



**Submission to the Ministry of Education consultation
on legislative changes to;
strengthen the right to education and,
transfer provisions regarding special schools and re-
name special schools.**

**14 June 2019
Trish Grant
Director of Advocacy
IHC New Zealand Inc
PO Box 4155
Wellington**

Tel: 04 472 2247

Contents

1. Key points and recommendations	3
2. About IHC	6
3. IHC's overall response	7
3.1 Human right to education.....	7
3.2 Strengthening education rights	8
3.3 Enforcement of rights.....	9
3.4 Renaming of special schools.....	10
4. Conclusion	11
5. References	12

1. Key points and recommendations

IHC acknowledges the government intent to strengthen the right to education by making it clearer where in legislation the right to education is contained, and more explicitly include the right to attend school. The intent to include a description of the elements of the right to education and references to the provisions of the Act that specifically address those elements is welcomed.

IHC particularly supports the need to include links as to (a) where the right to education is found and (b) where the provisions to enforce that right are found within the legislation.

We note that the proposed changes seek to ensure compliance with New Zealand's international obligations.

IHC supports this intent and recommends that the opportunity be taken to consider how consistency could be achieved across legislation affecting or impacting on children and young people.

In this regard we note that the intent of the child and youth wellbeing strategy, Children's Act 2014 Part 1(6A)(1,2) to meet international obligations relating to children in respect of the United Nations Convention on the Rights of the Child (UNCROC) and the United Nations Conventions on the Rights of Disabled persons (UNCRPD) and the Children, Young Persons and their Families (Oranga Tamariki) Legislation Act 2017 Section 5 (b)(i) principle:

the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be treated with dignity and respect at all times and protected from harm.

IHC suggests that the proposals for legislative change reflect a critical and timely opportunity for the insertion of explicit reference to UNCROC and UNCRPD and related principles and enduring objectives to give full effect to children's rights to education being upheld in New Zealand law. We support the recommendations made within the Save the Children submission¹ regarding the opportunity to create a stand-alone purpose section of the Act that clearly sets out the right to education and obligations required to fulfill those rights.

Although IHC understands the intent to strengthen the right to education by making it explicit in the legislation the right to attend school, IHC does not support this approach as we are not confident that a legislative right alone will

¹ SCNZ submission to MOE consultation - Strengthening the right to education and changes for special schools

resolve the longstanding problems associated with children and young people being able to exercise their human rights to education.

We believe that the human right² to education will be strengthened by sustained policy and administrative actions to ensure education systems and structures effectively respond to the rights found within s.3 and s.8 of the Education Act and to ensure that those existing rights are able to be enforced.

IHC believes that existing rights within the legislation and any “new” rights will continue to be “hollow” rights when the context in which those rights are recognised and realised lacks confidence, capacity, resources and, in some instances, commitment to do so.

IHC notes that the legislative reform being consulted on is one component of the wider reform of the education system. The report³ from the Independent Taskforce identifies serious problems within the current system and makes recommendations for transformation. It is of critical importance that those recommendations are considered alongside the submissions made and conclusions reached within this consultation.

Should the decision be made to legislate for the right to attend it is inevitable that other rights including the rights to access curriculum, achievement and participation will also be called for. Currently it is recognised that elements of the right to education are reflected in the legislation with education policy and administrative practices further supplementing the realisation of this right.

Widespread concern relating to the lack of a quality public inclusive education system is well known and documented, as is the discrimination disabled students experience accessing enrolment, the curriculum and participating in school life on the same basis as their non-disabled peers.

IHC’s complaint under Part 1A of the Human Rights Act⁴ alleging that disabled students experience discrimination at school identifies that systemic and structural difficulties within the education system adversely impact on the disabled students’ education rights. The evidence from students and families included multiple examples of restrictions placed on enrolment and

² General Comment No 13: The right to education (article 13) 1999 (adopted by the Committee of Social & Cultural Rights at the Twenty First Session, E/C.12/1999/10/8 December) Retrieved from <https://www.right-to-education.org/resource/cescr-general-comment-13-right-education-article-13>

³ “Our Schooling Future: Stronger Together” Whiria Nga Kura Tuatinitini Report by the Tomorrow’s Schools Independent taskforce
<https://conversation.education.govt.nz/assets/TSR/Tomorrows-Schools-Review-Report-13Dec2018.PDF>

⁴ Second amended Statement of Claim dated 18 August 2014. IHC v Attorney General, in the Human Rights Review Tribunal HRRT024/2012

attendance compounded by the lack of any enforcement of rights mechanism to investigate breaches of rights.

Government action to establish of an independent education review Tribunal is required with urgency. Children and young people are the only group of New Zealand citizens unable to access an independent body to review decisions made about them. The lobby to establish such a Tribunal has strong civil society support that is now decades old.

The legislative right to attend school does not in and of itself ensure that students will be able to exercise their rights to, through and from education. The education reform process underway has identified serious problems of quality and equity with the current system⁵. For disabled students education is not only a right in and of itself, it is also a means of accessing other rights of citizenship (Lundy, 2007).

