



## Submission

### United Nations Human Rights Council resolution 37/20

### Empowering children with disabilities for the enjoyment of their human rights, including through inclusive education

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#### All Means All – The Australian Alliance for Inclusive Education

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#### Introduction

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1. All Means All is the Australian Alliance for Inclusive Education, a nationwide multi-stakeholder alliance working together to implement an inclusive education system and remove the legal, structural and attitudinal barriers that limit the rights of all students, including students with disabilities, to access full inclusive education in regular classrooms in Australian schools.
2. All Means All thanks the United Nations Human Rights Council for the opportunity to make this submission on the theme of "Empowering children with disabilities for the enjoyment of their human rights, including through inclusive education".
3. Notwithstanding various initiatives and reform efforts at national and State level, Australia has on the whole failed to take effective steps to ensure the realisation of an inclusive education system at a systemic level and accordingly, to realise the rights of all students with disabilities to an inclusive education pursuant to its international human rights obligations and consistently with 4 decades of evidence supporting inclusive education for students with and without disabilities<sup>1</sup>. A rise in educational segregation of Australian students with disabilities in concurrence with the period since the United Nations Convention on the Rights of Persons with Disabilities (CRPD) was ratified, corroborates to this conclusion.
4. We believe that a lack of clarity and understanding among policy makers, educators and other relevant stakeholder about the meaning of "inclusive education", in turn reflected at legal, policy and practice levels, and the failure of successive federal and State governments in Australia to provide for its comprehensive and positive implementation beyond limited anti-discrimination prohibitions, helps to explain the current contextual deficiencies for students with disabilities.
5. There are however positive examples of systemic transformation at the individual school level and new government policy formulations that seek to align with the principles enshrined in Article 24 of the CRPD. These example provide some promise towards the systemic transformation that is required to ensure the full realisation of the right of every child to education in a quality, universally accessible and inclusive education system.

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<sup>1</sup> See for example the comprehensive review of research "A summary of the Evidence in Inclusive Education" (2016), by Dr. Thomas Hehir, Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education and Abt Associates and the 2008 comprehensive analysis of the available research by Dr Robert Jackson,, "Inclusion or Segregation for children with an Intellectual Impairment: What does the evidence say?"

## Human right to inclusive education

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6. The right of children with disabilities to inclusive education is a fundamental human right as recognised in various international human rights instruments and notably the CRPD (as further explained by General Comment No. 4 - Right to Inclusive Education)<sup>2</sup>.
7. While there have been efforts to implement inclusive education around Australia with varying fidelity and success, the failure of successive Australian federal and State governments to proactively implement system-wide transformation as required by Article 24 of the CRPD and General Comment No.4, continues to mean that despite ratification of the CRPD many children with disabilities are still denied their basic right to inclusive education, in serious violation of their fundamental, consequent and associated human rights.
8. In particular, the current federal legal and policy framework has failed to support the realisation of the requirements of Article 24 within the education systems of Australia's States and Territories and has supported (rather than regressed) the maintenance and continued investment in a "parallel system" of education in Australia, comprising separate segregated settings for students with disabilities (whether in "special" schools, co-located education support units or separate classrooms in general education schools) - this is a key factor undermining the implementation of inclusive education in Australia.

## The experience of Australian students with disabilities and their families

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9. The reality for children with disabilities in Australia is that the education system remains resistant, both culturally and in terms of educational practice, to accommodating their full and effective participation and inclusion, particularly for students with intellectual, cognitive or sensory disabilities.
10. Despite the enactment of the *Disability Discrimination Act* 1992 (Cth)<sup>3</sup> (**DDA**) and the Disability Standards for Education 2005<sup>4</sup> (**the Standards**), which apply in respect of all Australians with disabilities, the National Disability Strategy that commits to an inclusive Australia<sup>5</sup> and a range of policy statements at State and Territory level that purport to support inclusive education, the reality of the experience for too many children with disabilities in the Australian education system is frequently one of discrimination and devaluation, isolation, lack of resources and supports, denial of enrolment or other forms of "gatekeeping"<sup>6</sup>, inadequately trained teachers, lack of expertise in inclusive practices and inflexible structures and approaches that operate as barriers. Too often, students with disabilities experience practices that are not evidence-based, that isolate them and that result in a lower quality educational provision and consequently poor educational outcomes.
11. A recent study of over 900 families across Australia identified that a staggering 71% of those surveyed reported either "gatekeeping" or restrictive practices<sup>7</sup>.
12. 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 disabilities<sup>8</sup>.
13. It seems clear that the experiences of Australian students with disabilities are strongly characterised by systemic "integration", "segregation" or "exclusion" – not "inclusive education", as those terms are defined in paragraph 11 of General Comment No. 4.

