



Submission
Human Rights Bill 2018
Section 36 - Right to Education

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Introduction

1. All Means All is the Australian Alliance for Inclusive Education, a nationwide multi-stakeholder organisation 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's stakeholders include children, families, educators and academic experts in Queensland and around Australia.
3. All Means All congratulates the Government of Queensland on the introduction of the *Human Rights Bill 2018* (the **Bill**) and thanks the Parliament of Queensland for the opportunity to make this submission.
4. This submission has been approved pursuant to board policy of All Means All.
5. It primarily considers the proposal by the Queensland government to protect the fundamental human right to education through proposed Section 36 of the Bill.
6. While we strongly support the express recognition of the human right to education in the Bill, in our view the proposed terms of Section 36 are insufficient and inappropriate and their application is likely to lead to perverse outcomes in violation of the human right to education for persons with disabilities.
7. In this regard, Section 36 of the Bill does not reflect the expression of the right to education as set out in relevant international treaties ratified by Australia, including Article 13 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), which is purported to be the source of the human right to education in Section 36 of the Bill (see Explanatory Note for the Bill).
8. Further, key elements of the right to education recognised and clarified in other relevant Conventions, namely the Convention on the Rights of the Child (**CRC**), and the Convention on the Rights of Persons with Disabilities (**CRPD**) aimed at ensuring the realisation of the right to education for vulnerable groups, including students with disabilities, have not been reflected in Section 36 of the Bill.
9. Finally, we believe that the proposed wording in Section 36 (1) and (2) may have the unintended consequences of increasing discrimination in education against persons with disabilities, including in breach of the Commonwealth's *Disability Discrimination Act 1992* (**DDA**), undermining the realisation of their right to education and leading to serious human rights violations.
10. Our detailed analysis is set out below.

11. In examining the relevant treaty texts and works of the treaty bodies, we have applied the rules of interpretation codified in the Vienna Convention on the Law of Treaties.

Recommendations

12. **Recommendation 1:** That proposed Section 36 of the Bill be replaced with the following provision reflecting the intent of applicable international Conventions and domestic disability discrimination laws:
- 36. Right to education*
- (1) *Every person has the right to education without discrimination and on the basis of equality of opportunity.*
- (2) *To realise this right, every person has the right to access quality early childhood, primary and secondary school education, and further education and training that is accessible and inclusive of all.*
13. **Recommendation 2:** That the Bill include a stand alone cause of action so that breaches of human rights can be heard before QCAT or the Supreme Court
14. **Recommendation 3:** That the Bill ensure that people have access to an effective remedy, including by compensating them.

Overview of human right to education in international human rights law

15. The right to education has been recognised in a range of international human rights instruments applicable to Australia and its expression has evolved in the 70 years since the Universal Declaration of Human Rights, adopted in 1948, first stated the universality of the right in Article 26:

'Everyone has the right to education'

16. Subsequent international treaties have reaffirmed the right to education generally¹, with thematic treaties also addressing the right to education in relation to specific groups².
17. The right to education was first made into a binding international legal obligation by the ICESCR, which entered into force in 1976 and recognises that everyone has the right to education directed towards the full development of the human personality and its sense of dignity, and to strengthening respect for human rights and fundamental freedoms. Article 13(1) provides:

"The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."

18. Article 13(2) of ICESCR provides some guidance on the realisation of the right to education and calls, among other things, for the provision of primary education that is "*compulsory and available free to all*" and for secondary education to be "*made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education*".
19. The Committee on Economic, Social and Cultural Rights (**CESCR**) further explains the right to education in its General Comment No.13. Notably, paragraph 6 of General Comment No.13 states that education should be available, accessible, acceptable, and adaptable. These concepts are explained to encompass the accessibility of education to all learners, its provision on the basis of non-discrimination and its acceptability in form, content, curricula, and overall substance. Further, education has to maintain adaptability to adjust to the changing and diverse needs of students; because education is a right, it must adapt to the learning needs of students – not the reverse.

