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21 August 2015

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: eec.sen@aph.gov.au

Dear Committee Secretary,

Submission to the Inquiry into the current levels of access and attainment for students with disability in the school system, and the impact on students and families associated with inadequate levels of support

Background

1. Australian Lawyers for Human Rights (ALHR) thanks the Education and Employment Committee for the opportunity to comment on the Inquiry into the current levels of access and attainment for students with disability in the school system, and the impact on students and families associated with inadequate levels of support ("Inquiry").
2. ALHR was established in 1993 and is a national network of over 2600 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged

National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Submission

3. ALHR provides the following submission on point (j) of the Terms of Reference to address the international human rights obligations that apply in respect to children with disabilities having access to and participating in education in Australia.

Summary

4. In summary, ALHR submits that in accordance with articles 24 and 7 of the *United Nations Convention on the Rights of Persons with Disabilities* children with disabilities must have access to inclusive education that offers them equal opportunities with other children where they can achieve full development that enables them to participate effectively in a free society. ALHR submits that schools or government policies which fail to provide equal and inclusive educational opportunities to children with disabilities are in breach of the *United Nations Convention for the Rights of Persons with Disabilities*.
5. Further, the *United Nations Convention on the Rights of the Child* establishes that all children have a right to education. Article 23 of the *United Nations Convention on the Rights of the Child* recognizes the special needs of children with disabilities, requiring that assistance is made available to ensure the child has effective access to and receives education. Article 29 requires that education should be directed to developing the child's mental and physical abilities. ALHR submits that where children with disabilities are unable to access education that develops their physical and mental abilities by way of receiving special needs where required, the child's fundamental human right to education is being denied. Practices which permit this to occur must cease immediately.

Division of Responsibilities between Commonwealth and State and Territory governments

6. While the *Convention on the Rights of the Child* makes the delivery of a non-discriminatory education a federal responsibility, constitutional arrangements in Australia specify that State and Territory governments are responsible for the delivery, and the funding, of primary and the secondary education. As a result, there is no Commonwealth legislation directly assuring the right to education.¹
7. However, the Commonwealth has assumed responsibility for particular educational sectors as specified in the following legislation:

¹ Humanrights.gov.au, *Information Concerning Australia and the Convention on the Rights of the Child / Australian Human Rights Commission* (2011) <https://www.humanrights.gov.au/information-concerning-australia-and-convention-rights-child-0#s8_2> at 19 August 2015.

- a. The *Higher Education Funding Act* 1988 (Cth) provides for funding for certain institutions of higher education and for the Higher Education Contribution Scheme (HECS) and other forms of financial assistance for students at higher education institutions.
 - b. The *Schools Assistance Act* 2008 (Cth) provides for financial assistance to the States and Territories for non-Government primary and secondary education.
 - c. The *Indigenous Education (Targeted Assistance) Act* 2000 (Cth) provides targeted financial assistance which is intended to advance the education of Indigenous persons.
 - d. The *Education Services for Overseas Students Act* 2000 (Cth) is designed to provide financial and tuition assistance to overseas students for courses for which they have paid.²
8. In addition, under the *Disability Discrimination Act* 1992 (Cth), the Attorney-General may make Disability Standards to specify rights and responsibilities about equal access and opportunity for people with disability, in more detail and with more certainty than the Act itself provides. A Standard has been made under the Act in relation to education, which sets out the right to comparable access, services and facilities, and the right to participate in education and training without discrimination for students with disabilities.³

United Nations Convention on the Rights of Persons with Disabilities

9. The United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) was ratified in July 2008 and the Optional Protocol in 2009. The CRPD “elaborates in detail the rights of people with disabilities and sets out a code of implementation”.⁴

Article 7

10. Article 7 of the CRPD requires Australia to undertake the necessary measures to ensure that children with disabilities have the same full enjoyment, human rights and fundamental freedoms that are had by other children. Further, it requires that the best interests of children with disabilities should be the foremost concern; and that they have a right to express their own opinion on any matter which affects them, with due consideration given to their age and maturity, as with other children.⁵
11. In our view, recent incidents of physical and/or emotional abuse and restraint of children with disabilities in Australian schools, such as the caging of a 10-year-old

² Humanrights.gov.au, *Information Concerning Australia and the Convention on the Rights of the Child / Australian Human Rights Commission* (2011) https://www.humanrights.gov.au/information-concerning-australia-and-convention-rights-child-0#s8_2 at 19 August 2015.

