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Ms Megan Mitchell
National Children's Commissioner
Australian Human Rights Commission
Sydney NSW

Dear Commissioner Mitchell

Consultation on the Rights of the Child – Education of Children with Disability

I write on behalf of All Means All - The Australian Alliance for Inclusive Education.

We are a nationwide network of people with disability, families, teachers, academics and organisations working together for the implementation of an inclusive education system and the removal of the legal, structural and attitudinal barriers that limit the rights of some students to access full inclusive education in regular classrooms in Australian schools. You can visit our website for more information at www.allmeansall.org.au

This submission focusses on the right of children to an inclusive education and in particular, children with disability and diverse learning needs.

Summary

The right of children with disability to inclusive education is a fundamental human right as recognised in various international human rights instruments.

However, the maintenance and continued investment in a “dual system” of education, comprising separate segregated settings for students with disability, whether in “special” schools, co-located education support units or separate classrooms in general education schools, is fundamentally discriminatory, not supported by the research evidence and inconsistent with inclusive education as the modality by which children with disability realise the universal human right to education.

While there have been efforts to implement inclusive education around Australia with varying fidelity and success, the failure of the Australian and State Governments to systemic transformation, including the development of a coherent national strategy for systemic transformation towards a universal inclusive education system that

welcomes and provides quality education to all learners, continues to mean that many children with disability are denied their basic right to education, in serious violation of their fundamental human rights.

Human Rights Framework for inclusive education

The right to education is one of the most important rights in international human rights law and is protected by several international instruments.

Article 26 (1) of the Universal Declaration on Human Rights provides that '[e]veryone has the right to education'. This is also recognised in Article 13 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) as 'the right of everyone to education' and in the Convention on the Rights of the Child (**CRC**) which includes detailed provisions on the right to education.

The Committee on the Rights of the Child has clarified the meaning and scope of this right through General Comment No. 1 on the aims of education (Article 29 (1) of the CRC). It is worth noting that Article 2 of the CRC mentions disability in the list of prohibited discrimination grounds and Article 23 (3) of the CRC states that children with disabilities must have access to education 'in a manner conducive to the child's achieving the fullest possible social integration and individual development'.

However, the Convention on the Rights of Persons with Disabilities (**CRPD**) (ratified by Australia on 17 July 2008) makes it clear that inclusive education is the means by which children with disability realise their right to education, without discrimination and on equal terms with others (see Article 24). In other words, the right of children with disability to an education is in fact the right to an inclusive education.

Article 24.1 of the CRPD requires State Parties to "*ensure an inclusive education system at all levels*" and Article 24.2 provides more specifically that persons with disabilities are not to be excluded from the general education system on the basis of disability and that they have a right to access an inclusive, quality education on an equal basis with others in the communities in which they live. Article 24 also mandates reasonable accommodation of the individual's requirements and for supports to be provided "within the general education system".

Sustainable Development Goal 4 which is not limited to people with disability, aims to "ensure inclusive and equitable quality education and promote lifelong learning opportunities for all."

The meaning of inclusive education

In August 2016, the UN Committee on the Rights of Persons with Disabilities issued General Comment No. 4 on the right to inclusive education.

A key reason for the development of a General Comment on inclusive education was the Committee's concern, after reviewing a decade's worth of country implementation reports, of widespread failure to ensure compliance with Article 24, including because of a lack of clarity around the meaning of "inclusive education".

As recognised by the European Commissioner on Human Rights in a recent comment, some of this confusion has arisen through the "rebranding" of segregated models of delivery as "inclusive":

“In other instances, countries appear to be willing to settle for some form of segregation and rename segregated forms of education under a more acceptable brand (such as ‘appropriate education’ in the Netherlands) or even as inclusive education (for instance ‘inclusive education centres’ in Romania).”¹

As such, perhaps the most critical clarification in General Comment No.4 is as to the need to distinguish between “exclusion”, “segregation”, “integration” and “inclusion”. Paragraph 11 sets out important definitions:

- “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.