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

² See Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990); Convention on the Rights of Persons with Disabilities (2006)

20. While education is considered a cultural right, it is also related to many other human rights because the enjoyment and realisation of other rights is dependent on realisation of the right to education³. This relationship between the right to education and other rights illustrates the indivisibility and interdependence of all human rights:

“As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can ... obtain the means to participate fully in their communities.”⁴

21. Articles 28 and 29 of the CRC, which entered into force in 1989, reflect the ICESCR principles primarily through the concepts of “equal opportunity” (Article 28(1)), “accessibility” (Article 28(1)(a), (b) and (c)) and more broadly “non-discrimination” (Article 2). Further, the CRC is the first international human rights treaty to include disability as a prohibited ground for discrimination (Article 2) and to explicitly recognise education for children with disabilities (Article 23).
22. Article 24 of the CRPD, which came into force 17 years after the CRC in 2006, provides the most up-to-date expression of the right to education and the fundamental principles that underpin it, such as “equality of opportunity” and “non-discrimination” and “accessibility”. It is also the first international treaty to expressly recognise that inclusive education is the means by which persons with disabilities realise their right to education, and to impose a legal obligation on State parties to ensure an inclusive education system at all levels, with a correspondent right to inclusive education.
23. Article 24.1 of the CRPD provides as follows:
- “States Parties recognize the right of persons with disabilities to education. With a view to realizing this right **without discrimination** and on the basis of **equal opportunity**, States Parties shall ensure an **inclusive education system** at all levels and lifelong learning directed to:*
- (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*
 - (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*
 - (c) Enabling persons with disabilities to participate effectively in a free society.”*
24. Article 24.2 of the CRPD requires that “reasonable accommodation of the individual’s requirements is provided” and that “persons with disabilities receive the support required, within the general education system, to facilitate their effective education”.
25. It is worth noting that the Queensland Government’s newly released *“Inclusive Education Policy”* adopts key concepts from General Comment No.4 (Right to Inclusive Education), the guidance text issued by the Committee on the Rights of Persons With Disabilities (CRPD Committee) explaining the requirements of Article 24.
26. In our view and consistently with the fundamental principles underlying the expression of the universal human right to education under international human rights law applicable to Australia, Section 36 of the Bill should incorporate the concepts of *freedom from discrimination, equality of opportunity, accessibility* and *inclusive education*. In this regard, section 22 of the DDA prohibits discrimination on the grounds of disability in the context of education.
27. The proposed qualification in Section 36 of the Bill to education being “appropriate to the child’s needs” is not present in the expression of the right to education under the applicable human rights instruments, whether generally or in the context of specific groups or themes.
28. Our strong concern is that this language is likely to encourage discrimination against students with disabilities in particular, and undermine the realisation of their human right to inclusive education. In our view, it is not appropriate to adopt this language in Section 36 of the Bill as there is nothing in Article 13 of ICESCR or beyond, that supports its use.
29. While we cannot be certain of the source of the term “appropriate to the child’s needs” and the wording in Section 36 of the Bill in general, we are concerned that this is intended to reflect the concept of “free and appropriate public education” (FAPE) under the domestic law of the United States of America, adopted by Section 504 of the 1973 Rehabilitation Act, Individuals with Disabilities Education Act and Americans with Disabilities Act.
30. It is worth noting that unlike Australia, the United States of America has never ratified the CRC or the CRPD and its domestic laws do not seek to adopt those treaties as part of its legal framework for education.

