



Australian
Human Rights
Commission

Inclusive Education for People with Disability

Submission to the Royal Commission into Violence, Abuse,
Neglect and Exploitation of People with Disability

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to provide this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission).
2. The Commission is Australia's National Human Rights Institution, with recognised independent status and roles in United Nations human rights fora. The Commission's purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
3. The Royal Commission provides an important opportunity to prevent and redress violence, abuse, neglect and exploitation of people with disability. More generally, the Royal Commission has the potential to play a key role in upholding the equality, dignity and autonomy of people with disability and ensuring their full participation and inclusion in Australian society. Ultimately this will benefit all Australians, with and without disability.
4. The Commission emphasises the need to ensure that people with disability are at the centre of all aspects of the Royal Commission's work and that they are provided with adequate support services throughout the process. Particular efforts are needed to ensure that the Royal Commission is accessible to Aboriginal and Torres Strait Islander people with disability, culturally and linguistically diverse (CALD) people with disability, and those from rural, regional and remote areas of Australia. In this regard, the Commission welcomes the development and publication of the Royal Commission's *Accessibility and Inclusion Strategy*.¹
5. The Commission welcomes the endorsement of a human rights-based approach in the Royal Commission's Terms of Reference. The Commission also welcomes the recognition in the Terms of Reference of the intersectional nature of discrimination and disadvantage, noting that the specific experiences of people with disability are multilayered and can be influenced by experiences associated with age, sex, gender, gender identity, sexual orientation, intersex status, ethnic origin and race.

6. The Commission is well placed to assist the Royal Commission by providing a human rights framework to guide the development of findings and recommendations within the Terms of Reference. The Commission will provide a number of written submissions on specific issues raised by the Royal Commission in the course of its work. In addition, the Commission would be happy to appear before the Royal Commission and to provide further clarification on its submissions or other issues of interest to the Royal Commission.
7. This submission addresses the issue of education for people with disability in Australia, which was the focus of the Royal Commission's *Education and Learning Issues Paper*² (Issues Paper) released in October 2019 and its first public hearings in Townsville in November 2019. This submission provides: an overview of the international and domestic frameworks relevant to education for people with disability; an analysis of the right to inclusive education and its implementation in Australia; a human rights perspective on particular issues raised in the Issues Paper; and a number of concrete recommendations to improve implementation of the right to inclusive education for people with disability in Australia.

2 Summary of recommendations

8. **Recommendation 1: The Royal Commission closely consider the CRPD, CRC and other relevant human rights instruments and ensure its recommendations regarding inclusive education align with the Australian Government's obligations under those instruments.**
9. **Recommendation 2: The Royal Commission identify key issues and appropriate recommendations to be addressed in the reviews of the National Disability Strategy and the Education Standards to assist the Australian Government to implement its obligations under international human rights law.**
10. **Recommendation 3: The Australian Government implement the recommendations regarding inclusive education set out in the CRPD Committee's Concluding Observations on Australia's implementation of its international human rights obligations under the CRPD (15 October 2019).**
11. **Recommendation 4: The Australian Government incorporate the relevant recommendations of the CRPD Committee in the reviews of the**

National Disability Strategy and the Education Standards, with appropriate targets and monitoring of progress, to implement its obligations to provide to inclusive education.

- 12. Recommendation 5: The Australian Government develop a National Action Plan, including a multi-year strategy and budgetary framework, appropriate guidance for school staff, clear targets and systematic monitoring of progress, to ensure the progressive implementation of the right to inclusive education in Australia.**
- 13. Recommendation 6: The Australian Government ensure that the funding model and budgetary allocations for students with disability 'expeditiously and effectively' transfer resources from segregated to inclusive education environments.**
- 14. Recommendation 7: The Australian Government commit to ensuring that no new segregated schools are created.**
- 15. Recommendation 8: Australian universities and vocational education and training (VET) institutions ensure that compulsory and comprehensive training on inclusive education practices and disability awareness is integrated throughout the curricula of all education degrees and diplomas.**
- 16. Recommendation 9: The Australian Government expand the Nationally Consistent Collection of Data on School Students with Disability to collect data on:**
 - the numbers of students with disability who do not qualify for an adjustment**
 - the number of students who are unable to enrol in their local mainstream schools**
 - educational attainment and completion rates**
 - the rates of suspension and expulsion**
 - the use of restrictive practices.**
- 17. Recommendation 10: The Australian Government work with state and territory governments to develop a national framework to monitor and regulate the use of restrictive practices against people with disability, with a view to reducing and eliminating their use in all settings, including education facilities.**

18. **Recommendation 11: the Australian Government work with state and territory governments to provide schools, teachers and other staff with clear policy and practice guidance, training resources and access to expert advice regarding positive behaviour management tools and practical strategies to avoid restrictive practices in schools. This should consider issues of intersectionality, in particular regarding Aboriginal and Torres Strait Islander students with disability.**
19. **Recommendation 12: The Australian Government work with state and territory governments to collect and make publicly available data on incidents of restrictive practices – disaggregated by the child’s age, location, Indigenous status, type of school, type of disability, demographic characteristics, and type of restrictive practice.**

3 The importance of inclusive education

20. The Commission welcomes the selection of education as the first topic for the Royal Commission’s consideration. Both children and adults with disability have the right to an education that is free from discrimination and provided on the basis of equal opportunity. To protect the rights of people with disability and provide them with an equitable and participatory learning experience and environment, education systems must engage holistically with the concept of inclusion. This involves embedding the values of diversity and inclusion not just in classroom teaching but also in leadership, in relationships with parents/carers, in the provision of medical and counselling services, and in the design of physical environments. Placing diversity and inclusion at the heart of education systems can have a significant impact on community perceptions of disability.
21. Education is a key enabler of other rights, particularly for people with disability. The United Nations Committee on the Rights of the Child (CRC Committee) has stated that the aim of education is to promote, support and protect ‘the human dignity innate in every child and his or her equal and inalienable rights’.³
22. The United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) has stated that ‘inclusive education’ is:
 - a) 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.

- b) A principle that values the well-being of all students, respects their inherent dignity and autonomy, acknowledges individual requirements and ability to effectively be included in and contribute to society.
- c) A means of realizing other human rights. It is the primary means by which persons with disabilities can lift themselves out of poverty, obtain the means to participate fully in their communities, and be safeguarded from exploitation. It is also the primary means through which to achieve inclusive societies.
- d) The result of a process of continuing and pro-active commitment to eliminate barriers impeding the right to education, together with changes to culture, policy and practice of regular schools to accommodate and effectively include all students.⁴

23. The promotion of inclusive education in international human rights law arises from over 40 years of research that has shown the considerable benefits of inclusive education to all students, with and without disability. In particular, inclusive education results in:

- improved overall development of students with disability, including academic and social development⁵
- improved inclusion of people with disability in the labour market and society as a whole⁶
- a number of benefits for students without disability, including increased appreciation of diversity and the worth of their peers⁷
- broader benefits for communities such as acceptance of diversity and improved tolerance.⁸

24. Furthermore, from an economic standpoint, studies have shown that inclusive education is more efficient and cost effective.⁹ In this regard, the UNESCO Salamanca Statement (arising from the 1994 World Conference on Special Needs Education, in which 92 governments and 25 international organisations participated) stated that inclusive education 'improve[s] the efficiency and ultimately the cost-effectiveness of the entire education system'.¹⁰

25. United Nations Sustainable Development Goal 4 (SDG4) recognises the centrality of inclusive education to the development of inclusive, peaceful and

fair societies. When education is more inclusive, this is likely to be replicated in civic participation, employment and community life. Conversely, education systems that exclude and segregate tend to perpetuate discrimination against traditionally marginalised groups. The targets under SDG4 thus include ensuring equal access to all levels of education for people with disability (target 4.5) and inclusive, accessible learning environments for all (target 4a).

