driving change: A roadmap for achieving inclusive education in Australia' (ACIE Roadmap)** that sets out clear goals and guidance, based on six key pillars under which short, medium and long term outcomes are identified, as well as key levers that need to be activated to progressively achieve Inclusive Education in Australia. The six pillars are:
 - Ensure Inclusive Education
 - Phase out segregation
 - Improve educational outcomes
 - Stop gatekeeping and other discrimination
 - Eliminate restrictive practices
 - Prevent suspensions and expulsions
17. The ACIE Roadmap also identifies government agreements, including the NSRA, as key levers to achieve Inclusive Education (p.14). The ACIE Roadmap is in Schedule 1 to this Submission.
18. The CRPD Committee's call to States Parties, including Australia, to commit to working towards an end to the segregation of students with disability as a



fundamental human rights issue under Article 24 of the CRPD remains unaddressed despite:

- 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;
- 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 2 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.
19. In accordance with the CRPD and GC4, the practice of segregating students on the basis of disability is a discriminatory practice that is incompatible with Inclusive Education on the basis of equality and non-discrimination. Importantly, **segregation on the basis of disability is not only discrimination, its prevalence in the education system is a key marker of systemic inequality.**



Systemic failure and human rights violations: The experience of Australian students with disability

20. Overall, the failure of sufficient and robust frameworks to support the realisation of the human right to 'Inclusive Education of students with disability' 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 practices⁹.
21. 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 decades¹⁰ 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);

⁹ 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*.

¹⁰ 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).



- 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);
 - 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).
22. 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. The NSRA provides an opportunity to drive education reform and improvements necessary to ensure a universally accessible, quality and Inclusive Education system consistently with Australia's international human rights obligations to people with disability.



Constitutional arrangements and the NSRA as a key lever to implement Australia's human rights obligations to students with disability

23. Under Australia's constitutional arrangements, responsibility for the provision of education primarily falls to State and Territory governments.
24. However the Australian government has constitutional power to make laws and policies in relation to the education of students with disability. In this regard, the Commonwealth Constitution empowers the Australian Government with respect to 'external affairs' pursuant to section 51(xxix), including by overriding inconsistent State legislation and policy pursuant to section 109. As noted by Stubbs, Webster and Williams in their Research Report for the Royal Commission into Violence, Abuse Neglect and Exploitation of People With Disability 'there is considerable constitutional scope for the Australian government to expand its existing support for and protection of the rights of persons with disability'¹¹.
25. In our view, the NSRA should explicitly recognise Australia's obligations under the CRPD and responsibility to students with disability, to ensure an Inclusive Education system.

Conclusion

26. 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.
27. All Means All considers that the current 'dual system' architecture which separates and excludes students based on disability is not only discriminatory and in violation of their human rights, it has demonstrably failed them as they remain some of the most marginalised and with the poorest outcomes within and beyond education systems.
28. As such, it is critically important that the NSRA does not support, permit, perpetuate or increases the segregation of Australian students with disability,

¹¹ Mark Stubbs, Adam Webster and John Williams, 'Research Report: Persons with Disability and the Australian Constitution' (2020), Royal Commission Into Violence, Abuse, Neglect and Exploitation of People With Disability, p.1 <https://disability.royalcommission.gov.au/system/files/2020-10/Research%20Report%20-%20Persons%20with%20Disability%20and%20the%20Australian%20Constitution_0.pdf>.



which is contrary to Australia's obligations under the CRPD. Rather, the NSRA should be utilised as one of the key levers to ensure Australia's international human rights obligations in relation to the Inclusive Education of people with disability and a Better and Fairer education system that does not marginalise and segregate them.

29. Specifically and as set out in our Recommendation 2, we consider that the NSRA:

- (a) should explicitly refer to the right of people with disability to Inclusive Education and the obligations of governments across Australia to ensure Inclusive Education systems;
- (b) is directed to ensuring systemic reforms to implement Inclusive Education as a fundamental right of all students including students with disability; and
- (c) imposes specific requirements and limitations on the use of Commonwealth funding by States and Territories, to ensure that students with disabilities have access to quality, universally accessible and Inclusive Education systems across Australia consistently with Australia's obligations under the CRPD.