IHC has taken a human rights approach in considering the proposed changes to the legislation and was concerned to read in the Cabinet paper⁶ that “Schools may be concerned about the workload impacts of a strengthened right to education that would require them to do more to ensure that all students could attend.....”(Para 28). Clearly the intent to strengthen the right to education for rights holders (students) would be compromised should the interests or concerns of the duty bearer (government and its agents) be given inappropriate weighting.

IHC recommends that the Government:

- 1.1 Consider recommendations from the report⁷ from the Independent Taskforce set up to Review Tomorrow’s Schools alongside the submissions made and conclusions reached within this consultation.
- 1.2 Develop a consistent approach to ensuring compliance with New Zealand’s international obligations in all legislative reform impacting on children and young people.

⁵ “Our Schooling Futures:Stronger Together” Whiria NgaKura Tuatinitini Report by the Tomorrow’s Schools Independent taskforce
<https://conversation.education.govt.nz/assets/TSR/Tomorrows-Schools-Review-Report-13Dec2018.PDF>

⁶ Cabinet paper:Education and Training Bill-public consultation on second tranche of policy proposals retrieved from <https://www.education.govt.nz/assets/Documents/Ministry/Information-releases/2019-releases/P-34-E-and-T-Bill-Public-Consultation-on-2nd-Tranche.pdf>

⁷ “Our Schooling Futures:Stronger Together” Whiria NgaKura Tuatinitini Report by the Tomorrow’s Schools Independent taskforce
<https://conversation.education.govt.nz/assets/TSR/Tomorrows-Schools-Review-Report-13Dec2018.PDF>

- 1.3 Include within the Education Act a right to inclusive education (defined) and a right to reasonable accommodation.
- 1.4 Include UNCROC and UNCRPD as a key element of the legislative framework within new education legislation as an explicit commitment to New Zealand's human rights treaty obligations. IHC supports the recommendation made by Save the Children New Zealand that this commitment is set out in the purpose section of the Act.
- 1.5 Strengthen the right to education within the legislation (as submitted by CCS Disability Action⁸) by adding a new subsection to section 8 to read (or similar wording)
Disabled students and/or their family/whanau can request the Secretary to investigate a breach of their rights in subsection 1. The secretary of Education must investigate the alleged breach of rights and publicise the findings
- 1.6 Establish an Independent Education Review Tribunal
- 1.7 Collate and publish on an annual basis the number of individual complaints made, and actions taken to resolve each complaint, to education system stewards, Ministry of Education, Teachers Council, Boards of Trustees and the Educational Review Office about problems children and young people experience exercising the right to education.
- 1.8 Ensure that all initial and ongoing teacher education, and the professional development of professionals and practitioners working in schools include responsibilities regarding the recognition and response to the education rights of children and young people.
- 1.9 Further safeguards are established within the education system to ensure a vision for inclusive education is realised through a mechanism at the highest systems level to monitor the achievement of that vision.

2. About IHC

IHC advocates for the rights, inclusion and welfare of all people with intellectual disabilities and supports them to live satisfying lives in the community.

IHC was founded in 1949 by a group of parents who wanted equal treatment from the education, health and social service systems for their children with intellectual disability. Today IHC is still striving for these same outcomes and is committed to advocating for the rights, welfare and inclusion of all people with an intellectual disability throughout their lives.

⁸ CCS Disability Action Submission

IHC's 70-year history has been characterised by unwavering advocacy about the rights of children with intellectual disabilities to education. Many families felt that after the enactment of the 1989 Education Act, which gave disabled children equal rights to enrol and receive education at their local school, the difficulties would end. Sadly, despite legislative and policy enablers, disabled children have continued to experience significant difficulties with enrolment, access to the curriculum and participation in school life.

The difficulties were so widespread that in 2008 IHC lodged a complaint under Part 1A of the Human Rights Act alleging that disabled children were being unlawfully discriminated against because their rights to education were responded to differently than their non-disabled peers. IHC's complaint had a preliminary hearing in the Human Rights Review Tribunal in early 2015 but some four years later the substantive matters of the complaint are still to be heard.

Alongside the litigation IHC continues to work co-operatively with government in collaboration with disability and education sector non-government organisations to resolve the structural and systemic difficulties which give rise to the discrimination.

Evidence collected for the complaint and recent engagement with families, teachers and Principals confirm the serious ongoing difficulties students with disabilities experience in having equitable access to and outcomes from New Zealand's education system.

IHC supports people with intellectual disability to lead satisfying lives and have a genuine place in the community as citizens. We believe that the foundations for inclusion of people with intellectual disability in society are built on integrated, across-government and community-linked support to families of children with intellectual disability and access to inclusive early childhood, primary, secondary and tertiary education.

Underpinning our work is the principle that intellectually disabled children and young people are part of the community of all children and young people – they are entitled to full enjoyment of their human rights and fundamental freedoms on an equal basis with other children and young people.

