



SWJ Ref: Ltr 01/31.12.2022  
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The Royal Commission Into Violence Abuse and  
Exploitation of People With Disability

Date: 31 December 2022

### Happy New Year to the Disability Royal Commission – one last written submission before the deadline

It is New Year's Eve 2022. Today is the last day that the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) will receive written submissions.

By 29 September 2023, in nine months' time, the Disability Royal Commission is required to issue its final report and recommendations.

The Disability Royal Commission was established in April 2019, nearly four years ago. Its [first ceremonial sitting](#) was held in Brisbane on 16 September 2019. That day the Chair of the Disability Royal Commission, The Hon. Ronald Sackville AO QC, set the tone and framework for the Commission's pending work.

The Chair noted the hard and long struggle of the disability community to establish the Commission:

*'This Royal Commission is therefore the product of tireless and persistent efforts by disability advocates and many others who have long recognised that people with disability in this country are routinely subjected to violence, abuse, neglect and exploitation.'*

The Chair emphasised the engagement of the disability community in the formulation of the Commission's Terms of Reference:

*'The Terms of Reference for the Royal Commission were finalised after a public consultation process which included a survey to which nearly 4000 people responded. In addition, 65 written submissions were received from organisations and individuals. About three quarters of the respondents to the survey were people with disability or parents, family members or carers of persons with disability.'*

The Chair acknowledged the 'rights-based' focus of the Commission's Terms of Reference:

*'The Terms of Reference expressly recognise that Australia has obligations under the Convention on the Rights of Persons with Disabilities to promote the human rights of people with disability. ...'*

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...  
*The express recognition, in the Letters Patent, the Terms of Reference, of Australia's obligations under the UN Convention means that this Royal Commission must have a rights-based focus. We must take as our starting point the rights under international law that Australia is required to recognise and protect.*

The Chair also recognised the potential for investigative inquiries to also involve social policy recommendations:

*'Often, ... [Royal Commissions] have been required to investigate forms of abuse or wrongdoing and to make recommendations on broad questions of social policy arising out of or connected to those investigations. Examples include the recent Royal Commission into Institutional Responses to Child Sexual Abuse, the Royal Commission into Aboriginal Deaths in Custody ... and the Royal Commission into Aged Care Quality and Safety ... . This Royal Commission is another example. It has both investigative and policy functions.'*

And significantly and rightly, the Chair recognised the opportunity and expectation for 'transformational' change for the disability community and Australian society presented by the Commission:

*'Let me now talk about the opportunities for change. Just as we are conscious of the magnitude of the task that the Commission faces, we're also conscious that the disability community and their supporters, as well as the wider Australian community, have extremely high expectations of this Royal Commission. People want and expect real change. ...*

...  
*With the active participation of people with disability and the disability community at large, the Royal Commission provides an opportunity to achieve transformational change. It is a very large challenge, but it is one that should be embraced.'*

But now, and there has been for some time, real concern within the disability community that the Disability Royal Commission is not 'the Royal Commission they wanted' and that the Commission will not be true to the Chair's 'opening framework' statements set out above.

Within the disability community, there are few things that are held more dearly than the threshold disability rights mantra: 'Nothing about us, without us'.

Yet, whilst recognising the very significant role of the disability community and its advocates in the genesis of the Commission and its Terms of Reference, the Commission has apparently resisted, with no explanation, persistent demands by the disability community (through their Disabled Persons and Representative Organisations (**DPROs**)) for the proposed recommendations (or draft propositions) of the Commission to be released in draft form for comment – or at the least to be provided to the DPROs confidentially for their comment. This is notwithstanding that the two recent 'investigative and policy' based Royal Commissions, referred to by the Chair in the Commission's ceremonial opening sitting as



being similar in nature to the Commission, both released their draft recommendations for public comment.



This refusal to release the Commission's draft recommendations, if maintained, will further undermine confidence in the transparency of the Commission's processes and particularly its capacity and willingness to deliver a final report with recommendations conducive to achieving the necessary 'transformational change' for people with disability and Australian society.