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<sup>2</sup> CRPD/C/GC/4, see

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en)

<sup>3</sup> See

<http://www.comlaw.gov.au/ComLaw/management.nsf/current/bytitle/2CEDE1C513E5D87ACA256F710006F23F?OpenDocument&mostrecent=1>

<sup>4</sup> See <http://www.education.gov.au/disability-standards-education>

<sup>5</sup> The Strategy states: "The shared vision is for an inclusive Australian society that enables people with disability to fulfil their potential as equal citizens."

<sup>6</sup> Gatekeeping" is an unconscionable practice and refers to the formal and informal discouragement of enrolment and attendance of students with disabilities 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](#).

<sup>7</sup> See <http://allmeansall.org.au/wp-content/uploads/2017/10/TIES-4.0-20172.pdf>

<sup>8</sup> See

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/students\\_wit\\_h\\_disability/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_wit_h_disability/Report)

## **Inconsistent policies governing education of students with disabilities**

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14. Despite the many Parliamentary and departmental inquiries across Australia, the reports and responses that have followed in many cases have themselves been either insufficient or problematic. For example, the outcomes of a review in New South Wales, Australia's most populous State, has resulted in that State government's adoption of a recommendation to increase the segregation of students with disabilities in "special classrooms" (Recommendation 10),<sup>9</sup> undertaking that "support class establishments" will increase in 2018 at "a greater rate than general enrolment growth". Without a corresponding commitment to decreasing other forms of segregated education, this in fact represents an impermissible retrogressive measure in light of Australia's obligations to ensure the full realisation of Article 24 of the CRPD.
15. In the case of other State and Territory reviews and policies adopted in light of them, many of the positions would seem to be inconsistent with Article 24 and the guidance in General Comment No.4, as well as Article 5 and the guidance in General Comment No.6 (Equality and Non-Discrimination). A correct understanding and application of relevant concepts in inclusive education is critical to implementing a genuinely inclusive education system for children with disabilities to realise their human right to education. In particular, initiatives that support the delivery of education services in education environments that separate or segregate students with disabilities cannot be characterised as "inclusive".
16. In many cases, State policies have, deliberately or by omission, failed to articulate clear and appropriate definitions of "inclusive education" and often do not reflect awareness of the distinction between common educational practices that exclude, isolate and segregate students on the basis of disability and inclusive practices. Too often the word "inclusive" is used as a euphemism for something that is implemented specifically for students with disabilities, including segregating measures.
17. A notable exception is the newly released Inclusive Education Policy<sup>10</sup> of the State of Queensland that adopts key definitions and concepts outlined in General Comment No.4 and documents "a commitment to continue to work towards a more inclusive state education system and the principles, which will guide that work".