³ Ibid.

⁴ United Nations Department of Public Information, *The Convention in Brief* (2006) <<http://www.un.org/disabilities/convention/convention.shtml>> at 19 August 2015.

⁵ *United Nations Convention on the Rights of People with Disabilities*, UN Doc A/RES/61/106 (13 December 2006, adopted 3 May 2008) art 7.

boy with autism in a Canberra classroom,⁶ are clear breaches of article 7 of the CRPD and requires immediate remedy. Physical, emotional or psychological mistreatment of any kind is a breach of the human rights of children to fundamental freedoms and full enjoyment of life.

12. ALHR calls on the Australian Government to make a clear commitment to Article 7 of the CRPD and provide the necessary measures to ensure children with disabilities have the right to fundamental freedoms as other children do. Accordingly, a centralised system of procedures should be adopted in schools to include children with disabilities in mainstream classroom settings; and stringent penalties should be applied in circumstances where the freedoms and the rights of children with disabilities have been violated by education staff.

Article 24

13. In today's society, the notion of a child with a disability being excluded from receiving an education in a mainstream environment is inconceivable and unacceptable. Australia has an obligation under article 24 of the CRPD to directly address this by making inclusive education available to all children with disabilities.
14. Article 24 of the CRPD provides the right for people with disabilities to an education by ensuring an inclusive education system at all levels. Reasonable accommodations must be made to facilitate full and equal participation and appropriate measures taken to employ teachers who are appropriately trained in disability awareness including (where necessary) being trained in sign language and/or to read braille and to have an understanding of the use of augmentative and alternative modes of communication.
15. ALHR is appalled by the recent mistreatment of children with disabilities in educational settings which amount to clear breaches of the CRPD. Curricula should not be delivered at the expense of—or with an exception to—participation of any student with a disability. In circumstances where there is disadvantage as a direct consequence of exclusion, or when learning is not maximised via the adoption of alternative modes of delivery or the implementation of additional resources and support services, a contravention of the CRPD has occurred.
16. ALHR further submits that familiarising teachers with the relevant guidelines on the inclusion of children with disabilities in the classroom is a pertinent first step; however, teachers to be offered far more than a modicum of insight into the rights which underpin those guidelines. ALHR submits that teachers should be required to undertake disability awareness training that is specific to the requirements of inclusive education as set out in Article 24 of the CRPD.

⁶ Rachel Browne, 'Children with autism caged and abused at school', *The Sydney Morning Herald* (online), 2 April 2015 <<http://www.smh.com.au/nsw/children-with-autism-caged-and-abused-at-school-20150331-1mbt48.html>> .

17. In addition, teachers should be familiar with alternative methods of maximising learning and/or undertaking practical experience in classrooms where alternative methods are offered. Being aware of, and familiar with, the issues and solutions that face children with disabilities in education should be a condition of the teacher's training.
18. Jordan, Schwartz and McGhie-Richmond recommend that "... teachers have practical experiences in which there are opportunities to examine and foster their beliefs and learn desirable lessons about how to address the needs of diversity in the classroom".⁷ The authors go on to argue that "[t]eachers who believe students with special needs are their responsibility tend to be more effective overall with all their students".⁸
19. There is no doubt that teachers should be familiar with the legal requirements that reinforce their role; however, it should not be confined to the theoretical notion of inclusion. ALHR submits that requirement of practical experience with students with disabilities will not only strengthen the ability of teachers to adapt to changing situations, but that it will better equip them for their ongoing role in the classroom.
20. ALHR further submits that planning should be a key feature of ensuring the rights of children with disabilities to education, and that such planning should be centered on the student's individual needs. In order to plan effectively, educators and educational facilities should work with students and/or parents to ensure that the relevant inclusive resources are available. These resources encompass, but are not limited to, assistive technology, appropriate information and training, and support staff.
21. It is recommended that to meet the obligations of article 24, teachers utilise an approach similar to that of the functional curriculum, whereby the individual needs of the students are met with appropriate topics, tasks and activities. In order to achieve this, it is further suggested that teachers meet with the relevant stakeholders in a student's education: parents, health practitioners (where appropriate and/or necessary) and the students themselves. Where possible, short-term objectives aimed at achieving long-term outcomes should be discussed; and teachers, parents and students should all have an input into the strategies which are adopted as a means of maximising learning.
22. ALHR submits that article 24 requires education be accessible to all students on an equal basis and calls on the Government to guarantee the measures as set out in article 24 of the CRPD to guarantee an inclusive educational system both in theory and in practice.