Given, as the Commission itself recognises, that the Terms of Reference mandate a 'rights-based' approach consistent with Australia's obligations at international law, including its obligations under the Convention on the Rights of Persons with Disabilities, there are (even more so than in the case of the two other recent Royal Commissions) objective standards against which the disability community may consider the Commission's draft recommendations.

Transformational change can only be achieved by desegregation in all aspects of life for people with disability – which is a core objective of the UN Convention – and must (in particular as a broader society cultural matter) commence with desegregation in kindergartens and schools by implementing the fundamental human right to an inclusive education, whilst dismantling segregated 'special' school settings. In that regard, we ask the Commission receive this statement and our article '[CRPD requires segregated education to be phased out: Expert opinion for Disability Royal Commission rejects Australian Government's position](#)', endorsing the views of the Commission's own legal expert, Professor Andrew Byrnes, as a written submission to the Commission.

**Catia Malaquias**  
**Chairperson, 31 December 2022**  
**Starting With Julius**



## Appendix - CRPD requires segregated education to be phased out: Expert opinion for Disability Royal Commission rejects Australian Government's position



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### CRPD REQUIRES SEGREGATED EDUCATION TO BE PHASED OUT: EXPERT OPINION FOR DISABILITY ROYAL COMMISSION REJECTS AUSTRALIAN GOVERNMENT'S POSITION

By Catia Malaquias

At the beginning of Public Hearing 24 into the experiences of young people with disability in different educational settings, Counsel Assisting the Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) [stated](#):

*'There is no doubt about the importance of education. Education prepares children and young people for life, work and citizenship. Education provides children and young people with the skills to make their own decisions and become independent. Education is a human right and a means by which people may understand their rights and also advocate for their rights.'*

At *Starting With Julius*, we very much agree about the importance of education – but it is not just about ensuring people with disability receive an education – what is critical to dismantling social and attitudinal barriers to the full participation of people with disability and creating an inclusive, respectful and safe society is the realisation of their human right under Article 24 of the UN Convention of the Rights of Persons with Disabilities (**CRPD**) to an **INCLUSIVE EDUCATION** – i.e. education in regular classrooms of regular schools, with appropriate supports, not separate from non-disabled peers – who will be their future community.



The [Terms of Reference](#) of the Disability Royal Commission recognise the human rights framework and Australia's international obligations to realise the human rights of people with disability under the CRPD.

The [Interim Report](#) of the Disability Royal Commission published in October 2020 specifically identified one issue in the context of education – the critical issue of whether people with disability may continue to be placed in segregated 'special' education settings as a matter of the proper interpretation of Australia's obligations under Article 24 of the CRPD. The Commission noted:

*'The opinions expressed about the proper interpretation of Article 24 in submissions and responses to the [Commission's Education and learning] issues paper have varied. Some argue that Article 24 must be broadly interpreted to require, for example, State Parties to phase out special, or segregated schools. Others, including the Australian Government, contend that retaining state-run special/segregated schools is compatible with Article 24.'*

The Interim Report identifies the 'broad' interpretation as the interpretation of the right to inclusive education under Article 24 supported by the UN Committee on the Rights of Persons with Disabilities (the body responsible for administering State Party compliance with the CRPD), including as set out in the UN CRPD Committee's General Comment No. 4 explaining the Right to Inclusive Education under Article 24 of the CRPD – as well as the interpretation supported by detailed submissions to the Disability Royal Commission made by [All Means All – The Australia Alliance for Inclusive Education](#), [Women with Disabilities Australia](#) and [Children and Young People with Disability Australia](#).