26. The National Principles for Child Safe Organisations, which were endorsed by the Council of Australian Governments in February 2019, support the notion of inclusion as a key mechanism for keeping children safe. Principle 4, in particular, specifies the following standard: 'Equity is upheld and diverse needs respected in both policy and practice'.¹¹

27. Inclusive education is not just a plan or policy; it is a general approach and mindset that embraces human diversity, 'values the well-being of all students, respects their inherent dignity and autonomy, acknowledges individual requirements and ability to effectively be included in and contribute to society'.¹² This benefits all students, with and without disability, and leads to more inclusive societies in the long term.

4 International & domestic human rights framework

28. Australia has ratified a range of international human rights instruments that include clear rights and obligations relating to education for people with disability, most importantly the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *Convention on the Rights of the Child* (CRC). At the national level, a framework of legislation and other instruments helps to protect the rights of people with disability and the right to education, including the *Disability Discrimination Act 1992* (Cth), the *Disability Standards for Education*, the *Melbourne Declaration on Education Goals for Young Australians* (recently replaced with the *Alice Springs (Mparntwe) Education Declaration*) and the *National Disability Strategy*.¹³

4.1 Convention on the Rights of Persons with Disabilities

29. Australia ratified the CRPD in July 2008¹⁴ and the Optional Protocol to the CRPD in July 2009.¹⁵ The CRPD requires Australia to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all people with disability, and to promote respect for their inherent dignity.

30. The CRPD embraces the social model of disability. Article 1 of the CRPD provides that ‘persons with disabilities’ include ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’. The CRPD reflects a broad understanding of disability and recognises that disability is an ‘evolving concept’ resulting from interaction with ‘attitudinal and environmental barriers’.

31. As the CRPD is the most recent international human rights convention and the first international convention to address exclusively the rights of people with disability, it offers important guidance for realising the human rights of people with disability in Australia. Many provisions of the CRPD require States to take positive action, including significant law reform, to implement the principles underlying the Convention and protect the rights contained within it.

32. The rights set out in the CRPD that are particularly relevant to education of people with disability include:

- Article 5—the right to equality and non-discrimination
- Article 7—the rights of children with disability, including the right to have their best interests as a primary consideration in all actions concerning them
- Article 9—the right to accessibility
- Article 10—the right to life
- Article 14—the right to liberty and security of the person
- Article 15—the right to freedom from torture or cruel, inhuman or degrading treatment or punishment
- Article 16—the right to freedom from exploitation, violence and abuse
- Article 17—the right to integrity of the person
- Article 24—the right to education.

33. The CRPD is the first legally binding instrument to expressly enshrine the concept of quality inclusive education. The content of the right to inclusive education in Article 24 of the CRPD and its relationship with other rights is discussed in more detail below.

4.2 Convention on the Rights of the Child

34. Articles 28 and 29 of the CRC protect a child's right to education. These articles set out certain standards for education, including that education should be accessible and free to all children and provided on the basis of equal opportunity.

35. The CRC also articulates a range of other rights relevant to children with disability, including:

- protection against all forms of discrimination¹⁶
- right to protective measures such as appropriate legislative, administrative, social and educational measures to protect them from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse¹⁷
- right of children with disability to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate their active participation in the community¹⁸
- right of children with disability to special care and assistance appropriate to their condition¹⁹
- right of children with disability to effective access to education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to achieving their fullest possible social integration and individual development, including their cultural and spiritual development.²⁰

36. In addition, Article 42 of the CRC requires States Parties to educate the community and children about the rights of children set out under the CRC.

4.3 Other international human rights instruments

37. The right to education is included in Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Australia ratified in 1980.²¹

38. Australia has also ratified a range of other international human rights instruments that contain important provisions relevant to people with disability. These include:

- the International Covenant on Civil and Political Rights (ICCPR)²²
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²³
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²⁴
- the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD).²⁵

39. Australia has agreed to be subject to United Nations complaint mechanisms associated with a number of the abovementioned treaties. These complaint mechanisms, which relate to the ICCPR, ICERD, CEDAW, CRPD and CAT, are distinct from the complaint mechanisms under national human rights and anti-discrimination laws.

40. In addition, Australia has endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).²⁶

4.4 Disability Discrimination Act 1992 (Cth)

41. At the national level, a framework of legislation and other instruments helps to protect the rights of people with disability and the right to education in Australia.

42. Most important, the *Disability Discrimination Act 1992 (Cth)* (DDA) makes disability discrimination unlawful and promotes equal rights, equal opportunity and equal access for people with disability, including with respect to education. The DDA makes clear that people with disability have a right to study at any educational institution in the same way as other students.²⁷

43. The DDA prohibits discrimination against people with disability in regard to admission to a course.²⁸ It obliges educational institutions to enrol a person with a disability if they meet the entry requirements, regardless of their disability. Assumptions about disability should not be made, and entrance to a course should be based only on the person's ability to meet the entry requirements. A person with a disability cannot be treated less favourably than a person without a disability; for example, being made to pay higher fees would be prohibited.

44. The DDA also requires educational institutions to ensure that their courses and premises are accessible. This includes excursions, the delivery of lessons or lectures, accessible formats for information and accessible student

common areas. It is not permitted under the DDA to expel a person because of a disability or to subject a person with a disability to any other detriment. This extends to harassment and humiliating comments in relation to a person's disability.²⁹

45. Under the DDA, an educational institution is expected to make reasonable adjustments or changes to the course, so long as a person meets the essential coursework requirements, subject to the defence of unjustifiable hardship.³⁰ This may include, for example, changing the desk heights to enable a wheelchair user to participate in activities. It may also include making structural changes to the built environment (e.g. providing ramps, modifying toilets and ensuring classrooms are accessible); providing or modifying equipment used for the purposes of learning and studying (e.g. providing specific computer software); modifying assessment procedures (e.g. providing more time or allowing exams to be taken orally instead of in written format); and changing course delivery (e.g. sign language delivery of lessons).
46. The DDA also provides people with the right to make a complaint to the Commission about unlawful discrimination on the ground of disability. Where the complaint cannot be resolved by conciliation, the DDA provides the possibility of pursuing the matter to the Federal Court of Australia for an enforceable remedy.³¹ An overview and analysis of the complaints received by the Commission in relation to primary and secondary education between January 2013 and November 2019 is provided in **Appendix A**.

4.5 Disability Standards for Education

47. Section 31 of the DDA enables the Commonwealth Attorney-General to formulate disability standards in relation to a range of areas, including the education of people with disability. The *Disability Standards for Education* (Education Standards) were formulated under this provision to clarify and elaborate the applicable legal obligations in relation to education for people with disability. The fundamental principle underlying the Education Standards is that people with disability should have the same opportunities and choices as people without disability in applying for enrolment, participating in lessons and courses and accessing facilities provided by educational institutions.³²
48. The Education Standards cover enrolment, participation, curriculum development, accreditation and delivery, student support services, and the elimination of harassment and victimisation of students with disability. They apply to education providers including preschools, primary and secondary

schools, universities and other institutions at which education or training is provided.³³ They also apply to organisations that develop and accredit education and training.³⁴ The Education Standards came into force in August 2005 and are reviewed every five years, with the next review due in 2020.

4.6 Australian Human Rights Commission Act 1986 (Cth)

49. The *Australian Human Rights Commission Act 1986* (Cth) provides limited rights in relation to specific international instruments, including the CRPD and the ICCPR.

4.7 National Disability Strategy

50. Following Australia's ratification of the CRPD in 2008, the Commonwealth, state and territory governments developed the *National Disability Strategy* (NDS). This sets out a ten-year national strategic plan (2010-2020) to implement the CRPD and aims to 'ensure that the principles underpinning the Convention are incorporated into policies and programs affecting people with disability, their families and carers'.³⁵

51. The NDS was launched in 2011 and has six foundational elements or policy areas:

- **Inclusive and accessible communities:** the physical environment including public transport; parks, buildings and housing; digital information and communications technologies; civic life including social, sporting, recreational and cultural life
- **Rights protection, justice and legislation:** statutory protections such as anti-discrimination measures, complaints mechanisms, advocacy, the electoral and justice systems
- **Economic security:** jobs, business opportunities, financial independence, adequate income support for those not able to work, and housing
- **Personal and community support:** inclusion and participation in the community, person-centred care and support provided by specialist disability services and mainstream services; informal care and support
- **Learning and skills:** early childhood education and care, schools, further education, vocational education; transitions from education to employment; life-long learning

- **Health and wellbeing:** health services, health promotion and the interaction between health and disability systems; wellbeing and enjoyment of life.