⁷ Jordan, A., Schwartz, E. & McGhie-Richmond, D. (2009) Preparing teachers for inclusive classrooms. *Teaching and Teacher Education*, 25(4), p.538.

⁸ Ibid.

United Nations Convention on the Rights of the Child

23. The Convention on the Rights of the Child (“CRC”)⁹ was adopted by the UN General Assembly in November 1989. Australia ratified the CRC in December 1990, meaning that the federal government of Australia has an obligation to ensure that all children physically in Australia regardless of their immigration status enjoy the human rights set out in the Convention.¹⁰ The CRC was the first international instrument to focus exclusively and entirely on the rights of children¹¹ and to protect several different rights that children have, including ‘civil, cultural, economic, political and social rights’.¹²
24. Article 2(1) of the CRC states that “*Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*”¹³

The Definition of Education

25. The CRC does not define the meaning of education, although it does provide that education includes primary, secondary and higher education.
26. UNICEF has provided the following indicia as evidence of quality in education:
- Learners who are healthy, well-nourished and ready to participate and learn, and supported in learning by their families and communities;
 - Environments that are healthy, safe, protective and gender-sensitive, and provide adequate resources and facilities;
 - Content that is reflected in relevant curricula and materials for the acquisition of basic skills, especially in the areas of literacy, numeracy and skills for life, and knowledge in such areas as gender, health, nutrition, HIV/AIDS prevention and peace.
 - Processes through which trained teachers use child-centered teaching approaches in well-managed classrooms and schools and skillful assessment to facilitate learning and reduce disparities.
 - Outcomes that encompass knowledge, skills and attitudes, and are linked to national goals for education and positive participation in society.”¹⁴

⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁰ Humanrights.gov.au, *Australia's Commitment to Children's Rights and Reporting to the UN / Australian Human Rights Commission* (2007) <<https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un>> at 19 August 2015.

¹¹ Jordan, A., Schwartz, E. & McGhie-Richmond, D. (2009). Preparing teachers for inclusive classrooms. *Teaching and Teacher Education*, 25(4), p.538.

¹² UNICEF 2014, *Convention on the Rights of the Child: Promoting and Protecting Rights for Children*, <http://www.unicef.org/crc/index_30168.html> at 15 August 2015.

¹³ Emphasis added.

¹⁴ unicef.org, *A Paper Presented by UNICEF at the Meeting of the International Working Group on Education in Florence, Italy* (2000) <<http://www.unicef.org/education/files/QualityEducation.PDF>> at 19 August 2015.

27. ALHR adopts the view that education includes primary, secondary and tertiary education and that the children have the right to any means and conditions required for its realization.

Article 2(4)

28. Article 2(4) of the CRC prohibits any kind of discrimination, including discrimination against children with disabilities. Australia has an obligation to provide compulsory and free primary education to all children, including children with disabilities. In addition, secondary education must be available to all children regardless of disability.

Article 28

29. Article 28 of the CRC sets out state parties' obligations in relations to the right to education, as follows:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

30. The combination of Article 2(1) and Article 28 means that all children, including children with disabilities, should enjoy all rights set out in the CRC, including the right to education, without any type of discrimination.
31. This is supported by section 22 of the *Disability Discrimination Act* 1992 (Cth) which provides that discrimination against any person on the ground of that person's disability in the educational system is unlawful.¹⁵ In addition, State and Territory legislation across Australia provides for compulsory education between the ages of 5/6 to 15/16/17 years old.¹⁶
32. Article 28 requires state parties to make higher education "*accessible to all on the basis of capacity by every appropriate means.*" The same obligation is created by Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR")¹⁷, which states that higher education '*shall be made equally accessible to all, on the basis of capacity by every appropriate means, and in particular by the progressive introduction of free education.*' ECOSOC has stated that "capacity" of a student with disability must be judged on the basis of their expertise and experience and not their disability.¹⁸
33. Article 28 of the CRC sets out the state parties' general obligations regarding the right to education providing the foundation of those obligations and together with other Articles, such as Article 2(1) of the CRC and other Articles in CRPD in addition to ICESCR, drawing the framework for the State Parties' obligations regarding the right to education for children with disabilities.
34. **ALHR has grave concerns that the current provision of education in Australia is failing to provide children with disabilities with accessible education, free from discrimination and in failing to do so, breaches the human rights obligations stipulated by the CRC.**

