

Attorney-General's Department

**Australia's draft report to the UN Committee on the
Rights of the Child**

**Children and Young People with Disability Australia
Submission – November 2017**

INTRODUCTION

As a State Party to the United Nations Convention on the Rights of the Child (CRC), Australia has undertaken to uphold the human rights of children and young people with disability under international law. Australia's human rights obligations under the CRC in respect of children with disability are reinforced and complemented by those in the Convention on the Rights of Persons with Disabilities, which Australia has also ratified.

Available statistics, the findings of numerous government reviews at national and local levels and consistent feedback from the membership base of Children and Young People with Disability Australia (CYDA) indicate that there is a wide chasm between Australia's formal commitment as a State Party to these international treaties and the commonly poor everyday experiences of children with disability and their families.

Children with disability face profound disadvantage across all life areas. The typical experience of too many children and young people with disability involves missing out on many opportunities afforded to their peers without disability. Children with disability are regularly denied social, educational, recreational and employment opportunities. Further, many children with disability are subjected to instances of abuse, violence or neglect which are not acted on or adequately addressed. In these instances it is often the case that the unacceptable is seen as acceptable or there are a range of barriers for the child accessing justice.

It is critical that specific considerations for children and young people with disability are taken into account in all areas and levels in assessing compliance with obligations to protect and promote the rights and wellbeing of children. This brief submission will focus on the implications of Australia's programs, policies and laws for children with disability in view of the CRC. Feedback is grouped under the headings used in Australia's draft combined report on the CRC, the Optional Protocol on the involvement of children in armed conflict, and the Optional Protocol on the sale of children, child prostitution and child pornography (Draft Report).

Children and Young People with Disability Australia (CYDA) welcomes the opportunity to provide feedback on the Draft Report. CYDA believes that the short time frame provided for comments and feedback on the Draft Report has not allowed for thorough consultation with stakeholders and denied many the opportunity to meaningfully contribute to this important process. Due to the limited timeframe, CYDA has been unable to comprehensively cover all issues relating to the human rights of children with disability which are of relevance to Australia's joint fifth and sixth report under the CRC. CYDA would welcome an opportunity to provide further information through direct discussion with the Attorney-General's Department.

CHILDREN AND YOUNG PEOPLE WITH DISABILITY AUSTRALIA

CYDA is the national representative organisation for children and young people with disability, aged 0 to 25 years. The organisation is primarily funded through the Department of Social Services and is a not for profit organisation. CYDA has a national membership of 5300 and a growing social media presence with 22 500 followers across the three major platforms of Facebook, Twitter and LinkedIn.

CYDA provides a link between the direct experiences of children and young people with disability to federal government and other key stakeholders. This link is essential for the creation of a true appreciation of the experiences and challenges faced by children and young people with disability.

CYDA's vision is that children and young people with disability living in Australia are afforded every opportunity to thrive, achieve their potential and that their rights and interests as individuals, members of a family and their community are met.

CYDA's purpose is to advocate systemically at the national level for the rights and interests of all children and young people with disability living in Australia and it undertakes the following to achieve its purpose:

- **Listen and respond** to the voices and experiences of children and young people with disability;
- **Advocate** for children and young people with disability for equal opportunities, participation and inclusion in the Australian community;
- **Educate** national public policy makers and the broader community about the experiences of children and young people with disability;
- **Inform** children and young people with disability, their families and care givers about their citizenship rights and entitlements; and
- **Celebrate** the successes and achievements of children and young people with disability.

II. GENERAL MEASURES OF IMPLEMENTATION

Data Collection

CYDA notes that the Concluding Observations on Australia's last report on the CRC (CRC Concluding Observations) included a recommendation that national data collection mechanisms include data covering 'all children below the age of 18 years and pay particular attention to ethnicity, sex, disability, socio-economic status and geographic location.'¹ CYDA suggests that the subsection on data disaggregation give some indication of the extent to which national data is disaggregated by disability. CYDA acknowledges that the appendices will provide detailed information about data disaggregation.

Recommendation 1: It is recommended that the 'data collection' section of the Report include information about the extent to which national data collection mechanisms collect data disaggregated by disability, in addition to the appendices.