## **Insufficiency of legal framework to implement inclusive education**

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18. Overall, Australian laws do not establish sufficiently robust legal frameworks in support of inclusive education for students with disabilities and this has resulted in States and Territories continuing to operate education systems that deny students with disabilities their fundamental human rights.
19. In theory, the right of all Australian children with disabilities to attend their local government schools is a right protected by the DDA<sup>11</sup>(and the Standards) which seek to reflect Australia's international law obligations under the CRPD. As a matter of Australian Constitutional law, the Australian Government derives its power to enact laws relating to the education of students with disabilities and with which State jurisdictions must comply, through its ratification of the CRPD.
20. However, neither the DDA nor the Standards mention "inclusive education" or seek to provide for positive steps to implement inclusive education at a systemic level as required by Article 24 of the CRPD, beyond the limited prohibition of specific forms of discrimination and the provision of individual rather than systemic remedies.
21. Briefly, under the DDA a school or other education authority is not permitted to discriminate on the grounds of disability:
  - in deciding an application for admission;
  - in the terms or conditions on which it is prepared to admit a student (e.g. by requiring higher fees or accepting payment of the cost of an education assistant or aide);

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<sup>10</sup> See <http://ppr.det.qld.gov.au/pif/policies/Documents/Inclusive-education-policy.pdf>

<sup>11</sup> See <http://www.comlaw.gov.au/ComLaw/management.nsf/current/bytitle/2CEDE1C513E5D87ACA256F710006F23F?OpenDocument&mostrecent=1>

- by denying or limiting a student’s access to any benefit provided by the school (e.g. excursions, sports or extra curricular activities and areas of the school);
  - by expelling a student;
  - by developing curriculum content that will exclude a student from participation; or
  - by subjecting a student to any other detriment.
22. An exception to the prohibition on discrimination exists in cases of “unjustifiable hardship”.
23. While the Standards are required to be reviewed for their effectiveness every 5 years and the CRPD Committee has on various occasions, including in the course of Australia’s last periodic report review by the CRPD Committee in 2013, raised concern about their effectiveness, the most recent formal review in 2015 has not resulted in any updates.
24. Of particular concern, the key definition of “reasonable adjustment” in the Standards is materially inconsistent with the equivalent concept in Article 24 of the CRPD, as explained in General Comment No. 4 and General Comment No.6, and must be addressed as a matter of urgency.
25. Importantly, the DDA provides no guidance in respect of segregation of children with disabilities and in fact expressly exempts as permissible, the segregated delivery of services to persons with disabilities<sup>12</sup>.
26. However, a range of international human rights instruments have made it clear that the segregation of students with disabilities is a form of discrimination against them and that it is not compatible with their right to inclusive education. For example:
- General Comment No.4 provides in paragraph 10 that “*Segregation occurs when the education of students with disabilities is provided in separate environments designed or used to respond to a particular or various impairments, in isolation from students without disabilities*”;
  - Paragraph 12 of General Comment No.4 speaks of “*ending segregation within educational settings by ensuring inclusive classroom teaching in accessible learning environments with appropriate supports*” and calls for inclusive education to be “*monitored and evaluated on a regular basis to ensure that segregation or integration is not happening either formally or informally*”.
  - Paragraph 13 of General Comment No.4 states that “*the right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation*”;
  - General Comment No.6 states at paragraph 64 that “*segregated models of education, which exclude students with disabilities from mainstream and inclusive education on the basis of disability, contravene articles 5(2) and 24(1)(a)*”; and
  - Paragraph 39 of General Comment No.4 makes it clear that the full realization of Article 24 “*is not compatible with sustaining two systems of education: mainstream and special/segregated education systems*” and consistently with this, paragraph 68 calls for “*a transfer of resources from segregated to inclusive environments*”.
27. Despite clear guidance from relevant treaty bodies that the segregation of students with disabilities - whether in “specialist classes or units in mainstream schools and specialist schools” – is not a legitimate modality to deliver education to students with disabilities and that progressive realisation of an inclusive education system is not compatible with the preservation of and continued investment in segregated education models, in the decade since ratification of the CRPD, educational segregation of students with disabilities has in fact proportionately increased in Australia<sup>13</sup>.
28. This concern was also recognised by the UN Committee on Economic, Social and Cultural Rights on 31 May of 2017 in consideration of the fifth periodic report of Australia on its implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR):

*“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?”<sup>14</sup>”*

<sup>12</sup> See section 45 of the DDA exempting discrimination in the provision of facilities or services, including in relation to, education to meet “special needs”, although it also seeks to limit this where discrimination “is not necessary for implementing the measure”. As we understand it, segregation has never been challenged on the basis of “necessity”.