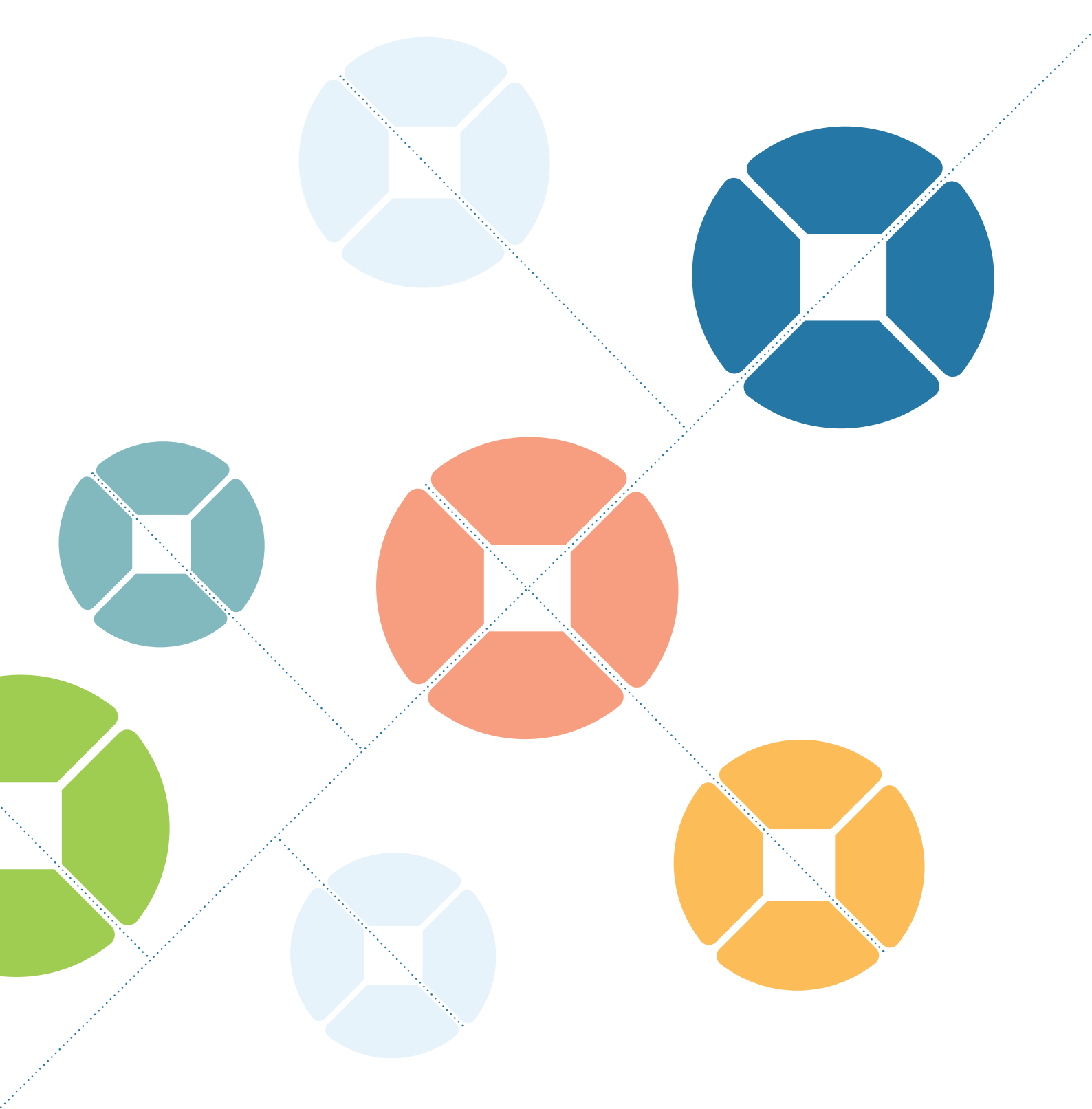
30. We hope that the Minister and Expert Panel adopt our Recommendations, including our Recommendation 1 in support of the CYDA Submission, and recognise the urgent necessity of reforms to ensure Inclusive Education as a necessary step towards achieving an inclusive Australian society and addressing the deep and systemic disadvantage and inequality experienced by people with disability.

For more information you can contact All Means All on: [REDACTED]



Schedule 1 – Driving change: A roadmap for achieving inclusive education in Australia

(see next page)



Driving change: A roadmap for achieving inclusive education in Australia

February 2021

Driving change: A roadmap for achieving inclusive education in Australia

Realising inclusive education in Australia for students with disability is essential for creating the inclusive society we all want, and lifelong benefits for children and young people.

A transformation in education is needed to ensure Australia complies with the United Nations Convention on the Rights of Persons with Disabilities (CPRD)

All Australian children must be welcomed and supported at their local school and provided with a high quality inclusive education. Sadly, for too many children and young people with disability, this is not the case.

We know that inclusive education is essential for creating the inclusive society to which every Australian is entitled.

Fifty years of evidence tells us that inclusive education best prepares students with disability for life and success. But students with disability in Australia face challenges in accessing inclusive education as recognised by the CPRD, and often face discrimination, segregation from their non-disabled peers, bullying, restrictive practices and suspensions and expulsions.

The Australian Coalition for Inclusive Education (ACIE) is a national coalition bringing together organisations that share a commitment to advance inclusive education in Australia and across state and territory education systems, including government and non-government schools.

We know that inclusive education is essential for creating the inclusive society to which every Australian is entitled.

Why a roadmap?

A roadmap is a journey from a starting point to an end destination. The end destination we want is inclusive education in Australia, a fundamental human right recognised in the CRPD and defined in General Comment No.4, for all children and young people with disability, without exception.

Australia has many educational stakeholders across state and territory government and non-government sectors, including students themselves, parents, teachers, principals, professional associations/unions, academics and more. Our starting point is that all education stakeholders want the best for students with disability.