V. CIVIL RIGHTS AND FREEDOMS

Cruel, Inhuman or Degrading Treatment & Corporal punishment

This section covers issues relating to corporal punishment and family violence. CYDA suggests that this section, or alternatively the section on children with disability, should incorporate discussion of the pervasive abuse, violence and mistreatment experienced by children with disability, which was recognised in a recent federal Senate inquiry as requiring attention.² Two key issues identified in the Senate Committee's recommendations relating to children with disability were: restrictive practices

¹ Committee on the Rights of the Child 2012, *Consideration of reports submitted by States parties under article 44 of the Convention*, Concluding observations: Australia, 29 August 2012, para 22 (CRC Concluding Observations).

² The Senate, Community Affairs References Committee 2015, *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*, Commonwealth of Australia, Canberra, ch 10.

against children; and mistreatment of students with disability in schools in contravention of the CRC.³ The actions the government is taking in response could also be outlined.

Experiences of abuse, including restraint and seclusion, are now shamefully common for students with disability in education settings. There are increasing incidents of restraint and seclusion coming to public attention and reported to CYDA, which are seen as a clear consequence of a system in crisis. A 2017 New South Wales Government report, for example, found that there were unacceptable levels of allegations of ill-treatment of children and associated reportable incidents in NSW schools.⁴

The seclusion of students with disability is often justified as ‘behaviour management’ and it is also often reported to CYDA that it is used as a punishment. For some students with disability the experience of seclusion has involved: isolation for long periods which have been reported to range from one hour to most of the school day; being exposed to weather without reasonable protection provided; denial of food; and denial of access to a toilet. Restraint involves restricted movement and in some cases leads to injury. Students and families have reported to CYDA that children have experienced high levels of distress, including anxiety and other negative psychological impacts, as a result of being subject to restraint and/or seclusion.

CYDA believes that the mistreatment of students with disability in schools frequently constitutes torture or other cruel, inhuman or degrading treatment or punishment. The Australian Government’s intention to ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, discussed in section XII of the Draft Report, is relevant to this issue.

Presently, there is no timely, independent mechanism for students and families to pursue complaints regarding education experiences. A range of different child protection and disability oversight bodies exist at the state, territory and Commonwealth levels, each with different powers of investigation. There is significant variation regarding the powers for investigation and intervention between these bodies. A key concern raised to CYDA relates to organisations having insufficient powers to address complaints and enforce sanctions, or compliance not being mandatory.

Specific and focused actions at the systemic level to counter the persistent abuse of students with disability within schools settings are needed, including the development of a nationally consistent approach to complaints mechanisms.

Recommendation 2: It is recommended that the ‘cruel, inhuman or degrading treatment & corporal punishment’ section of the Report include discussion of the issue of abuse, violence and neglect experienced by children with disability, with a specific focus on students with disability and the use of restrictive practices, seclusion and restraint.

³ Ibid, pp. 278-280.

⁴ Legislative Council, Portfolio Committee No. 3 – Education 2017, *Education of students with a disability or special needs in New South Wales*, NSW Parliament.

VII. DISABILITY, BASIC HEALTH AND WELFARE

Children with Disability

The section on children with disability does not address a number of the concluding observations made in the corresponding section in the CRC Concluding Observations.⁵ CYDA suggests including specific responses to each of the concluding observations.

National Disability Insurance Scheme

The National Disability Insurance Scheme (NDIS) represents a major reform of disability services, aiming to fulfil Australia's human rights obligations, including under the CRC and the CRPD.⁶ Whilst CYDA has received some positive feedback about the NDIS, a high number of reports of negative experiences have been received from children with disability and families. Some of the key concerns include: significant delays in accessing supports and services; the inclusion of inadequate or inappropriate supports in NDIS plans; and funding of support at inappropriate amounts.

According to available data, issues raised in recent Senate Committee inquiries and direct experiences reported to CYDA, some children have experienced significant delays accessing services through the Early Childhood Early Intervention (ECEI) Approach, rather than being provided with 'immediate therapeutic assistance' as stated in the Draft Report. Delays in the delivery of ECEI services significantly undermine the fundamental learnings and purpose of early intervention. Early childhood is a well-established pivotal time for development and it is critical that children and families have timely access to expertise, services and supports during this time.