<sup>13</sup> Australian Bureau of Statistics. 2013. Schools Australia. View at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4221.02013> showing that between 1999-2013, there was an increase in special schools of 17% Australia

<sup>14</sup> See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21677&LangID=E>

## Use of "parental choice" to justify segregation

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29. The superficial use of "parental choice" by Australia's governments and education systems to justify their failure to move towards an inclusive education system and discard segregation models for the delivery of education to students with disabilities remains a significant barrier to the implementation of inclusive education.
30. General Comment No.4 provides a clear statement that inclusive education is to be understood as, amongst other things:

*"a fundamental human right of all learners – notably, education is the right of the individual learner and parental responsibilities in regard to the education of a child are subordinate to the rights of the child" [paragraph 10].*
31. While it is recognised that it is parents who should determine, in the first instance, what is in their child's best interests, in our view it is not legitimate for governments to continue to invest in segregated education to protect choice of a discriminatory mode of delivering education to students with disabilities, over a child's fundamental human rights to inclusive education. Just as the "parental choice" argument cannot today be relied upon to support parents' decisions not to educate girls or to choose that girls should not be taught academic subjects, "parental choice" should not justify placing a child in a segregated setting – both being impermissible educational discrimination.
32. We further note in this context that the segregation of students with disabilities is not a choice in the nature of the cultural or religious preferences or beliefs sought to be protected by Article 13 of the ICESCR, for example. Further, it must be recalled that children themselves are "active rights holder[s] who [are] increasingly able to exercise those rights as they develop, given proper guidance and direction"<sup>15</sup>.
33. As such, the principle of "parental choice" must be applied within, and not in spite of, the human rights framework – a framework that recognises that it is through inclusive education that the fundamental right to education is realised by persons with disabilities and that educational segregation is a form of impermissible discrimination.
34. In any event, the fallacy of "parental choice" in this context is evident when you consider the consistent finding across Australia, in the Australian Senate's review, various State and Territory reviews as well as significant research undertaken across Australia, that students with disabilities and their families experience widespread discrimination and unconscionable "gatekeeping" (see explanation above) in trying to access and seeking appropriate support in the general education system. The practice of "gatekeeping", whether deliberate or not, compromises a parent's free and informed choice, not to mention the child's rights to access the general education system.
35. The continued "leakage" of students with disabilities from the general education schooling system to the segregated "special" system is reflective of the failure of Australian governments to progress inclusive education and to adequately support students with disabilities in the general system. That failure cannot be properly characterised as legitimate parent-driven "demand" for segregated schooling, thereby releasing the Australian Government's from its obligation to fully implement Article 24 and to continue to consume valuable resources in maintaining a parallel segregated system for students with disabilities.

### Case Study: Thuringowa State High School – Demonstrating Systemic Transformation to Implement Inclusive Education

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36. Despite the deficiencies of legal and policy frameworks, some schools in Australia have worked to implement systemic transformation to deliver inclusive education to all their students.
37. While there are various examples of schools around Australia, we note the recent journey at Thuringowa State School in Queensland, which closed down its segregated unit for students with disabilities and implemented school-wide inclusive education for all their students guided by the CRPD and General Comment No. 4<sup>16</sup>:

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<sup>15</sup> CRC/C/GC/21, para 35, see [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f21&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f21&Lang=en)

<sup>16</sup> Read more at <https://school-inclusion.com/inclusion-in-action/thuringowa-shs-journey/>

*"Throughout 2015, Thuringowa SHS implemented a deliberate and gradual roll out of their Inclusive Schooling model. To begin with, they invested heavily in developing staff capacity in Years 7 and 8, and with pre-existing Special Education staff. They engaged in an action research project focused on Co-teaching and Differentiation which saw the development of a weekly Professional Learning Community to build capability. They engaged in regular cycles of inquiry, tracking data, and ironing out problems of practice as they arose. They sought feedback from parents, students, staff, and broader Department representatives and continued to evolve their practice.*