It is clear from General Comment No.4 that inclusive education is not the segregation of students with disability into “special schools” or “special” units or classrooms within general schools (i.e. separate buildings or classrooms for students with disability co-located within regular schools). And nor is it the mere physical placement of students with disability in general education classrooms without adequate supports or adaptations, so that they are unable to meaningfully access the physical, learning or social environments and are therefore excluded from participating and belonging.

Further, inclusive education is not physical placement in a general classroom for the purpose of receiving a separate education, often delivered by a teaching assistant rather than the classroom teacher and sometimes involving a completely separate curriculum.

In this regard, it is important to note that the same “rebranding” phenomenon is observed in Australia where special education organisations such as the Australian Special Education Principals Association continue to advance the position that “inclusion is not a place” and that “special schools” and other segregated models can be legitimately characterised as forms of inclusive education², a position that cannot be reconciled with Article 24 of the CRPD, General Comment No.4 or any logical concept of inclusion.

¹ See <https://www.coe.int/en/web/commissioner/-/respecting-the-human-rights-of-persons-with-psychosocial-and-intellectual-disabilities-an-obligation-not-yet-fully-understood>

² See https://www.researchgate.net/publication/227643447_Towards_inclusion_an_Australian_perspective

In his recent paper on inclusive education, the European Commissioner on Human Rights noted the tendency for “vested interests” to preserve the status quo and resist inclusive education:

Professional groups involved in special education, such as teachers, psychologists and testing centres frequently oppose desegregation in order to protect vested interests.” [pp 10-11]³

A correct understanding and application of these concepts is critical to implementing a genuinely inclusive education system as is required for children with disability to realise their human right to education.

In this regard, it is pleasing to see that the Queensland Government recently adopted a human rights based definition of inclusive education through its newly released (22 May 2018) Inclusive Education Policy⁴ - a welcome step in the right direction - although it is too early to assess whether this will be sufficient to drive progressive realisation of an inclusive education system in that State in line with Article 24 of the CRPD and the right of children with disability to an inclusive education.

Unfortunately we are not aware of any other State government adopting a similar position on inclusive education.

It is important to note that the Committee in October 2017 issued questions to Australia about its compliance with the CRPD which will be the subject of review later this year, including notably:

“26. Please explain how the State Party’s new education funding model supports progressive implementation of article 24 of the Convention, including in the light of the Committee’s general comment No. 4 (2016) on the right to inclusive education, which calls for the transfer of resources from segregated to inclusive education settings.”

The experience of students with disability and families

The reality for children with disability in Australia is that, too often, they are offered a “qualified” opportunity to participate in an education system established before people with disability were recognised as holders of educational rights and without regard to their functional needs. That system remains resistant, both culturally and in terms of educational practice, to accommodating their participation and inclusion, particularly for students with intellectual, cognitive or sensory disabilities.

Ten years after the CRPD and notwithstanding the *Disability Discrimination Act* 1992, the experience of children with disability in the Australian education system is too frequently one of discrimination and devaluation, isolation, lack of resources and supports, denial of enrolment or other forms of “gatekeeping”⁵, inadequately trained teachers, lack of expertise in inclusive practices and inflexible structures and

³ See <https://www.coe.int/en/web/commissioner/-/respecting-the-human-rights-of-persons-with-psychosocial-and-intellectual-disabilities-an-obligation-not-yet-fully-understood>

⁴ See <http://ppr.det.qld.gov.au/pif/policies/Documents/Inclusive-education-policy.pdf>

⁵ Gatekeeping” is an unconscionable practice and refers to the formal and informal discouragement of enrolment and attendance of students with disability by local mainstream schools, as identified in 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.

approaches that operate as barriers. Too often, students with disability experience practices that are not evidence-based, that tend to isolate them and that result in a lower quality educational provision and consequently poor educational outcomes.

A recent study of over 700 families across Australia identified that a staggering 71% of those surveyed reported either “gatekeeping” or restrictive practices.

These concerns are backed up by many Parliamentary and departmental inquiries across Australia, notably the national 2016 Report by the Education and Employment References Committee of the Australian Senate into the impact of policy, funding and culture on students with disability⁶.