Returning to Public Hearing 24, Counsel Assisting the Disability Royal Commission continued:

*'... during the course of the hearing this week, the Royal Commission will publish on its website Professor Andrew Byrnes' advice explaining the scope of Article 24 of the CRPD. And with all of the research commissioned by the Royal Commission, the research informs the Commission's work but does not necessarily represent the views of the Commissioners.'*

It was interesting that Professor Byrnes' advice, as [an eminent international law jurist](#) who has served as a legal adviser to governments and a range of national and international bodies including the United Nations and the Australian Parliamentary Joint Committee on Human Rights and is currently Emeritus Professor of Law at the University of New South Wales, was described as falling within 'research' commissioned by the Commission – and that reference to it was immediately followed with the 'warning' that it may not represent the views of the Commissioners.

But this, it would seem, is not the first reference during the Disability Royal Commission's public hearings to Professor Byrnes' advice. In Public Hearing 18 on 8 November 2021, Professor Byrnes appeared as an expert witness and in response to a question from

Commissioner McEwin regarding his views on Australia's obligations to implement inclusive education in line with the CRPD responded:

*'I understand that an analysis I prepared for the Commission is going to be tendered. The bottom line of that analysis is although ... a contested issue, my own view is the better view of the Convention's obligation, in particular Article 24, is that Australia needs to move progressively over some time to have [a] transformed system with inclusive education, which does not, as a matter of principle, include special schools as a long-term separate form of education. And I think that is also a position taken by the CRPD Committee.'*



As it turned out, [Professor Byrnes' advice](#) was not published by the Disability Royal Commission until 24 June, 2 weeks after the conclusion of Public Hearing 24 on 10 June, and approximately 1 year and 8 months after it was provided to the Commission in September 2020. No reason has been given for the delay – noting the central questions it addresses would have been relevant to Public Hearing 24.

**So what does Professor Byrnes say** in his 131 page analysis – which he describes as an 'expert opinion' [p4] in response to a 'Request for Advice' on specific questions relating to the interpretation of a number international instruments, including the CRPD. Footnote No 1 [p4], let alone the text of the legal opinion, is devastating enough for the Australian Government position:

*'In preparing this analysis I have taken into account the two background papers submitted by the Australian Government to the Royal Commission: ... [Part 1 – Australia's position and interpretive approach to the CRPD generally and Part 2 –*



*a specific paper on the right to education under Article 24]. While I am broadly in agreement with the general approach and specific statements made in the first Background Paper (Part 1) and a number of statements made in the second Background Paper (Part 2 – article 24) I do not agree with the central contentions that the CRPD permits the indefinite or long term maintenance of segregated special schools ... or that Article 13 of the International Covenant on Economic, Social and Cultural Rights requires that Australia continue to allow special schools ... . The arguments advanced in the Part 2 paper essentially reiterate Australia's previous articulation of its position, and my reasons for rejecting that analysis appear below.'*

In addition to the Australian Government Papers submitted to the Disability Royal Commission, it appears from the List of Resources [p49] that Professor Byrnes was also asked to consider [All Means All](#)'s competing submission dated March 2020.

The three main issues that Professor Byrnes was asked to provide advice upon were:

- the status and relevance of the UN CRPD Committee's General Comment No 4 on the right to inclusive education to the interpretation of Article 24 of the CRPD;
- whether Article 24 of the CRPD obliges Australia to phase out segregated 'special' education settings; and
- whether Article 13(3) of the International Covenant on Economic, Social and Cultural Rights (**ICESR**) or Article 26(3) of the Universal Declaration of Human Rights (**UDHR**) provide parents with the right to choose segregated 'special' education settings, or oblige Australia to provide or maintain parental choice as to such settings, for children with disability?

As a threshold matter, Professor Byrnes noted that Australia, upon its ratification of the CRPD, did not lodge any reservation or declaration contrary to the terms of Article 24 of the CRPD and accordingly 'Australia accepted the full scope of the obligations provided for under Article 24' [p23].