However, the best cannot be achieved when we have education systems that continue to overlook the human rights of students with disabilities and the strong evidence base for inclusive education.

All parts of the system need to work together to ensure that inclusive education is achieved. While different education stakeholders are at different starting points along the roadmap to inclusive education, the end goal is very clear. Hence this is why we have developed this roadmap, *Driving change: A roadmap for achieving inclusive education in Australia*. It aims to assist educational stakeholders on this journey over the next 10 years.

A note on terminology

In this roadmap we have adopted the same terms used in the CRPD General Comment No.4 Right to Inclusive Education.

Definitions in CRPD General Comment No.4 Right to Inclusive Education.

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.

Inclusion involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences. Placing students with disabilities within mainstream classes without accompanying structural changes to, for example, organisation, curriculum and teaching and learning strategies, does not constitute inclusion. Furthermore, integration does not automatically guarantee the transition from segregation to inclusion.

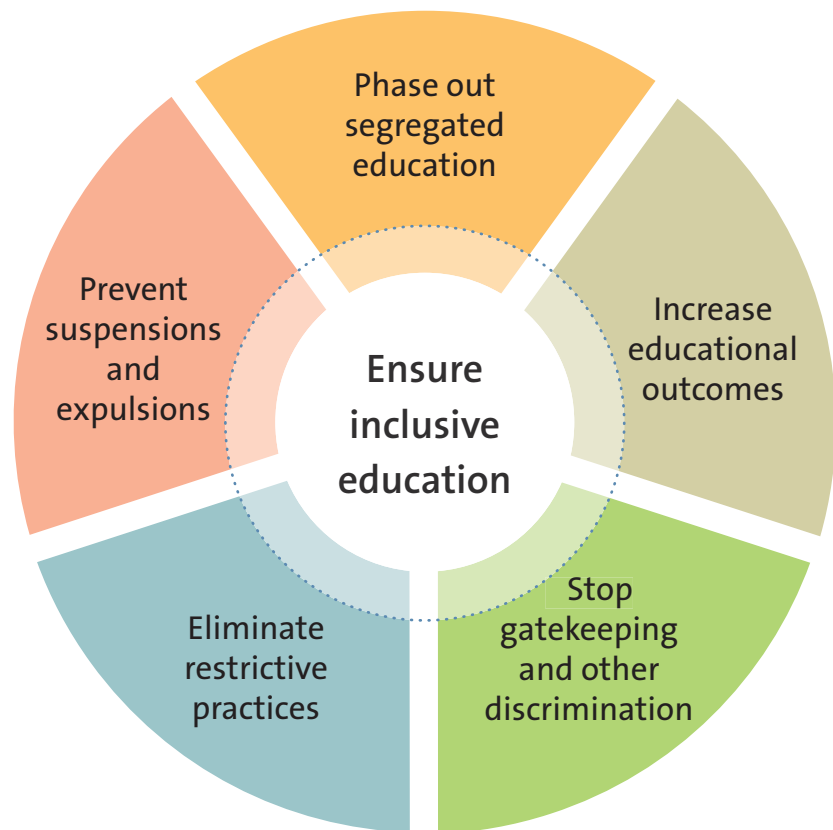
Broadly, the term ‘segregation’ is used to refer to systems, policies or practices, including but not only in education, that share the characteristic of separating a group of people, usually based on a minority attribute – such as disability – from the dominant or majority group.*

It is worth noting that throughout Australia there are many different labels applied to settings where education services are delivered to students with disability separately from students without disability (e.g. ‘special school’ ‘specialist’ school or unit or classroom, ‘schools for specific purposes’, ‘special developmental’ schools, ‘education support’ units, ‘flexible learning’ centres, ‘learning studios’, ‘learning support’ centres, ‘multi categorical’ classes, diverse learning programs, learning enrichment centre, resource centres, disability units, and even ‘inclusive learning’ units and others).

**In December 2020, disability rights and advocacy organisations endorsed a position paper asking the Disability Royal Commission to actively work toward the goal of ending the segregation of people with disability in schools, housing and workplaces. For more information and to endorse access www.dpoa.org.au/endsegregation*

Our roadmap for change

Inclusive education recognises the right of every child and young person – without exception – to be welcomed as a valued learner and genuinely included in general education. It involves ensuring that learning environments and teaching approaches support full participation of all children and young people on an equal basis regardless of individual attributes or characteristics.



Our Roadmap for achieving inclusive education in Australia is underpinned by six key pillars to help realise inclusive education in Australia and prevent the violence, abuse, neglect and exploitation of students with disability.

These pillars are drawn from the evidence base and embed the rights of students set out in the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD).

The Roadmap for achieving inclusive education in Australia has two key sections: the outcomes that need to occur, stepped out over the next 10 years, and the key levers for change needed to realise these outcomes.