52. Regarding the fifth policy area of the NDS listed above, 'learning and skills', the desired outcome has been identified as:

People with disability achieve their full potential through their participation in an inclusive high quality education system that is responsive to their needs. People with disability have opportunities to continue learning throughout their lives.

53. The Commission notes that a comprehensive review of the NDS will be undertaken in 2020.

4.8 Melbourne Declaration on Education Goals for Young Australians

54. The *Melbourne Declaration on Education Goals for Young Australians* (Melbourne Declaration) set the direction for Australian schooling for the ten-year period from 2009 to 2018, as agreed by all Education Ministers at the Commonwealth, state and territory levels.

55. The Melbourne Declaration had two overarching educational goals:

- **Goal 1:** Australian schooling promotes equity and excellence
- **Goal 2:** All young Australians become successful learners, confident and creative individuals, and active and informed citizens.

56. The Melbourne Declaration also included a Commitment to Action in eight interrelated areas to support the above goals:

- developing stronger partnerships
- supporting quality teaching and school leadership
- strengthening early childhood education
- enhancing middle years development
- supporting senior years of schooling and youth transitions
- promoting world-class curriculum and assessment
- improving educational outcomes for Indigenous youth and disadvantaged young Australians, especially those from low socio-economic backgrounds

- strengthening accountability and transparency.

57. The Commission notes that a review of the Melbourne Declaration was recently completed and a new declaration, the *Alice Springs (Mparntwe) Education Declaration*, was published in December 2019.³⁶

58. Recommendation 1: The Royal Commission closely consider the CRPD, CRC and other relevant human rights instruments and ensure its recommendations regarding inclusive education align with the Australian Government's obligations under those instruments.

59. Recommendation 2: The Royal Commission identify key issues and appropriate recommendations to be addressed in the reviews of the National Disability Strategy and the Education Standards to assist the Australian Government to implement its obligations under international human rights law.

5 Australia's obligations to provide inclusive education

60. This section discusses Australia's obligations to provide inclusive education in accordance with Article 24 of the CRPD. It analyses the content of the right to inclusive education and discusses the concept of 'progressive realisation' in relation to this right. This helps to identify not only what is expected of Australia under Article 24 of the CRPD, but also what strategies could be adopted to fulfil these obligations.

5.1 Content of the right to inclusive education

61. Article 24 of the CRPD recognizes the right of people with disability to equal access to free and inclusive education, with reasonable adjustments and supports, to meet their full potential and participate effectively in society. This establishes a requirement for States Parties to the CRPD, including Australia, to ensure an inclusive education system at all levels for people with disability, without discrimination and on the basis of equal opportunity.

62. In 2016, the Commonwealth Senate Education and Employment References Committee concluded that 'it is clear that Australia has obligations to ensure inclusive education is available to all children'.³⁷

63. In particular, Article 24 requires Australia to ensure that:

- people with disability are not excluded from the general education system on the basis of disability, and that children with disability are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability
- people with disability can access an inclusive, high-quality and free primary education and secondary education on an equal basis with others in the communities in which they live
- reasonable accommodation of the individual's requirements is provided
- people with disability receive the support required, within the general education system, to facilitate their effective education
- effective individualised support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

64. While 'inclusive education' is not defined in the CRPD, the CRPD Committee has expounded and clarified this concept in its *General Comment No. 4 (2016) on the right to inclusive education* (General Comment No. 4). The CRPD Committee stated that inclusive education is a fundamental human right of all learners, which 'provide[s] all students of the relevant age range with an equitable and participatory learning experience and the environment that best corresponds to their requirements and preferences'.³⁸

65. The CRPD Committee distinguished inclusive education from exclusion, segregation and integration:

- **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 disability is provided in separate environments designed or used to respond to a particular impairment or various impairments, in isolation from students without disability
- **Integration** occurs when students with disability are placed in existing mainstream educational institutions without altering the way in which such institutions operate.³⁹

66. Thus, inclusive education is more than simply increasing the number of children with disability in mainstream schools. As the CRPD Committee explained, 'placing students with disabilities within mainstream classes

without accompanying structural changes to, for example, organization, curriculum and teaching and learning strategies, does not constitute inclusion'.⁴⁰ Rather, inclusion requires the adaptation of education systems to accommodate the individual needs of children with disability. It involves 'a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education'.⁴¹

67. The failure of education systems to adapt to individual needs helps to explain why some students with disability may feel unsatisfied attending mainstream schools, despite the opportunities that such schooling provides for their participation in society.⁴² Some students with disability may not feel accepted or welcome in mainstream schools for a variety of reasons, including bullying or harassment, with the result that the students and/or their families may prefer a special education setting rather than mainstream schooling. The onus is on the education system to accommodate children with disability and provide a personalised educational response, rather than expecting the student to fit the system.⁴³

68. There was intense debate during the negotiations leading to the drafting of the CRPD regarding the role, if any, of special education facilities tailored to the needs of people with disability. Some countries and disability organisations advocated for the flexibility to deliver education in specialised settings.⁴⁴ This was seen as particularly important for students who are blind, deaf or deafblind.⁴⁵ According to Gauthier De Beco, the final text of Article 24 reflects a compromise which he describes as 'a clear example of negotiated ambiguity'.⁴⁶ Article 24(2)(e) provides that States Parties shall ensure that '[e]ffective individualized support measures are provided in environments that maximize academic and social development, *consistent with the goal of full inclusion*' (emphasis added).

69. The CRPD Committee stated in its *General Comment No. 4 (2016)* that the obligation to move towards a goal of full inclusion 'is not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system'. Rather, States must 'move as expeditiously and effectively as possible towards the full realisation of Article 24'.⁴⁷ This appears to be a stronger position than that taken during CRPD negotiations by the Working Group of the Ad Hoc Committee, which emphasised that 'the general education system and specialist education services are not mutually exclusive options, and that there is a range of options in between that are available'.⁴⁸

70. There continues to be considerable debate among commentators regarding the appropriate role, if any, of special schools.⁴⁹ Commentators have also noted the tension between Article 24 of the CRPD and the right of parents to choose schools for their children. This 'right to choose schools' has been explicitly recognised by the Universal Declaration of Human Rights (article 26(3)) as well as the ICESCR (article 13(3)) and the CRC (article 28).⁵⁰
71. While the debate around special schooling is likely to continue, both in Australia and elsewhere, the CRPD is clear that States Parties must take concrete steps 'consistent with the goal of full inclusion' in relation to education for people with disability. The goal of Article 24 is for the education system, taken as a whole, to be inclusive and directed to 'the full development of human potential and sense of dignity and self-worth' of people with disability.⁵¹ The steps required of States Parties are guided by the notion of 'progressive realisation', which is discussed below.

5.2 Progressive realisation of the right to inclusive education

Progressive realisation of economic, social and cultural rights in the ICESCR

72. The right to education falls within the category of 'economic, social and cultural rights' recognised in core international human rights treaties such as the ICESCR, to which Australia is a party. A central aspect of States' obligations in relation to such rights is the concept of 'progressive realisation' articulated in Article 2(1) of the ICESCR. This provides that a State Party is not expected to achieve full realisation of economic, social and cultural rights immediately, but must 'take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights in the present Covenant'.⁵²
73. The Committee on Economic, Social and Cultural Rights (CESCR Committee) has clarified the notion of progressive realisation in regard to the rights in the ICESCR, including the right to education in Articles 13 and 14. According to the CESCR Committee, progressive realisation acknowledges that the 'full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time', but States Parties have an obligation 'to move as expeditiously and effectively as possible towards that goal'.⁵³
74. Progressive realisation has been described as primarily a 'procedural obligation', which requires States Parties to put in place a budgetary

framework and plan of action with a view to making the right fully effective.⁵⁴ Therefore, while States may postpone implementing some aspects of economic, social and cultural rights, they may not postpone their efforts indefinitely and must take concrete steps towards full implementation within a reasonable period of time.