All Means All hears from families daily reporting these same issues and concerns to us through our closed national peer led forum "School Inclusion Parent Network".

It is clear to us that the experiences of Australian students with disability are strongly characterised by systemic “integration”, “segregation” and “exclusion” – not “inclusive education”, as those terms are defined in paragraph 11 of General Comment No. 4.

The continued operation, demand for and growth of a parallel and high-resourced system of segregated education alongside the general education system, evidences systemic failure of the general education system to ensure access and inclusion of every Australian student and a denial of their fundamental human rights. Reports also suggest significant increases in rates of “home schooling”, particularly for autistic students.

It is particularly disturbing that in the last decade or longer, a period that also coincided with ratification of the CRPD and the introduction of the Disability Standards for Education, there has been significant growth in segregated education of students with disability⁷. This concern has also been expressed at an international level where Australia was asked by the UN Committee on Economic, Social and Cultural Rights to explain (May 2017):

“Rodrigo Uprimny, Committee Expert and Co-Rapporteur for Australia: “As for persons with disabilities and inclusive education, there was evidence of a rise in segregated education. What measures was the Government taking to ensure inclusive education across the country?”⁸

A week before the above Committee session, the Australian government released a fact sheet showing a 35% growth in segregation of students with disability in special schools alone.

As such, while the current and previous governments have expressed their commitment to inclusive education, including through the National Disability Strategy, the growth in segregation speaks to the national failure in education of

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http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Report

⁷ Australian Bureau of Statistics. 2013. Schools Australia. View at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4221.02013> Viewed on 15 April, showing that between 1999-2013, there was an increase in special schools of 17% Australia

⁸ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21677&LangID=E>

children with disability and a denial of their fundamental human right to inclusive education.

Evidence basis for inclusive education

For over 40 years, the body of relevant research into education of students with disability has overwhelmingly established inclusive education as producing superior social and academic outcomes for all students.

Italy ended segregated education in 1978 when it closed its special schools and today 99% of students with disability are fully educated in regular classrooms. More recently, the Canadian province of New Brunswick prohibited segregated education in the public education system through its internationally award-winning legally enforceable Policy 322⁹. Schools like Thuringowa State School¹⁰ in Queensland have demonstrated the benefits of a fully inclusive model applying evidence based practices, and the capacity for schools to transition out of segregated delivery of education services to students with disability into full inclusion for all.

The research has consistently found that academic and social outcomes for children in fully inclusive settings are without exception better than in the segregated or partially segregated environments¹¹.

Unfortunately segregated education remains a historically-entrenched practice that continues to be suggested to families and educators as the appropriate default option, despite having virtually no evidence basis.

In the case of students with intellectual disability, a comprehensive 2008 literature review by Australian academic expert Dr Robert Jackson found that no study has ever demonstrated “special” segregated education to produce better outcomes¹².

The most recent comprehensive review of the research was undertaken in an international report entitled “A Summary of the Evidence on Inclusive Education” released in 2017¹³, by [Dr Thomas Hehir, Professor of Practice in Learning Differences at the Harvard Graduate School of Education](#), with [Abt Associates](#).

The Report, which defines inclusive educational settings in accordance with General Comment No. 4, documents the results of a systematic review of 280 studies from 25 countries.

The Report recognises that growth in inclusive practices stems from increased recognition that students with disabilities thrive when they are, to the greatest extent possible, provided with the same educational and social opportunities as non-disabled students [p4].

⁹ See <http://www.startingwithjulius.org.au/canada-policy322/>

¹⁰

https://mediawarehouse.qut.edu.au/QMW/player/?dID=59155&dDocName=QMW_049204&ref=embed

¹¹ “Inclusion in Education: Towards Equality for Students with Disability“, Dr K. Cologon, Children and Young People With Disability Australia

¹² Jackson, R (Ibid), at page 13 stated “No review could be found comparing segregation and inclusion that came out in favour of segregation in over forty years of research”

¹³ [http://alana.org.br/wp-](http://alana.org.br/wp-content/uploads/2016/12/A_Summary_of_the_evidence_on_inclusive_education.pdf)

[content/uploads/2016/12/A_Summary_of_the_evidence_on_inclusive_education.pdf](http://alana.org.br/wp-content/uploads/2016/12/A_Summary_of_the_evidence_on_inclusive_education.pdf)

Parental "choice" and inclusive education

In our society, we recognise that it is parents who should determine, in the first instance, what is in their child's best interests. Most parents want to exercise choice to give their child the best chance of success in life.