## **ISSUE 1 – STATUS OF GENERAL COMMENT NO 4?**

As to the question of **whether the CRPD Committee's General Comment No 4 on the right to inclusive education is authoritative in relation to the proper interpretation of Article 24 of the CRPD**, Professor Byrnes, after recognising that General Comments in themselves (as such) are not legally binding, provides the following summarised answer consistent with General Comment No 4's authoritative nature:

'However, General Comment No 4 should be given considerable weight in the interpretation of the treaty. The interpretation of the CRPD set out in General Comment No 4 is for the most part and as relevant to the questions asked ... [of me], the one that would be reached by the proper application of the accepted rules of treaty interpretation.' [p1]



Further, Professor Byrnes stated as to the nature of the concept of 'inclusive education' (the 'undefined' nature of which has sought to be used as a refuge for the Australian Government) that 'in ... [his] view the description of inclusive education offered by the CRPD Committee in General Comment No 4 provides a *sound legally based working definition* of the concept' [p24].

In other words, General Comment No 4 is consistent with the proper legal interpretation of Australia's obligations under Article 24 of the CRPD in relation to the right of people with disability to an inclusive education.

## ISSUE 2 – OBLIGATION TO PHASE OUT SEGREGATED 'SPECIAL' SETTINGS?

In response to the question '**... does Article 24 of the CRPD oblige State Parties to dismantle and abolish special schools or other forms of segregated education for children with disability? If so, what is the content of that obligation and over what period must it be achieved?**' Professor Byrnes provides the following summarised answer:

- 'Article 24 of the CRPD obliges State Parties to transition to a system of fully inclusive education and this will involve over the medium-term to long-term the allocation of resources to general schools to support this transition and the eventual abolition of special schools or other forms of segregated education for children with disability.
- The description of inclusive education offered by the CRPD Committee in its General Comment No 4 provides a sound legally based working definition of the concept.
- While some aspects of the right are immediately realisable, the obligation is one of 'progressive implementation'. However, this obligation means that a number of steps need to be taken immediately including the adoption of a policy, a baseline assessment, the setting of measurable and time-defined goals, and a means of monitoring and reviewing progress.' [p1-2]

Further, Professor Byrnes elaborated as to the impact of Australia's inadequate response and delay to date in transitioning to an inclusive education system:

*'Australia signed the CRPD on 30 March 2007 and ratified it on 17 July 2008. The Convention thus entered into force for Australia on 16 August 2008. What Australia is currently required to do under the CRPD in terms of progressive realisation may now be different from the extent of its obligations more than a decade ago when it ratified the Convention. As it appears that the implementation of the obligation to phase out special schools in favour of fully inclusive education has not progressed and indeed appears to have gone backwards since 2010 [footnoting that in 2010 there were 414 special schools in Australia and by 2019 this had increased to 483 special schools], Australia's obligation may now be to set*





*out a revised more urgent timeline and to take expedited measures towards the achievement of the goal of inclusive education in light of this lost decade.’ [p27]*

As to how the Australian Government’s obligations under Article 24 of the CRPD are to be implemented in a federation where the States and Territories have primary operational carriage of their education systems, Professor Byrne states:

*‘Thus while the CRPD may not explicitly require a uniform national plan to give effect to the obligations under the CRPD, it does mean that the different approaches adopted in each State and Territory must nonetheless comply with the standards of the Convention and that the Commonwealth Government has responsibility under international law for ensuring that this is the case. As a consequence the CRPD would appear to require the Commonwealth to have at the very least a process for monitoring the fulfilment of these obligations and to ensure that its own legislative, policy and funding interventions support the transition to a fully inclusive education system and do not contribute in the medium to long-term to the sustaining of separate systems of education.*

*Thus, the CRPD may require the Commonwealth to exercise the powers that it has to influence States and Territories to ensure an inclusive education system, if that is not happening or happening at the appropriate speed. This may involve the provision of additional funding by the Commonwealth to support the transition (or not continuing indefinitely to provide funding to support special schools where it currently does so), or the exercise of the legislative powers of the Commonwealth, for example by amending the Disability Discrimination Act 1992, the Disability Standards for Education 2005 or other relevant instruments to ensure a clear and time-defined shift to inclusive education systems.’ [p29]*