75. Moreover, States Parties have certain 'minimum core obligations' which must be fulfilled immediately in relation to each right. The CESCR Committee explained that States Parties have 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' in the ICESCR.⁵⁵ In other words, the concept of progressive realisation does not relieve states of their immediate obligations in relation to the core aspects of the right in question. These minimum core obligations provide a 'bottom line' under which progressive realisation does not apply.⁵⁶

76. In regard to the right to education in the ICESCR, the CESCR Committee stated that a State Party 'in which any significant number of individuals is deprived of ... the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant'.⁵⁷ This indicates that the minimum core obligation includes providing 'the most basic forms of education'.

Progressive realisation of the right to inclusive education in CRPD Art. 24

77. Article 2(1) of the ICESCR is essentially replicated in Article 4(2) of the CRPD, meaning that the right to inclusive education in Article 24 of the CRPD is subject to progressive realisation. According to the CRPD Committee:

Progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 24. This is not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system.⁵⁸

78. State Parties, including Australia, must therefore take measures to ensure a 'comprehensive and intersectoral commitment to inclusive education'.⁵⁹ This includes: adopting legislation based on the human rights model of disability that fully complies with Article 24;⁶⁰ allocating sufficient resources to inclusive education, including by transferring resources from segregated to inclusive environments;⁶¹ and providing training for inclusive education.⁶²

79. In addition to taking concrete steps towards progressive realisation of the right to inclusive education, Australia must immediately fulfil its 'minimum

core obligations' under Article 24. The CRPD Committee stated that the following core rights must be implemented with immediate effect:

- non-discrimination in all aspects of education and encompassing all internationally prohibited grounds of discrimination
- reasonable accommodations to ensure non-exclusion from education for people with disability. Failure to provide reasonable accommodation constitutes discrimination on the ground of disability
- compulsory, free primary education available to all.⁶³

80. Considering the ICESCR and the CRPD together, Australia has a minimum core obligation to provide 'the most basic forms of education' to children with disability, including compulsory, free primary education on a non-discriminatory basis. This suggests that the 'minimum core obligation' is more stringent with regard to the lower levels of education.⁶⁴ Thus, while the obligation under the CRPD to provide a fully inclusive education system for all students is subject to progressive realisation, the Commission considers a logical starting point to be the inclusion of children with disability in mainstream schools at the early childhood and primary stages of education.

81. The Commission acknowledges that achieving inclusive education at all levels in Australia is an ambitious objective. It is therefore essential for the Australian Government to consider a wide range of measures to be adopted over time, with particular attention given to planning, budgeting and monitoring, to ensure the progressive realisation of the right to inclusive education. This will require a multi-year strategy, budgetary framework and national action plan to implement a gradual process of systemic education reform. This process should include changes in content, teaching methods, approaches, structures and strategies in education. There should be a managed transition with clear and adequate time frames and systematic monitoring and evaluation mechanisms.

82. The Commission considers that it would be consistent with the Government's 'minimum core obligations' to prioritise inclusion in early childhood and primary education.⁶⁵ This in turn will facilitate access to, and participation in, subsequent education levels for children with disability. As the CRPD Committee observed, '[i]f identified and supported early, young children with disabilities are more likely to transition smoothly into pre-primary and primary inclusive education settings'.⁶⁶

83. This process should be informed by comprehensive consultations, including with children with disability and their families and representative groups. In this regard, Article 4(3) of the CRPD provides:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

84. Similarly, Article 12 of the CRC recognises the right of the child to express views on matters that affect them and to be given the opportunity to do so, consistent with procedural rules of national law. The voice of children and young people with disability is often missing in discussions about inclusive education.⁶⁷ Engaging with children and young people, with and without disability, on issues relating to inclusive education is consistent with the inclusion of all students in the learning environment.⁶⁸

6 Implementation of the right to inclusive education in Australia

85. Noting the flexibility inherent in the notion of ‘progressive realisation’ discussed above, the Commission is concerned that Australia is a long way from fulfilling its obligations to provide inclusive education under Article 24 of the CRPD. This section identifies the main factors impeding progress in the implementation of the right to inclusive education and discusses how the Concluding Observations recently published by the United Nations CRPD and CRC Committees could assist the Australian Government to improve its level of compliance.

6.1 Factors impeding progress in implementation

86. The Commission welcomes the recognition in the NDS of the importance of inclusive education for people with disability. One of the six policy areas of the NDS is ‘learning and skills’, and the desired outcome in this area is that:

People with disability achieve their full potential through their participation in an inclusive high quality education system that is

responsive to their needs. People with disability have opportunities to continue learning throughout their lives.

However, the Commission is of the view that there has not been significant progress to date in achieving the desired outcome expressed in the NDS.

87. Based on its consultations conducted in 2017–18 on inclusive education in Australia, as well as complaints made to the Commission’s investigation and conciliation function under the DDA, the Commission has identified the following factors as impeding progress in the implementation of the right to inclusive education:⁶⁹

- **Registration and gatekeeping:** schools continue to turn away local students because of their disability by discouraging enrolment or not allowing them to attend full time.⁷⁰ This ‘gatekeeping’ denies the applicant the same process of consideration given to prospective students without disability and does not fulfil the requirement for reasonable adjustment in the application process. A 2018 report by the Castan Centre for Human Rights Law, *Improving Education Outcomes for Children with Disability in Victoria* (the Castan Report), found that approximately 15% of parents experienced some form of difficulty enrolling their child in a mainstream Victorian Government School.⁷¹ A submission to the 2016 Senate Inquiry, *Access to real learning: the impact of policy, funding and culture on students with disability* (Access to real learning Senate Inquiry), found that ‘unofficial gatekeeping’ takes many forms including:
 - refusing to enrol a child because of their disability or delay
 - offering part-time hours
 - calling parents to pick their child up early or bring their child in late
 - suspending / expelling a child from school
 - having a child spend extended periods of time outside the classroom
 - not including a child in excursions, assemblies or other activities.⁷²
- **Growth of segregated learning:** the last decade has seen a significant increase in the use of segregated settings to educate students with disability (special education units/classes and special schools).⁷³ Research published in 2019 reveals ‘a strong shift towards more restrictive forms of segregation’, which has disproportionately affected students with autism.⁷⁴ Between 2009 and 2015, the inclusion of students with autism in

mainstream classes decreased from 18.8% to 3.3%.⁷⁵ Research indicates that students with autism in Australia are 13 times less likely to access mainstream classes than students with autism in the United States (3% compared with 39.4%).⁷⁶

- **Persistence in the use of restrictive practices in schools:** multiple government committees have recommended that the Australian Government work with states and territories to end the use of restrictive practices in schools.⁷⁷ However, a 2019 survey of students with disability found that 21% of respondents had experienced restraint at school and 21% had experienced seclusion.⁷⁸ This issue is discussed in more detail below.
- **Lack of support, training and resources for teachers and principals:** the Commission's consultations with education stakeholders found that teachers, principals and other staff identified a need for skills development, training and ongoing resources to assist in delivering inclusive education across the diversity of students in their classroom.⁷⁹ Similarly, a key theme emerging from the Access to real learning Senate Inquiry was the importance of teachers receiving training in teaching practice for students with disability. The *NSW Ombudsman Inquiry into behaviour management in schools* suggested a range of mechanisms to support teachers, including in regard to communication, information and accessibility, timeliness and transparency, complaint handling systems and taking ownership. It also recommended implementing the Positive Behaviour for Learning Framework in public schools, promoting and communicating good practice across schools, and further enabling access to expertise.⁸⁰
- **Inconsistent and inadequate provision of reasonable adjustments:** reasonable accommodation or adjustment requires the education provider to collaborate with the student and their family regarding any accommodations that may be required for equitable access to education. However, during the Commission's consultations, many stakeholders expressed frustration about the inconsistent and inadequate provision of reasonable adjustments to children with disability.⁸¹ Stakeholders emphasised the need for individualised learning plans and a differentiated curriculum where all children progress and achieve through 'learning progressions'. The Castan Report also found that teachers had difficulty

modifying curricula for individual needs and were instead reducing their expectations of students through the types of tasks allocated.⁸²

6.2 United Nations observations & recommendations

88. The concerns discussed above are largely reflected in recent reports of United Nations treaty bodies addressing inclusive education. In September 2019, the CRC Committee recommended in its Concluding Observations 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.⁸³

Australia will be required to report on its progress in implementing this recommendation when it reports back to the CRC Committee in January 2024. The National Children's Commissioner has called for an interim report within a year.⁸⁴

89. In October 2019, the CRPD Committee addressed these issues in greater detail in its Concluding Observations on Australia's implementation of the CRPD.⁸⁵ The CRPD Committee made a number of important observations and recommendations regarding Australia's implementation of the right to inclusive education in Article 24 of the CRPD. These point to a relatively poor level of overall implementation of Article 24 in Australia and identify a number of priority areas for improvement. Australia is required to act upon the CRPD Committee's recommendations and report on its progress by August 2026.⁸⁶ In the meantime, Australia must report to the United Nations Human Rights Council in 2020 as part of its four yearly Universal Periodic Review (UPR), which will examine Australia's implementation of a wide range of rights including the right to inclusive education.