Article 29

35. Article 29 of the CRC requires that education be directed to 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'¹⁹. The methods by which these goals are achieved can be determined by individual State curricula.²⁰

¹⁵ Humanrights.gov.au, *Information Concerning Australia and the Convention on the Rights of the Child / Australian Human Rights Commission* (2011) <https://www.humanrights.gov.au/information-concerning-australia-and-convention-rights-child-0#s8_2> at 19 August 2015.

¹⁶ Acara.edu.au, *School Structures / ACARA* (2009) <http://www.acara.edu.au/reporting/national_report_on_schooling_2009/schools_and_schooling/school_structures.html> at 19 August 2015.

¹⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁸ Humanrights.gov.au, *Information Concerning Australia and the Convention on the Rights of the Child / Australian Human Rights Commission* (2011) <https://www.humanrights.gov.au/information-concerning-australia-and-convention-rights-child-0#s8_2> at 19 August 2015.

¹⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁰ Hodgkin R, & Newell, P 2007, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn, UNICEF.

36. Accordingly, the curriculum must implement a strategy to achieve the aims set forth by the minimum standards provided in article 29. To satisfy Australia's international human rights obligations, ALHR submits that all school curricula should reflect article 29 which provides:
- a. Development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - b. Development of the child's respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - c. Development of the child's respect for their parents, their cultural identity, language and values, for the national values of their country (in which they live and originated from), and for cultures different to their own;
 - d. Preparation of the child for a responsible life in a free society, including an understanding and acceptance of peace, tolerance, equality of sexes, and friendship amongst all people including persons of different ethnic, national and religious groups; and
 - e. Development for respect for the environment.²¹
37. Inclusive education is a crucial element in achieving the aims detailed in article 29. As argued by Waddington and Toepke, the aims in article 29 set the foundation for inclusive education, even though those words are not specifically stated in that article or in the CRC.²² ALHR adopts this position and calls for inclusive education to be made available for all children with disabilities in Australia.
38. The Committee highlighted that when adhering to article 29 of the CRC, State Parties should not focus all parts of the curricula on academic performance and results as it 'may seriously hamper the harmonious development of the child to the fullest potential of [their] abilities and talents'.²³
39. Furthermore, in General Comment No. 1, the Committee noted that any system which permits 'exclusionary practices' does not meet the obligations set out in article 29(1).²⁴ A child cannot reach his or her 'fullest potential' where that child is segregated. The Statement explained:

'inclusive schooling is the most effective means for building solidarity between children with special needs and their peers. Assignment of children to special schools- or special classes or sections within a school on a permanent basis- should be the exception, to be recommended only in those infrequent cases where it is clearly demonstrated that education in regular classrooms is incapable of meeting a

²¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 29.

²² Jordan, A., Schwartz, E., & McGhie-Richmond, D. (2009). Preparing teachers for inclusive classrooms. *Teaching and Teacher Education*, 25(4), p. 21-22.

²³ UNICEF 2014, *Convention on the Rights of the Child: Promoting and Protecting Rights for Children*, <http://www.unicef.org/crc/index_30168.html> at 19 August 2015, para. 12.

²⁴ *Ibid*, para. 19.

child's educational or social needs or when it is required for the welfare of the child or that of other children'.²⁵

40. UNICEF have highlighted the clear benefits of mandating inclusive education in countries, such as Australia. These include:
- Developing a positive attitude towards diversity;
 - Children with disabilities will benefit socially by being included;
 - Development of tolerance for diversity;
 - Children with disabilities have access to a wider curriculum than in segregated 'special schools' leading to higher performance. This will also allow for children with disabilities to learn their rights and freedoms, and make a positive contribution to society.²⁶
41. **ALHR agrees that these are the benefits of inclusive education and submits that the inclusion of children with disabilities in mainstream schools must be undertaken to meet article 29 of the CRC.**