While the individualised funding approach has to be seen as a strength in the design of the Scheme, this shift will on its own do little to confront and resolve the fragmentation that characterises our service system. Further, the intention to shift from a medical model of disability to an approach of providing supports on the basis of the functional impact of disability has been only partially realised. Publicised NDIS policies and practices display an undue focus on impairment and diagnostic groups as pivotal to decision making processes and the insurance approach underpinning the Scheme. This approach risks perpetuating the siloing and marginalisation of children with disability.

CYDA is also highly concerned about the lack of attention to the protective and safeguarding needs of children with disability in the NDIS legal and policy framework. Standards and policies for safeguarding children are minimal and, in CYDA's view, need to be strengthened to ensure that children with disability are better protected against abuse.

Children with disability are over three times more vulnerable to experiencing abuse and neglect than their peers without disability.⁷ Since children who are NDIS participants will typically be accessing more services than others, this further increases their vulnerability to abuse. Further guidelines should be incorporated in the *NDIS Quality and Safeguarding Framework*, and regulations and standards relating to quality and safeguarding made under the *National Disability Insurance Scheme Act 2013*, to address the specific needs of children with disability.

⁵ CRC Concluding Observations, para 58.

⁶ *National Disability Insurance Scheme Act 2013* (Cth), section 3(1).

⁷ P Sullivan et al. 2000, 'Maltreatment and disabilities: A population-based epidemiological study,' *Child abuse and neglect*, Vol. 24, No. 10, p. 1257, M Maclean et al. 2017, 'Maltreatment Risk among Children with Disabilities,' *Paediatrics*, Vol. 139, No. 4.

Recommendation 3: It is recommended that the Report include responses to each of the concluding observations specifically concerning children with disability made in the CRC Concluding Observations.

Recommendation 4: It is recommended that the Report acknowledge the need to strengthen the NDIS quality and safeguarding framework specifically for children accessing the Scheme.

Health and Health Services

Forced sterilisation of children with disability

The subsection on forced sterilisation of children with disability is currently placed in the 'health and health services' section. CYDA suggests moving this subsection so that it falls under the 'children with disability' heading, consistent with the CRC Concluding Observations.⁸ The sterilisation of children with disability, in particular girls and young women with disability, is recognised at international law as an issue of disability discrimination and systemic violence.⁹ *Non-therapeutic* sterilisation of girls with disability persists in Australia, a practice that was recently condemned by the UN Special Rapporteur on the Rights of Persons with Disabilities.¹⁰ The way in which this issue is framed and positioned should reflect the fact this is not a health issue. This issue could additionally be discussed in a section on violence against women and children.¹¹

Recommendation 5: It is recommended that the Report discuss the forced sterilisation of children with disability in the 'children with disability' section, in recognition that this is an issue of disability discrimination and systemic violence.

VIII. EDUCATION, LEISURE AND CULTURAL RIGHTS

Accessing and participating in education is still typically extremely problematic for students with disability in Australia. Experiences of discrimination, inadequate expertise, insufficient resourcing, a systemic culture of low expectations, exclusion, bullying and poor processes for monitoring learning are all too common. As already discussed, there are increasing incidents of restraint and seclusion of students with disability coming to public attention and reported to CYDA. It is the view of CYDA that the education system is failing to adequately meet the needs and protect the rights of students with disability, contrary to the requirements of Article 28 of the CRC and despite the existence of the *Disability Standards for Education 2005*.¹²

The section in the Draft Report on inclusive education could be revised to include acknowledgment of the persistent disadvantage experienced by students with disability and the need for further action in response. CYDA regularly hears of experiences of discrimination and blatant dismissal of the educational rights and entitlements of students with disability. It is believed that additional strategies are needed to ensure realisation of the right of children with disability to a high quality education on an equal basis with others. CYDA is of the view that a national plan for students with

⁸ CRC Concluding Observations, para 58(f).

⁹ UN General Assembly 2017, Report of the Special Rapporteur on the rights of persons with disabilities, Sexual and reproductive health and rights of girls and young women with disability, 14 July 2017, viewed 16 November 2017, <http://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Reports.aspx>.

¹⁰ Ibid.

¹¹ See CRC Concluding Observations, para 47(b).

¹² Commonwealth of Australia 2006, *Disability Standards for Education 2005*, Canberra; *Disability Discrimination Act 1992* (Cth), s 31.

disability should be developed which contains a blueprint for embedded and systemic reform, grounded in a strong evidence base and research regarding best practice.