90. In its 2019 Concluding Observations, the CRPD Committee expressed concern about the significant increase in students with disability experiencing a segregated education, seclusion, isolation and a lack of age-appropriate settings, and the lack of adequate funding for inclusive education in mainstream schools in Australia.⁸⁷ The CRPD Committee accordingly recommended that Australia address the increasing rate of segregation, seclusion and isolation and the lack of age-appropriate settings for students with disability at all levels, in particular Aboriginal and Torres Strait Islander students, and redirect adequate resources to a nationwide inclusive education system for all students.⁸⁸

91. The Commission reiterates the CRPD Committee's call for greater funding of inclusive education in mainstream Australian schools and welcomes the Government's recent announcement of a review of the loading for students with disability.⁸⁹ The Access to real learning Senate Inquiry found that while educational outcomes for students with disability were not strong, experiences varied significantly and were greatly affected by the family's financial means and geographic location.⁹⁰ The *Gonski Review of Funding for Schooling* found that disability is one of the major determinants of educational outcomes in Australian schools and recommended an additional loading for all students with disability.⁹¹ The Commission further recommends that the funding model and budgetary allocations for students with disability transfer resources from segregated to inclusive education environments.
92. The CRPD Committee also expressed concern about Australia's failure to implement many of the recommendations made in the 2015 review of the Education Standards.⁹² The CRPD Committee recommended that Australia conduct a robust review of the Education Standards, in consultation with organisations of persons with disabilities, and that it implement the recommendations arising from that review and develop a national action plan for inclusive education.⁹³ The Commission notes that the third review of the Education Standards will take place in 2020, and it encourages the 2020 review to address the CRPD Committee's recommendations.
93. The CRPD Committee also made a number of important recommendations regarding data collection.⁹⁴ The Commission considers that the collection of accurate data is critical for the development of good policy, particularly in regard to education of people with disability. The Commission accordingly welcomes the recent endorsement of the National Disability Data Asset, which will bring together Commonwealth, state and territory data from across multiple sources and systems to provide a more complete picture of the requirements of people with disability. The CRPD Committee also expressly welcomed this initiative.⁹⁵
94. The *Nationally Consistent Collection of Data on Schools Students* collects data about school students with disability who receive an adjustment. While this data is important, it is also critical to know how many children did not qualify for an adjustment or were not assessed for an adjustment. Such data is crucial to understand compliance with the process of determining reasonable adjustment, what (if any) role students with disability and their families play in the process, and the transparency of the process and outcomes.⁹⁶ It is also important to collect national disaggregated data in a range of other areas

related to inclusive education and people with disability. In particular, the Senate Education and Employment References Committee recommended the collection and publication of information about the levels of access and attainment for students with disability, including the use of restrictive practices as well as suspension and expulsion rates. This is consistent with the recommendations made by the CRPD Committee.⁹⁷

95. Article 33 of the CRPD requires systematic monitoring of progress towards implementation. The CRPD Committee made a number of recommendations to enhance Australia's monitoring capacity, including establishing a formal monitoring mechanism under the NDS and expanding and strengthening the scope and power of the Commission to independently monitor CRPD implementation.⁹⁸ The Commission urges the Government to give careful attention to those recommendations. In addition, the Commission recommends that monitoring and assessment indicators be developed regarding inclusive education for people with disability, as part of a national action plan to implement Article 24 of the CRPD. These should be developed in conjunction with people with disability and their families, and should include structural, process, outcome and quality indicators.⁹⁹

96. Recommendation 3: The Australian Government implement the recommendations regarding inclusive education set out in the CRPD Committee's Concluding Observations on Australia's implementation of its international human rights obligations under the CRPD (15 October 2019).

97. Recommendation 4: The Australian Government incorporate the relevant recommendations of the CRPD Committee in the reviews of the National Disability Strategy and the Education Standards, with appropriate targets and monitoring of progress, to implement its obligations to provide to inclusive education.

98. Recommendation 5: The Australian Government develop a National Action Plan, including a multi-year strategy and budgetary framework, appropriate guidance for school staff, clear targets and systematic monitoring of progress, to ensure the progressive implementation of the right to inclusive education in Australia.

99. Recommendation 6: The Australian Government ensure that the funding model and budgetary allocations for students with disability

'expeditiously and effectively' transfer resources from segregated to inclusive education environments.

100. **Recommendation 7: The Australian Government commit to ensuring that no new segregated schools are created.**
101. **Recommendation 8: Australian universities and vocational education and training (VET) institutions ensure that compulsory and comprehensive training on inclusive education practices and disability awareness is integrated throughout the curricula of all education degrees and diplomas.**
102. **Recommendation 9: The Australian Government expand the Nationally Consistent Collection of Data on School Students with Disability to collect data on:**
- **the numbers of students with disability who do not qualify for an adjustment**
 - **the number of students who are unable to enrol in their local mainstream schools**
 - **educational attainment and completion rates**
 - **the rates of suspension and expulsion**
 - **the use of restrictive practices.**

7 Restrictive practices in educational settings

103. The Commission is concerned about the continued use of restrictive practices on children with disability in educational settings and the lack of a nationally consistent approach to monitoring, regulating, reducing and eliminating the use of such practices in Australia.
104. 'Restrictive practices' are understood as any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability. These primarily include restraint (chemical, mechanical, social or physical) and seclusion.¹⁰⁰ The Australian Law Reform Commission (ALRC) noted that:

while restrictive practices are used in circumstances to protect from harm the person with disability or others around them, there are concerns that such practices can also be imposed as a 'means of

coercion, discipline, convenience, or retaliation by staff, family members or others providing support.¹⁰¹

105. The use of restrictive practices on children with disability in educational settings potentially violates a number of the children's rights under international human rights law. In particular, as set out above, children with disability have the right to liberty and security; to protection from all forms of violence; to be free from torture and cruel, inhuman or degrading treatment or punishment; to special care and assistance appropriate to the child's condition; to effective access to education and other services to ensure that they achieve the fullest possible social integration and individual development; to have their best interests as a primary consideration in all actions concerning them; to express their views freely and be heard in all matters affecting them; and to enjoy all of their rights on an equal basis with other children and without discrimination of any kind.
106. Research published in 2018 indicates that restraint and seclusion are used in Australian schools for a variety of purposes beyond or in addition to a protective purpose, including as a means of coercion, discipline, convenience or retaliation.¹⁰² A 2019 survey of students with disability conducted by Children and Young People with Disability Australia (CYDA) found that 21% of respondents had experienced restraint at school and 21% had experienced seclusion.¹⁰³ During the Commission's own consultations with people with disability, the use of restrictive practices in schools was frequently raised as a major concern.
107. Australia currently has no nationally consistent regulatory framework to regulate the use of restrictive practices on children with disability in schools. The Commission notes that there is significant variation between states and territories regarding the use of restrictive practices in schools.¹⁰⁴ The *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2013) only applies to disability services.
108. Various domestic and international bodies have highlighted that restrictive practices are unacceptable, that such practices are still being used on children with disability in educational settings in Australia, and that a nationally consistent framework is required. These bodies include the CRPD Committee, the Senate Standing Committee on Community Affairs, the ALRC, the Australian NGO Coalition to Australia's Second Universal Periodic Review and the Universal Periodic Review Working Group.