Article 23

42. Article 23 of the CRC specifically protects the rights of children with disabilities to an education. Accordingly, as a State party, Australia must provide special care which will allow the child with a disability to reach the 'fullest possible social integration and individual development'.²⁷
43. Article 23 operates alongside article 29 of the CRC, as explained by the UN Committee on the Rights of the Child ("Committee") in their General Comment No. 1 2001:
- 'The Convention's provisions are interconnected, so that Article 29 cannot be properly understood in isolation from them. In addition to the general principles, other relevant aspects of the Convention include ... the rights of children with disabilities (23)...'.²⁸*
44. In the Committee's General Comment No.9 2006, it was noted that the specific inclusion of article 23 protecting children with disabilities and its reference to 'special care', does not condone the segregation of disabled children from mainstream education.²⁹ The Committee urged for the employment of a system of inclusive education for all children, including children living with disability.³⁰ The Salamanca Statement ('the Statement') released by UNESCO in 1994 described inclusive education as a system whereby:

²⁵ Waddington, L & Toepke, C 2015, *Moving Towards Inclusive Education as a Human Right*, In1School, p.8.

²⁶ Lansdown, G (ND), *The Right of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education*, UNICEF, p. 11.

²⁷ Ibid.

²⁸ United Nations Department of Public Information, *The Convention in Brief*, <<http://www.un.org/disabilities/convention/convention.shtml>> at 19 August 2015, 439.

²⁹ UN Committee on the Rights of the Child, General Comment No. 9, *The Rights of Children with Disabilities*, CRC/C/GC/9, (2006) para. 5.

³⁰ Ibid, para. 66.

*‘all children should learn together, wherever possible, regardless of any difficulties or differences they may have. Inclusive schools must recognise and respond to the diverse needs of their students, accommodating both different styles and rates of learning and ensuring quality education to all through appropriate curricula, organisational arrangements, teaching strategies, resource use and partnerships with their communities. There should be a continuum of special needs encountered in every school’.*³¹

45. While the Committee pressed for a system of inclusive education, the reference to ‘special care’ in article 23 is still an essential element in satisfying the obligations provided by article 29:

*‘It is important to understand that inclusion should not be understood nor practiced as simply integrating children with disabilities into the regular system regardless of their challenges and needs. Close cooperation among special educators and regular educators is essential. Schools’ curricula must be re-evaluated and developed to meet the needs of children with and without disabilities. Modification in training programmes for teachers and other personnel involved in the educational system must be achieved in order to fully implement the philosophy of inclusive education’.*³²

46. **It is ALHR’s view that children with disabilities will only reach their fullest potential in a system of inclusion. It is a breach of international human rights to place children with disabilities in a segregated system of education on the basis of their disability.**
47. In accordance with the CRC, children have a right to education. For children with disabilities, this includes the right to special care where required to reach their full potential. **ALHR submits that instances where children with disabilities are denied the right to an inclusive education that is directed to the development of their fullest potential, the CRC has been breached. Processes must be put in place immediately to redress this breach of rights.**

³¹ UNESCO 1994, *The Salamanca Statement and Framework for Action on Special Needs Education*, UNESCO, para. 7.

³² UNICEF 2014, *Convention on the Rights of the Child: Promoting and Protecting Rights for Children*, <http://www.unicef.org/crc/index_30168.html> at 15 August 2015, 67.

Concluding Remarks

48. The international human rights obligations relevant to the rights of children with disabilities to an education are found in the CRPD and CRC. Centrally, children with disabilities have a right to an inclusive education where they are able to reach their fullest potential and abilities. Segregation of children with disabilities in schools is a breach of the CRC and CRPD.
49. Further, teachers must be provided with disability awareness training and appropriate measures taken to have teachers that can facilitate alternative methods of communication including braille, sign language and augmentative communication.
50. **ALHR holds grave concerns that the current education systems in Australia fail to provide inclusive education to children with disabilities and as a result, children with disabilities are being denied their fundamental human rights.**
51. If you would like to discuss any aspect of this submission, please contact Nathan Kennedy, President, Australian Lawyers for Human Rights via email: president@alhr.org.au

Yours faithfully,

Nathan Kennedy
President
Australian Lawyers for Human Rights

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