1

Outcomes required to realise inclusive education and prevent violence, abuse, neglect and exploitation of students with disability



Ensure inclusive education

Inclusive education recognises **the right of every child and young person** – without exception – to be welcomed as a valued learner and genuinely included in general education. It involves ensuring that learning environments and teaching approaches support full participation of all children and young people on an equal basis regardless of individual attributes or characteristics.¹

1 The CYDA fact sheet is drawn from the 2019 report *Towards inclusive education: a necessary process of transformation*. It was written by Dr Kathy Cologon, Department of Educational Studies, Macquarie University for Children and Young People with Disability Australia.

● Short-term outcomes (1–2 years)

Pre-service teaching units and assessment adequately embed inclusive education principles across curriculum delivery, including universal design for learning and quality differentiation.

There is widespread and high quality teacher and principal professional development in inclusive education.

The Australian and state/territory governments have agreed to a 10-year Inclusive Education Plan, developed alongside people with disability, experts and advocates.

There is a positive narrative for inclusive education as an expectation and human right, which includes positive media coverage for students, teachers, schools and the broader community.

Students, parents, unions, professional associations and education system employees can all articulate what

inclusive education is – and what it isn't – in line with the UN CRPD.

Principals, teachers, professional associations and unions are advocating for all elements of inclusive education and no further investment in segregated settings.

The components, evidence and benefits of inclusive education are well known and able to be described by teachers and principals.

'Integration' approaches in general education are recognised as inadequate and distinguished from inclusive education.

Families have robust, transparent and independent complaints mechanisms when their child does not experience inclusive education (e.g. an independent tribunal or commission established by national harmonised legislation and implemented locally).

● Medium-term outcomes (3–5 years)

States and territories have a transparent improvement framework for inclusive education that is rigorously monitored and reported against, with an independent national oversight body/commission overseeing this work.

Schools and school systems are held accountable for inclusive education (e.g. via a transparent and independently assessed scorecard of schools).

National data are collected on the experience of students with disability in inclusive education

(or not) from existing and new sources across a range of data points:

- student voice and satisfaction
- attendance
- learning and engagement
- educational achievement
- post-school transition and outcomes
- accessibility, support and adjustments
- funding provided and spent
- inclusive education Key Performance Indicators (KPIs) monitoring change over time.

● Long-term outcomes (5–10 years)

Inclusive education is normalised in practice for students with disability.

Phase out segregation

Segregated education does not provide a pathway to an inclusive life for people with disability.

Segregated education **is not** inclusive education.

As the United Nations' CRPD states, "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."²

● Short-term outcomes (1–2 years)

A target is set that by 2023 there are no new enrolments of students entering the first year of primary school in special school, or special units/special classes in 'mainstream' schools.

There is research (quantitative, qualitative and longitudinal) on the consequences of segregated and non-inclusive education and its impact on:

- emotional and mental wellbeing of students
- academic achievement, attainment and outcomes
- employment pathways
- health outcomes
- housing solutions
- juvenile justice
- complementary and compensating support services
- life expectancy
- lifetime costs.

To identify system issues and barriers, there is independent research into the factors that families have taken into account when choosing segregated education.

The Australian and state/territory governments lead the development of and commitment to a plan to phase out segregated education for all students, which includes milestones, key performance indicators, and monitoring and accountability.

The transition timetable is child-centred.

There is a commitment to no new investment in segregated infrastructure at a state/territory or national level.

There is broader application of existing and new models of best-practice teaching and educational practice to support inclusion of all students.

New models have been co-designed with young people with disability, and they are involved in the change as paid community advocates.

There is funded individual advocacy and support for the transition for students and families.

The community, families, educators (including early childhood) and education system leaders recognise that segregation is not effective and there is support for the transition to inclusive education.

Existing support programs and services are refocused to promote de-segregation and transition (e.g. My Time funding, Inclusion Support Program (early childhood and before and after school care), the National Disability Insurance Scheme (NDIS), Early childhood funded services).

2 Paragraph 12 of General Comment No.4 calls for 'ending segregation within educational settings by ensuring inclusive classroom teaching in accessible learning environments with appropriate supports' and 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', paragraph 13 states that 'the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation', paragraph 39 provides that the full realisation of Article 24 'is not compatible with sustaining two systems of education: mainstream and special/segregated education systems' and paragraph 68 calls for 'a transfer of resources from segregated to inclusive environments'.

Phase out segregation

● Medium-term outcomes (3–5 years)

There are no new enrolments in special schools in primary and secondary levels (via a grandfathering method), and special units/special classes in ‘mainstream’ schools are closed.

There are policies and legislation in place to support a reduction in segregated education over time, including changes to state and territory legislation that currently supports ministerial (or equivalent) enrolment override.

The rights of students with disability to inclusive education is reflected in education policy and practice, and the myth of parental choice in segregation is debunked.

It is widely understood by parents, educators and the community that transition to inclusive education is achievable and should not be feared.

There is no further investment nationally or in the states/territories in a dual-track education system that segregates students with disability, and current specialised settings are re-purposed for general student populations.

● Long-term outcomes (5–10 years)

Segregated education no longer exists in Australia.

All primary and secondary schools are welcoming and inclusive of students with disability, with measured improvement in academic achievement and employment outcomes.