109. The ALRC devoted an entire chapter to restrictive practices in its 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*. The ALRC noted:

[G]iven the variety of settings in which restrictive practices are used, there is a need for a national or nationally consistent approach to regulation beyond the disability services sector and the NDIS.¹⁰⁵

The ALRC suggested that rather than simply including regulation of restrictive practices within a broader national quality assurance and safeguards system for the National Disability Insurance Scheme (NDIS), the Australian Government and the Council of Australian Governments (COAG) should facilitate the development of a national or nationally consistent approach separate from the NDIS system.¹⁰⁶

110. The Senate Standing Committee on Community Affairs (Senate Committee) considered the issue of restrictive practices in detail in 2015. The Senate Committee was ‘very distressed’ by the extensive evidence detailing cases of violence, abuse and neglect of children with disability in schools, and it was ‘disturbed by evidence of a lack of appropriate regulation, oversight and independent reporting and investigating mechanisms within the schools framework’.¹⁰⁷ It also referred to ‘systemic problems within the education system’ that are leading to the use of restrictive practices, and noted that these systemic problems ‘reinforce an attitude that facilitates the mistreatment of children with disability because they are viewed as different’.¹⁰⁸

111. The Senate Committee recommended that the Australian Government work with state and territory governments to implement a ‘national zero tolerance approach’ to eliminate restrictive practices in all service delivery contexts, which would entail:

- Ensuring the national framework is properly implemented across all jurisdictions, as a mandatory, reviewable and enforceable scheme, with oversight by a qualified senior practitioner and with a mandatory element of positive behaviour support
- A scheme that is not limited to the disability sector, but applies to all places where restrictive practice is used against people with disability
- Imposing requirements for the use of positive behaviour management tools. These policies and guidelines would be guided by the following principles:

- Policies and advice need to be available to the general public and linked in with behaviour and discipline policy
- The preferred substitution of positive behavioural management tools such as Applied Behavioural Analysis for 'restrictive practices'.¹⁰⁹

112. At the international level, the CRPD Committee recently addressed the use of restrictive practices against children with disability in educational settings in Australia. The CRPD Committee stated that it is 'seriously concerned' about this issue and urged Australia to:

Establish a nationally consistent legislative and administrative framework for the protection of all persons with disabilities, including children, from the use of psychotropic medications, physical restraints and seclusion under the guise of "behaviour modification" and the elimination of restrictive practices, including corporal punishment, in all settings, including the home.¹¹⁰

113. Similarly, the CRC Committee recently recommended in its 2019 Concluding Observations that Australia addresses cases of restraint and seclusion of children with disability in its schools.¹¹¹

114. Given the number of inquiries, committees and reports that have recommended a coordinated effort to address this issue, the Commission recommends the urgent development of a nationally consistent and targeted approach to reduce and ultimately eliminate the use of restrictive practices in educational settings in Australia. Schools and teachers must be fully supported through the provision of clear policy guidance, training resources and access to expert advice, including positive behaviour management tools and practical strategies to avoid restrictive practices. Such guidance and resources should consider issues of intersectionality, in particular the needs of Aboriginal and Torres Strait Islander students with disability.

115. A major challenge is the lack of consistent data on the rates of restrictive practices, including restraint and seclusion, used in Australian schools. There is no requirement at the national level for this data to be recorded and monitored, and existing recording and monitoring requirements in each Australian jurisdiction do not provide for rigorous analysis of restraint and seclusion data.¹¹² The CRPD Committee expressed concern about the lack of national disaggregated data on the use of

restrictive practices against students with disability in Australia and recommended that the collection of such data be expanded.¹¹³

116. The Commission accordingly recommends that further data on incidents of restrictive practices—disaggregated by the child’s age, location, Indigenous status, type of school, type of disability, demographic characteristics, and type of restrictive practice—be collected and made publicly available to gain a better understanding of how children are affected by these practices.
117. **Recommendation 10: The Australian Government work with state and territory governments to develop a national framework to monitor and regulate the use of restrictive practices against people with disability, with a view to reducing and eliminating their use in all settings, including education facilities.**
118. **Recommendation 11: the Australian Government work with state and territory governments to provide schools, teachers and other staff with clear policy and practice guidance, training resources and access to expert advice regarding positive behaviour management tools and practical strategies to avoid restrictive practices in schools. This should consider issues of intersectionality, in particular regarding Aboriginal and Torres Strait Islander students with disability.**
119. **Recommendation 12: The Australian Government work with state and territory governments to collect and make publicly available data on incidents of restrictive practices – disaggregated by the child’s age, location, Indigenous status, type of school, type of disability, demographic characteristics, and type of restrictive practice.**

8 Appendix A: Overview of DDA complaints in the area of education (2013-2019)

120. The Commission receives complaints under the *Disability Discrimination Act 1992 Cth* (DDA) in the area of education in relation to all stages of education, from kindergarten admission through to individuals engaging in tertiary studies.
121. Through an analysis of the data before the Commission, we are able to provide the information below regarding the main areas of concern articulated in school education. The accompanying table provides a further breakdown of the numbers of complaints received each year within the specific education settings.
122. The most common disabilities that are identified in complaints on behalf of children in school environments are: attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (ASD), anxiety, social anxiety, depression and oppositional defiance disorder, mild to moderate developmental delay and sensory processing disorder. It is very common for a child with an identified disability to have a combination of diagnosed conditions such as ADHD, ASD and anxiety.
123. The issues that arise in DDA education complaints relating to primary and secondary education settings are relatively uniform and do not (with one notable exception) vary significantly between government and non-government schools.
124. The notable exception referred to above is in relation to *school enrolments*. This is a concern that is raised far more frequently in complaints regarding non-government schools, including religious schools, than government schools. The main allegation regarding enrolments is that a school declines to accept the enrolment of a child with a disability. The reasons given by the relevant schools as outlined in complaint documents include:
- The school has met its 'quota' for autistic children
 - The school does not have the resources the child requires
 - The school considers that the child's needs would be more effectively met in an alternative education setting
 - The child's needs are 'too intense'

- Restricted enrolment—in circumstances where a school may provisionally allow attendance on a very restricted basis – for example 2 hours per day or three days per week for five hours per day (NB: this issue also arises within government schools).

125. Other than the exception above, the main issues that arise in school education complaints are relatively uniform and fit broadly into two main categories: a) access to the curriculum and learning supports that a child requires to gain access to an equal education; and b) measures employed to deescalate and/or discipline children—some of who may exhibit ‘behaviours of concern’ which would in turn be considered manifestations of their disability.

126. **Access to curriculum**—most complaints involving children with disability in a school setting allege a failure on the part of the education provider to provide sufficient support for the child. Such failures may be articulated in complaint documents as follows:

- Not provided with an Individual Education Plan (IEP) and/or IEP not complied with
- Inadequate IEP that does not properly address the child’s individual learning needs
- Not provided with sufficient individual learning support and/or school refusal to apply for additional/appropriate learning support funding
- Not provided with suitable language assessments and/or communication plans
- Not provided with appropriate remedial literacy and numeracy support
- Failure to provide reasonable adjustments with respect to assignments and exams (issue mainly raised in relation to secondary education)
- Not providing suitable and/or appropriate strategies to deal with challenging behaviours leading to an escalation in behaviours
- Failure to consult adequately with parents about all of the above (NB: the alleged failure to consult with parents is a very common theme of DDA education complaints).

127. It should be noted that in response to DDA complaints, education departments and schools will commonly point to the fact that in their view a significant amount of consultation and engagement with parents has taken place, it just may not have led to the outcome(s) being sought by the parents.

Reference is also made to excessive contact and unrealistic expectations about resources and the ability (or lack thereof) of the education provider to provide the support desired and/or perceived by the parent to be required.