Recommendation 6: It is recommended that the Report acknowledge the need for urgent and critical review and reform of the education system in relation to the provision of education to students with disability.

Early Childhood Education

Children with disability and their families in Australia face unique challenges in accessing and participating in early childhood education. CYDA is frequently informed of a range of poor experiences and barriers in relation to access, participation, resourcing, expertise and discrimination.

Statistics available on participation rates illustrate a disparity between the participation in early childhood education by children with disability compared to their peers without disability. The Productivity Commission's *Report on Government Services 2017* shows that children aged 3 to 5 years with disability had a lower representation in preschool (5.8%) than their representation in the community (6.7%).¹³

Markedly poorer experiences and lower participation rates place children with disability at a distinct disadvantage compared to their peers without disability as they enter primary education and beyond. Yet children with disability have not been a specific focus of the reform agenda to date.

Recommendation 7: It is recommended that the 'early childhood education section' of the Report include a subsection on early childhood education for children with disability, recognising the relevant discrepancy in participation rates and the need for dedicated reform measures.

IX. SPECIAL PROTECTION MEASURES

Children in Conflict with the Law, Victims and Witnesses

The section on children in conflict with the law currently deals with 'juvenile diversion programs' and 'children with mental illness'. CYDA suggests expanding this section so that it also covers the situation of children with disability who are participants in legal proceedings, whether as defendants, victims or witnesses.

The support processes or diversionary measures in place for children with disability who are in conflict with the law could be outlined. CYDA notes that it was recommended in the CRC Concluding Observations that children with mental illness or cognitive or intellectual disability who are in conflict with the law should be dealt with without resorting to judicial proceedings.¹⁴

Recommendation 8: It is recommended that the section in the Report dealing with 'children in conflict with the law, victims and witnesses' be expanded to specifically cover the situation of children with disability who are participants in legal proceedings.

¹³ Productivity Commission 2017, *Report on Government Services 2017: Volume B, Chapter 3, Early Childhood Education and Care*, Commonwealth of Australia, Canberra, p. 3.12.

¹⁴ CRC Concluding Observations, para 84(b).

CONCLUSION

CYDA has suggested that the Draft Report be revised and expanded in a number of areas to better reflect specific considerations and concerns for children with disability. Key issues which could be incorporated in the Report relate to: the abuse, violence and neglect experienced by children with disability; the NDIS and the quality and safeguarding framework specifically for children; the sterilisation of children with disability; and the poor experiences of children accessing and participating in the school system and early childhood education.

CYDA believes that the short time frame provided for comments and feedback on the Draft Report has not allowed for thorough consultation with stakeholders and denied many the opportunity to meaningfully contribute to this important process. Due to the limited timeframe, CYDA has been unable to comprehensively cover all issues relating to the human rights of children with disability which are of relevance to Australia's joint fifth and sixth report under the CRC. CYDA would welcome an opportunity to provide further information through direct discussion with the Attorney-General's Department.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: It is recommended that the 'data collection' section of the Report include information about the extent to which national data collection mechanisms collect data disaggregated by disability, in addition to the appendices.

Recommendation 2: It is recommended that the 'cruel, inhuman or degrading treatment & corporal punishment' section of the Report include discussion of the issue of abuse, violence and neglect experienced by children with disability, with a specific focus on students with disability and the use of restrictive practices, seclusion and restraint.

Recommendation 3: It is recommended that the Report include responses to each of the concluding observations specifically concerning children with disability made in the CRC Concluding Observations.

Recommendation 4: It is recommended that the Report acknowledge the need to strengthen the NDIS quality and safeguarding framework specifically for children accessing the Scheme.

Recommendation 5: It is recommended that the Report discuss the forced sterilisation of children with disability in the 'children with disability' section, in recognition that this is an issue of disability discrimination and systemic violence.

Recommendation 6: It is recommended that the Report acknowledge the need for urgent and critical review and reform of the education system in relation to the provision of education to students with disability.

Recommendation 7: It is recommended that the 'early childhood education section' of the Report include a subsection on early childhood education for children with disability, recognising the relevant discrepancy in participation rates and the need for dedicated reform measures.

Recommendation 8: It is recommended that the section in the Report dealing with 'children in conflict with the law, victims and witnesses' be expanded to specifically cover the situation of children with disability who are participants in legal proceedings.

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