### **ISSUE 3 – PARENTAL RIGHT TO CHOOSE, AND AUSTRALIAN GOVERNMENT OBLIGATION TO PROVIDE, SEGREGATED ‘SPECIAL’ SETTINGS?**

In relation to the questions of whether Article 13(3) of ICESCR or Article 26(3) of the UDHR recognise that parents or guardians have the legal right or liberty to choose segregated ‘special’ education settings for their children with disability, Professor Byrnes provides the following summarised answer:

- *‘A proper contemporary interpretation of the ICESCR leads to the conclusion that these provisions do not oblige States to ensure parents have the right in practice to be able to choose special schools or other forms of segregated education for their children based on disability.*
- *Nothing in the ICESCR would require a State party to enable the long-term maintenance of special schools or segregated education; the obligation of the State is to ensure a transition as soon as is feasible to a fully inclusive system.*

...



- *As with Article 13(3) of the ICESCR, a contemporary reading of Article 26(3) of the UDHR would not extend in principle to guarantee the liberty of parents to make this choice.’ [p2-3]*

In finding no international right or obligation to support ‘parental choice to segregate’, Professor Byrnes amplified the obligation on State Parties under Article 24 of the CRPD to ensure regular schools are adequately resourced to deliver inclusive education to all children:

*‘The liberty of parents in relation to the education of their children guaranteed by Article 13(3) of the ICESCR is not to be interpreted as guaranteeing them a right to choose special schools whether in the public system or in a private school, Article 13(3) on its terms may not extend to such a choice in any case. However, even if it did, the Article 13(3) guarantee must also be read in light of the non-discrimination guarantee in Article 2(2) of the ICESCR – on the current understanding of non-discrimination also involving inclusive education, a State’s permitting the private education of children in [a] non-inclusive environment would [be] allowing discrimination in the enjoyment of a right guaranteed by the ICESCR, namely the right to education in Article 13(1). In addition, it would be permissible under Article 4 of the ICESCR to restrict the liberty of parents (if it extended so far) in light of the State’s obligations under other more recent treaties that reflect more up to date understandings of equality and non-discrimination for persons with disability. However, in order to justify this as permissible limitations on rights, it would be necessary for the State party to demonstrate that it has committed adequate human and financial resources and is implementing the systemic, cultural and organisational transformation that is required for ‘inclusive education’ to become a reality for all students with disabilities.’ [p44]*

In essence, on all three issues, Professor Byrnes agreed with the legal positions of the UN CRPD Committee and *All Means All* (which are the same positions *Starting with Julius* has expressed for many years) – rather than the views of the Australian Government.

Professor Byrnes found the ‘broad’ interpretations of Article 24 of the CRPD – as described by the Disability Royal Commission in its Interim Report – to be the correct (or at least stronger) interpretations – which by definition would render in his ‘expert opinion’ the Australian Government’s views both narrow and incorrect.

## ON THE WRONG SIDE

The position on Article 24 of the CRPD of the Australian Government (under the former coalition government lead by Prime Minister Scott Morrison) submitted to the Disability Royal Commission is contrary to the views of:

- the **UN CRPD Committee** as expressed in [General Comment No. 4](#) and in its [Concluding observations on the combined second and third reports of](#)



[Australia \(Advance Unedited Version\) \(CRPD/C/AUS/CO/2-3\)](#) adopted in September 2019;