Improve educational outcomes

Students with disability in Australia experience considerably poorer educational outcomes than non-disabled students. Around a third of people with disability aged 20 or over have completed Year 12-level schooling – compared with 62 per cent of people without a disability.

● Short-term outcomes (1–2 years)

The school community embraces all learners and the value of students with disability to all learners is well known.

The role of teachers' aides in the Australian school system is independently reviewed, with recommendations for the future to ensure strong educational outcomes based on research and best practice.

All students with disability experience high learning and development expectations and have an Individualised Educational Learning Plan. This plan is developed in consultation with the family, the student and the school.

All pre-service teacher training includes universal design for learning and how to differentiate curriculum for students with disability, and there is upskilling of the current teaching workforce.

The Australian Curriculum embeds universal design for learning principles and provides examples and modelling of how to differentiate curriculum.

The educational outcomes and post-school pathways of students with disability are routinely collated and publicly reported.

The relationship between educational outcomes and being a valued member of the school and class community is well known, and efforts to improve are articulated in school improvement planning.

Students with complex communication needs (CCN) are supported in their right to a comprehensive communication system relevant to their individual requirements, allowing them to participate, access the curriculum, learn and achieve with equity.

● Medium-term outcomes (3–5 years)

Best practice in educating students with disability is occurring in Australian schools and independently monitored through school improvement methods.

All students with disability are learning the same curriculum as their peers, reasonably adjusted and differentiated to their needs.

Universal Design for Learning principles are embedded in all aspects of education design and delivery so the class lesson is accessible to the greatest number of students and the need for individualised adjustments is reduced.

● Long-term outcomes (5–10 years)

Increased retention of students with disability until year 12.

Increased rates of young people with disability enrolled in higher education and vocational education and training.

The gap in attainment and educational outcomes for students with disability and other learners is closing.

Stop gatekeeping and other discrimination

‘Gatekeeping’ occurs when there is formal or informal denial of access or informal discouragement of children with disability attending their school of choice. It may include school staff saying that a child is better off going to another school, a special school or a school with a special unit because their school doesn’t have enough resources or the skill to support the child. It may also include refusing to enrol a child with disability, only offering part-time hours, or encouraging home-schooling. It is discriminatory, devaluing and demeaning.

● Short-term outcomes (1–2 years)

Gatekeeping is well defined and:

- families know how to identify it, and what to do if it occurs
- there are consequences for schools that engage in gatekeeping.

Families have robust, transparent and effective mechanisms to make complaints and have them remedied at a school level, and access to an independent national oversight body/commission if the complaint is not resolved.

Schools are required to record the number of enrolments they have refused or discouraged and the reasons why.

Families have a process to provide feedback on their enrolment experience, and systemic and individual issues are addressed.

Regional offices are working with schools to identify and understand why students with disability are not enrolled at or attending their local or closest school.

There is zero tolerance of gatekeeping in the Australian school system, with punitive consequences if this does occur.

● Medium-term outcomes (3–5 years)

Gatekeeping does not occur.

School performance is measured by participation and inclusion and embracing all learners.

The ratio of students with disability compared to the rate in the community is reflected in school enrolments (to prevent quasi-segregation via ‘lighthouse’ schools conducting best practice).

Eliminate restrictive practice

‘Restrictive practice’ is any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability. This can include physical, mechanical or chemical restraint. It can also include psycho-social restraint, which involves using intimidation or threats to control a person. Restrictive practices are cruel, inhumane and degrading.

● Short-term outcomes (1–2 years)

There are clear definitions of restrictive practices in education and these are well known by educators, parents and school system employees.

There are independent senior practitioners for preventing restrictive practice in every jurisdiction and they provide expertise in alternatives to these measures.

A multi-layered approach (e.g. wrap-around supports) is developed within each school to be responsive and proactive in supporting students to minimise the use of restrictive practices.

Cases of restrictive practice are independently investigated and reviewed to identify root causes and systemic issues.

There is an understanding of how to regulate against restrictive practices.

Data are routinely collected and transparently reported, including applications for the use of restrictive practices, unauthorised restrictive practices occurring and prevention activities.

Teachers are trained in alternative empathetic supports and approaches so that restrictive practices are eliminated.

Policies and procedures are developed to support inclusive education, as opposed to behaviour control.

Students are able to voice their concerns and be heard.

All primary and secondary schools are required to develop a plan for reducing and applying a strong human rights based standard to restrictive practices.

● Medium-term outcomes (3–5 years)

There is recognition that there is no such thing as a low or no risk restrictive practice.

There is a strong and enforceable regulatory regime to prevent restrictive practices in school.

Restrictive practices, including restraint and seclusion, are eliminated.

Stories of success in reducing and eliminating restrictive practice are shared.

There are strong consequences for schools and educators that use restrictive practices.

Schools have developed a culture of flexibility and accommodation to support all students.