128. **Access to school activities**—a number of complaints received each year refer to children with disability being excluded from school excursions including camps as well as day trips. Behaviour and conduct and inadequate resources to support children with disability outside of the school environment are common reasons provided. In addition, the exclusion may form part of disciplinary measures (see below).
129. **Discipline including exclusion, restraint, suspension and expulsion** – a significant number of complaints in education relate to measures undertaken by schools to both deescalate challenging behaviour and prevent behaviour from occurring (or reoccurring). The most common allegations arising in these areas include the following:
- Child is excluded from activities within a school setting – not allowed to participate in sports and other events
 - Child is excluded from class and kept in confined spaces
 - Child is physically restrained by staff
 - Child is suspended from school for significant periods
 - Child is expelled from school
130. **Communication with family members**—one of the most consistent concerns raised in school education complaints is alleged communication failure between the education provider and the parent. This, in combination with an alleged failure to properly consult with the parent, is a feature of nearly all education complaints. It is noted that the above may well be a reflection of the fact that by the time the complaint reaches the Commission there has frequently already been a significant disintegration of the relationship between the education provider and the family/parent. In certain circumstances, this can lead to measures such as trespass orders and communication restrictions being placed on parents.

Table 1: DDA complaints received in the area of education (2013-2019)

	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Geographical location						
ACT	0	3	4	2	3	1
NSW	42	45	49	52	49	62
QLD	9	15	9	12	20	20
NT	0	0	2	0	0	1
SA	3	6	6	8	8	7
TAS	3	2	0	2	1	2
VIC	28	17	25	27	36	47
WA	2	11	8	13	9	16
Overseas	0	0	1	0	0	0
TOTAL	87	99	104 *	116 **	126	156 ***
Type of Educational Institution						

Australian Human Rights Commission
Inclusive Education for People with Disability, 19 December 2019

University	16	27	28	23	19	20
TAFE	5	3	7	2	5	12
Other Tertiary (Inc. RTOs)	8	5	6	10	11	10
State High School	8	14	9	12	26	29
State Primary School	14	16	24	27	18	41
Non Gov High School	14	9	7	12	12	16
Non Gov Primary School	9	10	10	13	24	17
Preschool	1	4	3	6	1	2
Board of Studies and equivalent (currently NESAs in NSW)	1	5	5	8	10	5
Dept of Ed/Educational Authority	9	1				
Other eg OOSH, Daycare	1	1	1	2	0	2
Other studies	1	4	4	1	0	2
TOTAL	87	99	104	116	126	156

Disability Standards for Education	75	66	65	81	100	129

*Annual report figure was 101

**Annual report figure was 115

*** Annual report figure was 155

The discrepancy with the Annual report figures is usually due to complaints being ‘split’ after they have been resolved, where there is more than one outcome recorded against different respondents.

¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Accessibility and Inclusion Strategy* (December 2019)

<<https://disability.royalcommission.gov.au/about/Documents/accessibility-inclusion-strategy.pdf>>.

² Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Education and Learning Issues Paper* (30 October 2019)

<<https://disability.royalcommission.gov.au/publications/Documents/education-learning-issues-paper.pdf>>.

³ United Nations Committee on the Rights of the Child (CRC Committee), *General Comment 1 (2001) on the Aims of Education*, UN Doc CRC/GC/2001/1 (17 April 2001) [1].

⁴ United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 4 (2016) on the Right to Inclusive Education*, UN Doc CRPD/C/GC/4 (25 November 2016) [10]. See also United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (1999) on the Right to Education*, UN Doc E/C.12/1999/10 (8 December 1999).

⁵ Richard Reiser, *Implementing Inclusive Education: Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of People with Disabilities* (Commonwealth Secretariat, 2008); Gauthier De Beco, ‘The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions’ (2014) 32(3) *Netherlands Quarterly of Human Rights* 263, 264; European Agency for Special Needs and Inclusive Education, *Evidence of the Link Between Inclusive Education and Social Inclusion: A Review of the Literature* (2018)

<<https://www.europeanagency.org/resources/publications/evidence-literature-review>>.

⁶ European Agency for Special Needs and Inclusive Education, above n 5.

- ⁷ Spencer J Salend and Laurel M Garrick Duhaney, 'The Impact of Inclusion on Students With and Without Disabilities and Their Educators' (1999) 20(2) *Remedial and Special Education* 114; Michael N Sharpe, Jennifer L York and John Knight, 'Effects of Inclusion on the Academic Performance of Classmates Without Disabilities: A Preliminary Study' (1994) 15(5) *Remedial and Special Education* 281; Cassandra M Cole, Nancy Waldron and Massoumeh Majd, 'Academic Progress of Students Across Inclusive and Traditional Settings' 24(2) *Mental Retardation* 136; Julie Causton-Theoharis et al, 'Schools of Promise: A School District—University Partnership Centered on Inclusive School Reform' (2011) 32(3) *Remedial and Special Education* 192.
- ⁸ Julie Causton-Theoharis et al, 'Schools of Promise: A School District—University Partnership Centered on Inclusive School Reform' (2011) 32(3) *Remedial and Special Education* 192; Reiser, above n 5; Emily Cukalevski and Cátia Malaquias (2019) 'A CRPD analysis of NSW's policy on the education of students with disabilities – a retrogressive measure that must be halted', 25(2) *Australian Journal of Human Rights* 232.
- ⁹ Academic Network of European Disability Studies, *Inclusive Education for Young Disabled People in Europe: Trends, Issues and Challenges* (2011) <www.youthmetro.org/uploads/4/7/6/5/47654969/aned_2010_task_5_education_final_report.pdf>; Reiser, above n 5.
- ¹⁰ UNESCO, Ministry of Education and Science Spain, *The Salamanca Statement and Framework for Action on Special Needs Education, World Conference on Special Needs Education: Access and Quality* (7–10 June 1994) <http://www.unesco.org/education/pdf/SALAMA_E.PDF>.
- ¹¹ National Principles for Child Safe Organisations (2018) <<https://childsafe.humanrights.gov.au>>.
- ¹² CRPD Committee, *General Comment No.4*, above n 4, [10(b)].
- ¹³ However, it is important to note that Australia's domestic legal framework has not been fully harmonised with these international human rights instruments. See, e.g., CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, CRPD/C/AUS/CO/2-3 (15 October 2019) [5(a)]: 'The Committee is concerned about...[t]he insufficient harmonization of the domestic legal framework with the Convention'.
- ¹⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1.
- ¹⁵ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008).
- ¹⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 2.
- ¹⁷ *Ibid*, art 19.
- ¹⁸ *Ibid*, art 23.
- ¹⁹ *Ibid*, art 23.
- ²⁰ *Ibid*, art 23.
- ²¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
- ²² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ²³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- ²⁴ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
- ²⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