However, the parental "choice" argument is frequently used by Governments in particular to deny children with disability their human right to inclusive education. In this regard, parental choice in education is recognised in Article 13(3) and (4) of the ICESCR but this is aimed to protect cultural rights, not discriminatory practices, and is expressed to depend on minimum schooling standards that are determined by the relevant Government (including in light of its obligations under Article 24 to provide inclusive education).

Choosing a segregated specialist classroom is not like choosing a private school over a public school, or a Catholic school over a non-denominational school. With over 40 years of research evidence overwhelmingly in favour of educating disabled students in the same classrooms as their non-disabled peers and demonstrating unequivocally superior long-term academic, social and economic outcomes, we know that the decision to segregate is not just a matter of cultural or philosophical preference. It is a decision that goes to the quality of the education and outcomes – and therefore it goes to equality of educational opportunity and provision – and therefore to discrimination against segregated children with disability as a group.

As recognised in the 1954 US case of *Brown v Board of Education* in relation to racial segregation, the notion of "separate but equal" has no legitimate place in education.

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group...Any language in contrary to this finding is rejected. We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal" – Earl Warren, Chief Justice of the U.S. Supreme Court.

We do not see this reasoning to have different application to students with disability.

Further, as stated expressly in General Comment No.4, inclusion education is to be understood as:

"A fundamental human right of all learners. Notably, education is the right of the individual learner, and not, in the case of children, the right of a parent or caregiver. Parental responsibilities in this regard are subordinate to the rights of the child."

The idea that parental rights to choose have some limitations is not radical. Government law and policy both enable and restrict educational options in a range of ways. For example, parents do not have the right to choose not to educate girls or to choose that girls should not be taught academic subjects, even though these beliefs were not uncommon that long ago and parents did exercise educational choices between girls and boys in that way.

Nowadays, we would see the exercise of such choice for what it is, namely educational discrimination.

Similarly, children with some disabilities used to be denied access to any education. As a society we no longer believe that is acceptable.

However, it is important to recognise that there are many reasons why parents choose segregated education for their children with disability and that, in general they responding to pragmatic limitations and deficiencies of the regular education system – from “gatekeeping” by schools that don’t welcome and support their child, to poor practices, safety concerns, inadequate responses to bullying and social vulnerabilities, to school cultures that are not inclusive of students with disability and their families. Ironically, these failures are sometimes attributed to “inclusive education” itself – in reality they are due to a lack of inclusiveness, not because if it.

While every parent would like to make choices in their child’s best interest, when it comes to education of children with disability, the range of options that some families are provided with are so poor that parents are effectively forced to make a “least worst” choice – between a low outcomes segregated setting (i.e. a special school or education support unit) that welcomes them and their child or a regular setting that fails to welcome and accommodate their child.

In most cases, parents accept segregation of their child because the regular education system did not, would not or was not expected to provide the appropriate supports and adjustments – which under Article 24 it is obliged to do.

The flow of students to segregated settings based on "parental choice" is not evidence of parental support for segregation of their children, it is the symptom of how far the regular education system has to go in order for it to be a genuinely inclusive system as required by Article 24 of the CRPD as the thematic expression of the rights of children with disability that are also protected under the CRC, ICESCR and the Universal Declaration on Human Rights.

Conclusion

All Australian Governments have a duty to ensure that laws, policy and funding progress the implementation of an inclusive education system as required under our international human rights obligations.

The rise in segregated education and home-schooling and the experiences of children with disability and their families are clear evidence of serious and ongoing violations of the right to education for children with disability.

Yours sincerely



Robert Jackson PhD

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