Prevent suspensions and expulsions

Suspensions and expulsions are familiar practices in the school experiences of students with disability, which shows the lack of understanding and support available. Almost 15 per cent of students with disability surveyed by CYDA in August and September 2019 had been suspended in the previous 12 months; 1.8 per cent were expelled.³

● Short-term outcomes (1–2 years)

Data on suspensions and expulsions of students with disability are routinely collected and publicly reported across the states and territories (e.g. number of suspensions/expulsions, gender and age of student, length of suspension, reasons, actions taken following suspension to prevent future suspensions and expulsions).

Each state and territory is required to have policies and practices that seek to reduce and eliminate suspensions and expulsions for students with disability, taking a whole-school approach.

Legislation is enacted in each jurisdiction to prevent suspensions and expulsions of students with disability.

Families have robust, transparent and independent complaints mechanisms to appeal and complain about suspensions and expulsions.

Schools and teachers are trained to prevent in-school and out-of-school suspensions and expulsions, and to make adjustments and modifications to keep students engaged in their learning.

When a student is suspended more than once, an independent investigation is undertaken to ensure the school's compliance with policies.

The impact of suspensions and expulsions on students is captured (e.g. student voice).

● Medium-term outcomes (3–5 years)

The number of suspensions and expulsions of students with disability is decreasing.

Schools and school systems are held accountable for reducing suspensions and expulsions of students with disability (e.g. via a scorecard of schools that is transparent).

School suspensions are only considered as a last resort for the most serious behavioural transgressions and in response to grave risks to health and safety.

● Long-term outcomes (5–10 years)

All students with disability are wholly included full-time, or there is a short-term plan to get them back to school full-time.

³ Children and Young People with Disability Australia (2019) *Time for Change: The state of play for inclusion of students with disability, Results from the 2019 CYDA National Education Survey*

2

Key levers for change



Key levers for change

All our children deserve better and the Disability Royal Commission is now giving us the opportunity to bring to light these wrongs and make long overdue changes to the education system.

a. Legislative/policy change

Recommendations

- All law and policy reform should comply with the CRPD.
- Review the Disability Discrimination Act, noting that anti-discrimination legislation can only go so far in helping to realise inclusive education.
- Meaningfully review the Disability Standards for Education, in line with the CRPD.
- Develop a National Inclusive Education Act, proactive rather than discrimination-based legislation.
- The Australian and state/territory governments commit resources and collaborate to develop and implement a new National Disability Strategy and National Disability Agreement (NDA), which provides for inclusive education and includes:
 - the development of an endorsed 10-year Inclusive Education Plan
 - shared responsibility to improve education systems and schools to ensure inclusive education, including indicators and outcomes
 - educational improvement targets and outcomes for students with disability that are reflected in the National School Reform Agreement
 - clear responsibilities for advocacy outside of the NDIS, including individual advocacy for families and young people with disability.
- Reform school funding models and move to functional needs-based funding (e.g. the Tasmanian model).
- Develop a national accreditation framework for inclusive education (along the lines of the National Quality Framework for Early Childhood Education).
- Audit education legislation in states and territories and amend or develop new legislation to realise inclusive education.
- State and territory education jurisdictions develop state-based inclusive education policies (inclusive of Catholic and independent schools sectors).
- Establish an independent national oversight body/commission for complaints resolution, with 'own motion' powers to conduct systemic inquiries into violence, abuse, neglect and exploitation of students with disability in the education system.

b. Monitoring/accountability

Recommendations

- Deliver on the Australian Government Department of Education, Skills and Employment's commitment to complete an evaluation of the Inclusion Support Program (ISP).
- Commit to post-evaluation investment in the ISP linked to indicators of outcomes, and shared responsibility to improve mainstream education services per a new NDA.
- Invest in information to support better inclusive practice and funding to support students with disability.
- Deliver on the Australian Government Department of Education, Skills and Employment's commitment to review the loading for students with disability and invest in continuous improvement of the NCCD (Nationally Consistent Collection of Data on School Students with Disability).
- Commit to post-review investment in the NCCD linked to indicators of outcomes, and shared responsibility to improve mainstream education services per a new NDA.
- Develop an inclusion scorecard for schools that has official status, is transparent and independently assessed (e.g. along the lines of the Australian Children's Education and Care Quality Authority). This includes:
 - educational inclusion
 - student voice/feedback
 - family feedback
 - number/proportion of students with disability
 - intersectional representation (gender, CALD, First Nations, out-of-home care, rural and remote, etc).
- Develop a National Minimum Dataset for education of students with disability (that can be analysed by state/territory, region, sector, demographic characteristics such as gender), including:
 - student voice and satisfaction
 - attendance
 - learning and engagement
 - educational achievement
 - support and adjustments
 - funding provided and spent
 - transition to inclusive education KPIs – experience and outcomes
 - retention, post-school pathways and transitions
 - educational achievement (e.g. NAPLAN)
 - educational adjustments (e.g. NCCD)
 - intersectional data (CALD, First Nations, out-of-home care, rural and remote, etc)
 - suspensions/expulsions and restrictive practices
 - number of students home-schooling.