- ²⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295, Annex, (2 October 2007) 295.
- ²⁷ *Disability Discrimination Act 1992* (Cth), s23.
- ²⁸ *Ibid*, s22.
- ²⁹ *Ibid*, s37.
- ³⁰ *Ibid*, ss11, 29A.
- ³¹ It is important to note that the Australian Human Rights Commission does not have the power to conduct systemic litigation under the DDA. It is up to individual parties to apply to the Federal Court for a remedy in their particular case.
- ³² *Disability Standards for Education 2005*, Part 2.2.
- ³³ *Ibid*, Part 1.5.
- ³⁴ *Ibid*, Part 1.5(g).
- ³⁵ *National Disability Strategy 2010-2020*
<https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf>.
- ³⁶ *Alice Springs (Mparntwe) Education Declaration* (December 2019)
<<https://www.reviewmelbournedeclaration.edu.au/draft-feedback>>. The review of the Melbourne Declaration provided an important opportunity to include a specific commitment to action regarding inclusive education for students with disability. In June 2019 the Commission recommended that the Melbourne Declaration be updated to include 'improving education outcomes for students with disabilities by promoting inclusive education at all levels', consistent with CRPD, as a new priority area for action. However, the Commission is disappointed to note that the new Declaration does not incorporate this recommendation.
- ³⁷ Senate Education and Employment References Committee, *Access to real learning: the impacts of policy, funding and culture on students with disability* (15 January 2016) [2.3]<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Report>.
- ³⁸ CRPD Committee, *General Comment No.4*, above n 4, [11].
- ³⁹ *Ibid*, [11]. See also Gary Thomas, 'Inclusive Schools for an Inclusive Society' (1997) 24 *British Journal of Special Education* 103; Anastasia Liasidou, *Inclusive Education, Politics and Policymaking* (2012) 8-9.
- ⁴⁰ CRPD Committee, *General Comment No.4*, above n 4, [11]. See also Thomas, above n 39; Liasidou, above n 39.
- ⁴¹ CRPD Committee, *General Comment No.4*, above n 4, [11]. See also Thomas, above n 39; Liasidou, above n 39.
- ⁴² Gauthier De Beco, 'Progressive Realisation and Inclusive Education' in Gauthier De Beco, Shivaun Quinlivan and Janet E. Lord (eds), *The Right to Inclusive Education in International Human Rights Law* (2019) 196; Sonali Shah and Mark Priestley, *Disability and Social Change: Private Lives and Public Policies* (Policy Press 2011) 107.
- ⁴³ CRPD Committee, *General Comment No.4*, above n 4, [12(c)].
- ⁴⁴ Dimitris Anastasiou, Michael Gregory and James M Kauffman, 'Article 24: Education' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the rights of Persons with Disability: A Commentary* (2018) 656, 673-674, 687-696, 698.
- ⁴⁵ Anastasiou, Gregory and Kauffman, above n 44, 698; Gauthier De Beco, 'Comprehensive Legal Analysis of Article 24' in Gauthier De Beco, Shivaun Quinlivan and Janet E. Lord (eds), *The Right to Inclusive Education in International Human Rights Law* (2019) 58, 66.
- ⁴⁶ Gauthier De Beco, 'Comprehensive Legal Analysis of Article 24', above n 45, 66.

- ⁴⁷ CRPD Committee, *General Comment No.4*, above n 4, [40].
- ⁴⁸ Anastasiou, Gregory and Kauffman, above n 44;
- ⁴⁹ See, e.g., Cukalevski and Malaquias, above n 8; Rosemary Kayess and Jennifer Green, 'Today's Lesson is on Diversity' in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 53; Anastasiou, Gregory and Kauffman, above n 44; Gauthier De Beco, 'Comprehensive Legal Analysis of Article 24', above n 45.
- ⁵⁰ Anastasiou, Gregory and Kauffman, above n 44, 694-696.
- ⁵¹ CRPD, art 24(1)(a).
- ⁵² See ICESCR, art. 2(1).
- ⁵³ United Nations Committee on Economic, Social and Cultural Rights (CESCR Committee), *General Comment No. 3: The Nature of States Parties' Obligations*, E/1991/23 (14 December 1990) [9].
- ⁵⁴ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2nd ed) (Cambridge University Press 2014) 530; De Beco, 'Progressive Realisation and Inclusive Education', above n 42, 196.
- ⁵⁵ CESCR Committee, *General Comment No. 3*, above n 53, [10].
- ⁵⁶ De Beco, 'Progressive Realisation and Inclusive Education', above n 42, 194.
- ⁵⁷ CESCR Committee, *General Comment No. 3*, above n 53, [10].
- ⁵⁸ CRPD Committee, *General Comment No.4*, above n 4, [40].
- ⁵⁹ *Ibid*, [61].
- ⁶⁰ *Ibid*, [62].
- ⁶¹ *Ibid*, [69]-[70].
- ⁶² *Ibid*, [36], [71]-[73].
- ⁶³ *Ibid*, [40].
- ⁶⁴ De Beco, 'Progressive Realisation and Inclusive Education', above n 42, 193.
- ⁶⁵ See in particular CRPD Committee, *General Comment No. 4*, above n 4, [24].
- ⁶⁶ *Ibid*, [67].
- ⁶⁷ Kyriaki Messiou, 'The missing voices: students as a catalyst for promoting inclusive education' (2019) 23 (7-8) *International Journal of Inclusive Education* 768.
- ⁶⁸ *Ibid*.
- ⁶⁹ A detailed analysis of the Commission's complaints relating to education is contained in Appendix A.
- ⁷⁰ Monash University, Castan Centre for Human Rights Law, *Improving Educational Outcomes for Children with Disability in Victoria - Final Report* (June 2018); Senate Education and Employment References Committee, *Access to real learning*, above n 37; Children and Young People with Disability Australia, *Towards inclusive education: a necessary process of transformation* (October 2019) <<https://www.cyda.org.au/LiteratureRetrieve.aspx?ID=217220>>.
- ⁷¹ Castan Centre for Human Rights Law, above n 70.
- ⁷² Senate Education and Employment References Committee, *Access to real learning*, above n 37.
- ⁷³ Australian Institute of Health and Welfare, *Disability in Australia: Changes over Time in Inclusion and Participation in Education* (2017) <<https://www.aihw.gov.au/getmedia/34f09557-0acf-4adf-837d-eada7b74d466/Education-20905.pdf.aspx>>.
- ⁷⁴ Kate de Bruin, 'The Impact of Inclusive Education Reforms on Students with Disability: An International Comparison' (2019) 23(7-8) *International Journal of Inclusive Education* 811, 816.
- ⁷⁵ *Ibid*, 816.
- ⁷⁶ *Ibid*, 822.
- ⁷⁷ Senate 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* (2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>; Senate Education and Employment References Committee, *Access to real learning*, above n 37.
- ⁷⁸ Children and Young People with Disability Australia, above n 70.
- ⁷⁹ See also Senate Education and Employment References Committee, *Access to real learning*, above n 37, 65–67; Castan Centre for Human Rights Law, above n 70.
- ⁸⁰ Ombudsman NSW, *NSW Ombudsman Inquiry into behaviour management in schools: A Special Report to Parliament under s 31 of the Ombudsman Act 1974* (2017).
- ⁸¹ See also Urbis, '2015 Review of the Disability Standards for Education 2005 - Final Report' (17 July 2015) 38–40 <<https://docs.education.gov.au/system/files/doc/other/final-report-2015-dse-review.pdf>>; Senate Education and Employment References Committee, *Access to real learning*, above n 37; De Bruin, above n 74.
- ⁸² Castan Centre for Human Rights Law, above n 70.
- ⁸³ CRC Committee, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) [43(c)].
- ⁸⁴ Australian Human Rights Commission, *Children's Rights in Australia: a scorecard* (2019) 40 <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-australia-scorecard>>.
- ⁸⁵ CRPD Committee, *Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its Tenth Session*, CRPD/C/AUS/CO/1 (21 October 2013).
- ⁸⁶ CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, above n 13, [67].
- ⁸⁷ *Ibid*, [45(b)].
- ⁸⁸ *Ibid*, [46(b)].
- ⁸⁹ Department of Education and Training, *Review of the loading for students with disability* (2018) <<https://www.education.gov.au/review-loading-students-disability-swd>>.
- ⁹⁰ Senate Education and Employment References Committee, *Access to real learning*, above n 37.
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- ⁹² CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, above n 13, [45(a)].
- ⁹³ *Ibid*, [46(a)].
- ⁹⁴ *Ibid*, [46(c)].
- ⁹⁵ *Ibid*, [4(i)].
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- ⁹⁸ *Ibid*, [62].
- ⁹⁹ CRPD Committee, *General Comment No.4*, above n 4, [73].
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- ¹⁰³ Children and Young People with Disability Australia, above n 70.
- ¹⁰⁴ Ibid.
- ¹⁰⁵ Australian Law Reform Commission, above n 100, [8.18].
- ¹⁰⁶ Ibid.
- ¹⁰⁷ Senate Community Affairs References Committee, above n 77, [3.69].
- ¹⁰⁸ Ibid, [10.57].
- ¹⁰⁹ Ibid, [10.59].
- ¹¹⁰ CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, above n 13, [8].
- ¹¹¹ CRC Committee, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, above n 83, [43(c)].
- ¹¹² McCarthy, above n 102, 200-201.
- ¹¹³ CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, above n 13, [12].