*Over the course of 2016 Thuringowa SHS scaled their capacity, and utilised their lessons learnt to impact classroom practices across all year levels and to develop and implement further operational policies and procedures. This resulted in the eradication of the temporary integration responses, and greater emphasis on not only access and participation, but on social and curriculum outcomes as well. The former Special Education Program/Unit was entirely disbanded.*

*In 2017 the model reached its intended representation.*

- All students are welcomed at enrolment, and parents and students are supported to engage with and undertake enrolment procedures. Students are timetabled into heterogeneous classes, and students with a disability are proportionally placed across all classes in the Year level.*
- Students are provided access to year level curriculum that is supported by quality, differentiated teaching and learning processes. Students requiring access to alternate year level junctures do so with the support of a unique curriculum alignment process which sees the variation in complexity of content descriptors and achievement standards being matched to regular, year level units of work – resulting in rigorous, full participation and engagement with age appropriate contexts within the general education classroom 100% of the time.*
- Explicit Instruction, cooperative learning, peer tutoring, and station teaching methods are regular pedagogical approaches. Learning environments are organised and managed to be accessible by all, and teachers adopt a variety of strategies to support attention and sensory regulation. Positive Behaviour for Learning is implemented school-wide.*
- Teachers and students are supported through the appointment of authentic Co-teaching partnerships that result in two teachers being assigned to one, regular sized class, with both having complete parity over the educational experiences of all students in the room. Teacher aide appointments from various allocations are pooled, and disseminated to support the classroom teacher and the whole class; not individual or marginal groups of students.*
- Students are seated sporadically within classes and not clustered together based on ability. Labels are not used to describe students, and students no longer receive ongoing, Special Education Case Management. Classroom teachers are the experts on student performance in their particular contexts; and in collaboration with support staff and parents they identify what supports and strategies work best and modify these through ongoing, real-time analysis of student response and performance.*
- Blanket strategies that are based on perception and past performance are no longer supported. The micromanagement of a student's every move is non-existent, adult proximity has been removed, and Special Education staff are no longer the gate keepers of information, communication, or intervention.*
- Investment in maintaining inclusive culture and its shared beliefs and understandings occurs through regular professional development, and through regular highlighting and sharing of best practice by members of staff. Staff capacity is supported through the application of Instructional Coaching – a job-embedded, highly responsive form of professional learning that focuses on building quality teaching and learning through the application of inclusive principles and practices.*
- The School Improvement Hierarchy from the current Every Student Succeeding – State School Strategy is used in combination with a Circle of Practice as a means of recognising current successful practice, and as a guide on what needs to happen next in the inclusive school improvement journey – this has the school aiming for the target of at least 90% of people, 90% of the time. Components of the Inclusive Schooling model can also be found within the school's Strategic Plan and subsequent Annual Implementation Plans.*

*Thuringowa SHS's goal is that when entering a classroom you cannot tell which students are students with disability, or which staff members are employed under the Special Education*

*banner; by this it is meant that supports are effective, but as invisible as possible, and that there are no special students, no special staff, no special curriculum, and no special places.”*

38. The school was recently featured in a video on the website of the Queensland Department of Education:  
<https://mediasite.eq.edu.au/mediasite/Play/e168a50e606440b18636e5b8fe0379071d>
39. We encourage closer analysis of promising examples such as Thuringowa that go beyond inclusion being implemented at a classroom level and also explore how systemic transformation can occur in "dual models", where the two existing parallel systems are effectively merged to create a single, universally accessible and inclusive education system.
40. Finally, we would like to note the international video campaign "Lea Goes To School" #IncludeUsFromTheStart and supporting website developed for World Down Syndrome Day 2018 with the participation of organisations from around the world including All Means All, and the patronage of the UN Special Rapporteur on the Rights of Persons With Disabilities, Ms Catalina Devandas, in promotion of the human right to inclusive education:  
[www.includeusfromthestart.com](http://www.includeusfromthestart.com)