c. Parent education/support

Recommendations

- Provide further funding for independent disability advocacy for families and young people with disability, to ensure students can have their rights to inclusive education upheld.
- Invest heavily in parent education, starting early in a child's life, so they are aware of children's rights to and benefits and outcomes of inclusive education and move away from thinking children need 'special' education.
- Support family involvement in achieving inclusive education.
- Invest in a national, state and territory-supported campaign/ a broad communications strategy to increase community understanding of the importance of inclusive education. This should include case studies, social change narratives and whole-of-community messaging.

d. Teacher education

Recommendations

- Research and develop the evidence base of best practice models and ensure this is widely disseminated (e.g. using co-teaching and peer tutoring, rather than teachers' aides).
- Train teachers in team-based approaches and collaborative models to support students with disability, including family-centred practice.
- Develop a national standard for inclusive education in pre-service teacher training.
- Fund postgraduate qualifications in inclusive education and strategically use and reward expertise across education systems to support schools in inclusion.
- Increase the numbers of teachers with disability.
- Invest in professional development for principals and teachers in inclusive education and preventing discrimination, violence, abuse and neglect of students with disability.

e. School cultures for inclusion

Recommendations

- Adopt approaches for teaching diverse classes using methods such as universal design for learning approaches.
- Develop resources and toolkits for families and educators on inclusive practices.
- Develop additional measures for student success other than NAPLAN and ATAR (e.g. an inclusion index).
- Reward educators and schools for good practice (e.g. through remuneration, status and profile).
- Measure and evaluate whole-of-school inclusive practice using new and existing models.

f. Student agency and voice

Recommendations

- Involve students with disability in democratic processes at the school and at regional and state/territory levels.
- Provide accessible information that allows students to safely learn about their rights and the process to complain.
- Develop programmatic responses for activating student voice.
- Seek feedback from students and ex-students with disability about what works, especially from those with complex communication needs and intellectual disability.
- Incorporate student voice in educational policy and practice.

The Australian Coalition for Inclusive Education (ACIE) is an initiative bringing together organisations that share a commitment to advance inclusive education in Australia and across state and territory education systems, including government and non-government schools.



The Australian Coalition for Inclusive Education would like to acknowledge the traditional custodians of the lands on which this report has been written, reviewed and produced, whose cultures and customs have nurtured and continue to nurture this land since the Dreamtime. We pay our respects to their Elders past, present and future.

This is, was, and always will be Aboriginal land.

Driving change: A roadmap for achieving inclusive education in Australia
developed by the ACIE is endorsed by the following organisations.





**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

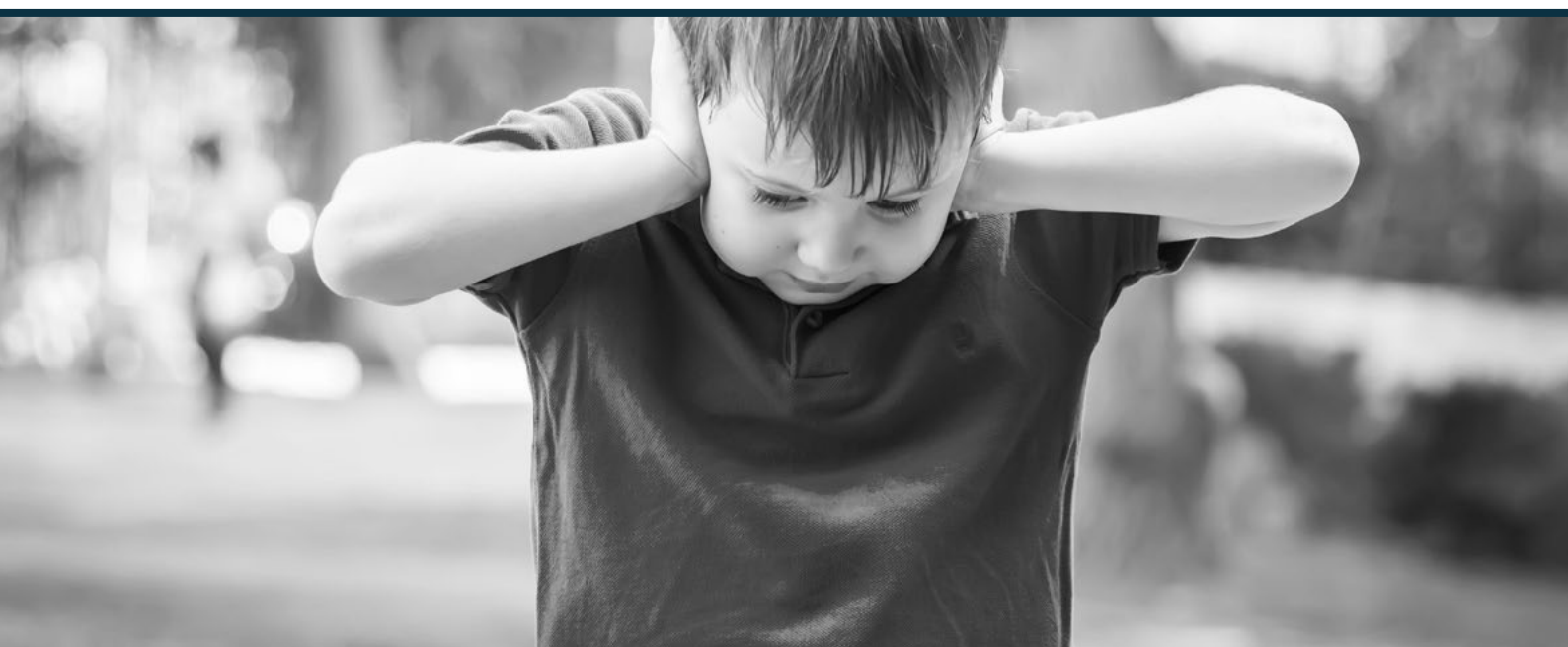
In the context of education, the CESCR Committee stipulates that segregated educational systems breach the ICESCR.¹¹ Although ICESCR recognises that parents have a right to choose the schools that their children attend, this right is limited to a choice between public and private education where the 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.