³ United Nations General Assembly Human Rights Council. Annual report of the United Nations High Commissioner on Human Rights and reports of the Office of the High Commissioner and the Secretary-General. Thematic study on the right of persons with disabilities to education. A/HRC/25/29 (18 December 2013) para 9

⁴ Ibid

“Appropriate to the child’s needs” undermines right to inclusive education

31. We believe that the adoption of the term “appropriate to the child’s needs” in Section 36 of the Bill is likely to:
- (a) perpetuate discriminatory treatment and inequality based upon the segregation of students with disabilities; and
 - (b) “justify” explicit and implicit prejudice in educational administration in qualifying the concepts of “non-discrimination”, “full participation” and “equality of opportunity”,
- and thereby has great potential to undermine the right of children, particularly children with disabilities to education, which is to be understood as at right to inclusive education in regular (non-segregated) settings (see Article 24 of the CRPD and General Comment No. 4 - Right to Inclusive Education)⁵.
32. We note that following the public release of the Bill, we were contacted by many parents of children with disabilities in Queensland expressing serious concerns about the terms of Section 36 and the words “appropriate to the child’s needs” and urging us to make a submission to this process. Some of the comments we received were:
- *“‘Appropriate to your child’s needs’ is just another way we are told that they don’t want to meet our son’s needs in mainstream and that our son should be somewhere more ‘appropriate’ - in special school.”*
 - *“These are the words that people use against our children, to exclude them from mainstream.”*
 - *“We fought for a good Inclusive Education Policy and the government delivered it. These words go against that, some people will argue it gives them a right to segregate children.”*
 - *“If you don’t know how these words have been used to keep children with disabilities out of mainstream education then you don’t see the problem.”*
 - *“Our children have the right to be included and they have human rights. Let’s protect that by using the right words instead.”*
 - *“My child’s needs are your child’s needs. All children have the same fundamental human needs but those needs may be met in different ways for different kids because we all diverse. This is about making education that is accessible to everyone, so why aren’t we using the right words to say this?”*
 - *“Why are we even using American education laws for human rights?!! They haven’t even signed the human rights Conventions and they have huge problem of inequality. Thanks but no thanks.”*
 - *“My son has finished school now but speaking from experience, these words ‘appropriate to your child’s needs’ have never been our friends.”*
33. In particular, the denial to children with disabilities of their right to access general education and their placement in segregated educational settings is recognised by the CRPD Committee as a clear form of discrimination in education,⁶ one it has urged States Parties to immediately address in its anti-discrimination legislation.
34. This same concern was recognised by the CESCR on 31 May of 2017 in consideration of the fifth periodic report of Australia on its implementation of Article 13 of the 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?”*

⁵ CRPD/C/GC/4 see

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

⁶ *Ib d* paragraphs 10 12 13 and 39 See also CRPD/C/GC/6 paragraph 64

⁷ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21677&LangID=E>

35. Children with disabilities are a significantly marginalised group and despite the recognition of their fundamental human rights to education, including the right to inclusive education in the last decade, they continue to experience serious violations of their fundamental, consequent and associated human rights.
36. The reality of the experience for too many children with disabilities across 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 and for autistic students. This experience is due to discrimination and devaluation, isolation, lack of resources and supports and inflexible structures and approaches that operate as barriers for students with disabilities realising their right to inclusive education.
37. The proposed wording of “appropriate to their needs” in Section 36 of the Bill threatens to provide a qualification on the human right to education and thereby a justification for the adverse educational experiences of many Australian children, including in Queensland, and a basis for the persistence and growth of segregated settings.
38. These concerns are backed up by many Parliamentary and departmental inquiries across Australia, notably the 2017 review of education for students with disability in Queensland State schools by Deloitte Access Economics and 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.

Other issues

39. The specific wording “based on the person’s abilities” in sub-section (2) is also likely to lead to discriminatory outcomes for persons with disabilities potentially in breach of the DDA. Rather, access to further education should be guaranteed on the basis of equality of opportunity, without discrimination.
40. We also find the reference to “vocational”, as opposed to “further” education and training, to be outdated and inappropriate.

Signed on behalf of All Means All:



Robert Jackson PhD, Secretary, All Means All –The Australian Alliance for Inclusive Education