- the **UN Committee on Economic, Social and Cultural Rights** which in its 2017 dialogue and [Concluding Observations on the Fifth Periodic Report of Australia \(E/C.12/AUS/CO/5\)](#) raised the segregation of students with disability in 'special' schools in Australia and formally recommended that Australia take effective steps to ensure that children with disabilities can access inclusive education;
- the **UN Committee on the Rights of the Child** which in its 2019 [Concluding observations on the combined fifth and sixth reports of Australia \(Advance Unedited Version\) \(CRC/C/AUS/CO/5-6\)](#) recommended Australia 'ensure that all children with disabilities have access to inclusive education in mainstream schools, are provided with the support needed, and address cases of restraint and seclusion.' Further, in March 2022, the Committee on the Rights of the Child issued a [joint statement](#) with the CRPD Committee on the rights of children with disability, affirming the right to quality inclusive education and stating that this right is 'not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system';
- the **UN Human Rights Council adopted Report of UN High Commissioner for Human Rights** – In 2019 the United Nation Rights Council adopted by [resolution A/HRC/RES/40/14](#) a thematic report tabled by the UN High Commissioner on Human Rights titled [Empowering Children with Disabilities for the Enjoyment of their Human Rights Including Through Inclusive Education \(A/HRC/40/27\)](#), which recognised the need to phase out segregated education for students with disability and specifically recommended the transfer of 'resources currently dedicated to special education' to be made available in the general education system 'as segregated settings are progressively replaced';
- **UN Experts who gave evidence at the Disability Royal Commission** – On 19 August 2020 at the Disability Royal Commission's Public Hearing 5 on 'Experiences of people with disability during the ongoing COVID-19 Pandemic', Ms Catalina Devandas-Aguilar the UN Special Rapporteur on the Rights of Persons With Disabilities, stated that segregated education is 'against, of course, the Convention' and 'segregation is a grave source of discrimination that we need to stop.' (Transcript 19 Aug 2020, p185). Further, the CRPD Committee's Chair, eminent Australian legal scholar and Human Rights Medal recipient Ms Rosemary Kayess also gave evidence at the Disability Royal Commission's Public Hearing 3 on 'The experience of living in a group home for people with disability' noting that 'segregated parallel systems have been established because social structures and administrative structures are not inclusive for people with disability' (Transcript 6 December, p394) and that 'it's important that we understand that the CRPD is about addressing segregation on the basis of disability' (Transcript 6 December, p395). Ms Kayess was also co-author of a research report for the Disability Royal Commission titled ['Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation research report'](#) which characterised



the Australian Government's position on segregated education and 'parental choice' as one based on 'misguided arguments' and leading to 'a system based on the discredited 'separate but equal' doctrine [that] thus provides a discriminatory outcome'(p38); and

- **Disabled Persons and Representative Organisations** – In a 2020 Position Paper submitted to the Disability Royal Commission, Australia's peak disabled persons and disability representative organisations, including *People With Disability Australia*, *Women With Disability Australia*, *First People's Disability Network*, *National Ethnic Disability Alliance*, *Children and Young People With Disability Australia*, *Inclusion Australia*, *the Australian Federation of Disability Organisations* and the *Disability Advocacy Network Australia*, titled **Segregation of People With Disability is Discrimination and Must End** stated they are 'fighting to end the segregation of people with disability in Australian education, housing and workplaces'. The Position Paper, which was widely endorsed by a range of other civil society organisations outlined the applicable human rights principles and highlighted the historical legacy that remains is embedded in existing systems that segregate people with disability prevent their full participation and inclusion in society. Further, a March 2020 report by the peak international organisation representing disabled persons and representative organisations, the *International Disability Alliance*, titled **What Inclusive, Equitable, Quality Education Means to Us** sets out the international and cross-disability consensus on inclusive education, which calls for the implementation of inclusive education and the phasing out of segregated settings.

## A FRESH START?

With the recent election of a new federal Government under Labor Prime Minister Anthony Albanese, there is an opportunity for the Australian Government to revisit its widely contested position on the human right to inclusive education and Article 24 of the CRPD and to make a significant contribution to the reforming potential of the Disability Royal Commission. In that regard, we would also strongly encourage the new Australian Government to support the Australian Coalition for Inclusive Education (ACIE) **[Driving Change: A Roadmap for Achieving Inclusive Education in Australia](#)** setting out short, medium & long term actions towards the implementation of an inclusive education system in Australia.

More from Starting With Julius:

**[DRC Interim Report: Segregated Education Still the Elephant in the \(Class\)room](#)**

**[Choosing Segregated Education – 'Parental Choice' or 'Parental Concession'?](#)**

**[UN Committee Explains Right to Inclusive Education](#)**



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