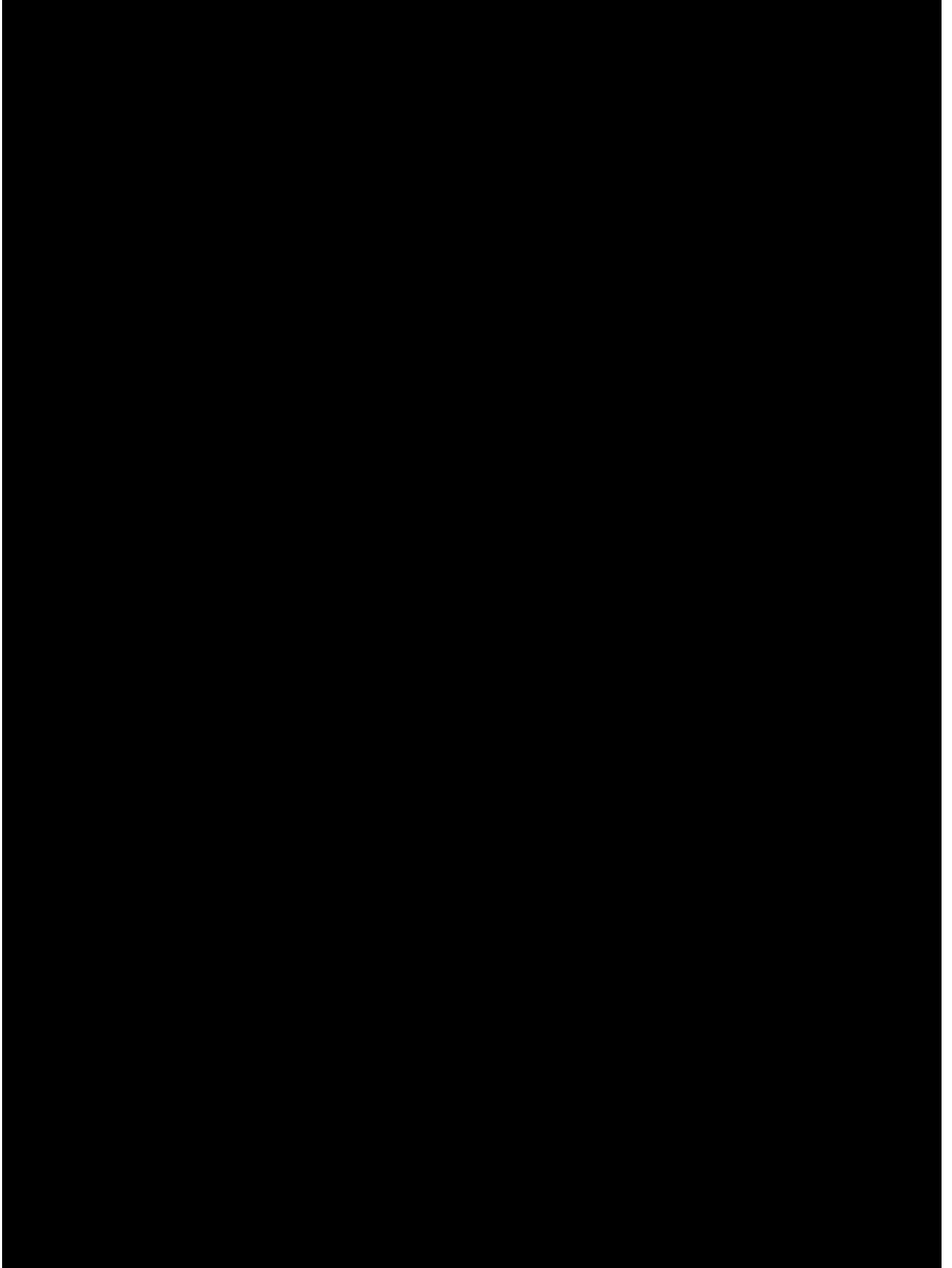
Actions to end segregation must include:

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



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 2023. 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."