3. IHC's overall response

3.1 Human right to education

Persons with disabilities are full rights holders and are entitled to claim and realise, on an equal basis with others, all civil, political, social, economic and cultural rights, including the right to education. To this end Article 24

(UNCRPD) affirms the right to education, without discrimination, and based on equal opportunity⁹

New Zealand's obligations under Article 24 of the UNCRPD in respect of disabled students' rights at school include;

The right to access an inclusive, quality education on an equal basis with others [Art 24(2)(b)].

Reasonable accommodation of the student's requirements [Art 24(2)(c)].

The right of students to receive support within the general education system, and that such support measures are effective, individualised, and provided in environment that maximises academic and social development, and consistent with the goal of full inclusion [Arts 24(2)(d) and (e)].

Compliance with Article 24 requires a legislative commitment. In the General Comment on the Right to Inclusive Education under Article 24, the UNCRPD Committee states that:

“The right to inclusive education encompasses a transformation in culture, policy and practice in all formal and informal educational environments to accommodate the differing requirements and identities of individual students, together with a commitment to remove the barriers that impede that possibility... It requires an in-depth transformation of education systems in legislation, policy, and the mechanisms for financing, administration, design, delivery and monitoring of education” (Article 24 UNCRPD General Comment).

Monitoring of New Zealand's compliance with the UNCRPD has led to a call for the right to inclusive education to be included in the Education Act as the means to achieving full implementation of Article 24. In its 2014 review of New Zealand, the UNCRPD Committee concurred with the Independent Monitoring Mechanism's position that the Government establish an enforceable right to inclusive education within legislation.

Recommendations

IHC recommends that government include within the Education Act a right to inclusive education (defined) and a right to reasonable accommodation.

IHC further recommends that UNCROC and UNCRPD are included within new education legislation as an explicit commitment to New Zealand's human rights treaty obligations and as a key element of the legislative framework. We support the recommendation made by Save the Children

⁹ Emily Cukaleveski&Catia Malaquias (2019): A CPRD analysis of NSW's policy on the education of students with disabilities-a retrogressive measure that must be halted,Australian Journal of Human Rights,DOI:[10.1080/1323238x.2019.1609720](https://doi.org/10.1080/1323238x.2019.1609720)

New Zealand that this commitment is set out in the purpose section of the Act.

3.2 Strengthening education rights

Legislation alone cannot guarantee the right to education in New Zealand given the devolved nature of education delivery and the current disconnected systems and structure.

Disabled students continue to be excluded/marginalized in the New Zealand education system, and to have their rights denied under the Education Act (1989) and the UNCRPD (2006) to enrol and receive a just education in an inclusive education system (Grant & Matthews, 2015; Moran, 2014).

The Office for Disability Issues (2016) notes that complaint mechanisms continue to indicate gaps in the implementation of accessible schooling, with concerns raised about enrolment and suspension/exclusion decisions involving disabled students, as well as levels of support and reasonable accommodation¹⁰.

IHC continues to assert that the marginalization, exclusion and discrimination experienced by disabled students directly relate to flawed systems and structures within the education system including but not restricted to:

1. Initial and ongoing teacher education resulting in limits in capacity to teach diverse learners and a lack of requirement to respect and respond to students' human rights to education
2. The current policy and resourcing framework not ensuring that students have the support to be present, achieve and participate and not providing what schools say they need to deliver a quality education to all learners
3. Lack of visibility and monitoring of disabled students school presence, participation and learning combined with a lack of effective accountability mechanisms
4. The lack of prevalence data of the number of students who require additional support to learn, which schools they are enrolled in, and what it would cost to provide the required support
5. Lack of access to an independent body to review decisions made by schools or to ensure accountability and system learning and innovation.

IHC acknowledges the work underway within the education system reform initiatives has the potential to strengthen the right to education. IHC's

¹⁰ They are us: Education for all Submission to Review of Tomorrow's School

submission to the Tomorrow's Schools review included a recommendation that is replicated below.

Recommendation

Further safeguards are established within the education system to ensure a vision for inclusive education is realised through a mechanism at the highest systems level to monitor the achievement of that vision.

3.3 Enforcement of rights

Families continue to report to IHC frustration and despair about the lack of processes or mechanisms that can investigate breaches of rights or enforce their children's education rights.

We support the proposal to make clear within the legislation enforcement of rights and question and suggest that the current enforcement powers of the Secretary of Education to direct a school to enrol and to direct a student to enrol at a special school be broadened.

IHC suggests that the opportunity is taken to broaden and strengthen legislative and policy enforcement options and makes the following recommendations.

Recommendations

Establish an Independent Education Review Tribunal.

Collate and publish on an annual basis the number of individual complaints made, and actions taken to resolve each complaint, to education system stewards, Ministry of Education, Teachers Council, Boards of Trustees and the Educational Review Office about problems children and young people experience exercising the right to education.

Ensure that all initial and ongoing teacher education, and the professional development of professionals and practitioners working in schools include responsibilities regarding the recognition and response to the education rights of children and young people.

3.4 Changes for special schools

IHC supports the Minister's proposal to transfer the legislative provisions currently contained in the Education Act 1964 for establishing and disestablishing special schools into the new legislation.

We also support the minor changes to remove references to some clinics and classes that are no longer used.

IHC acknowledges the changed role of special schools and the intent of the proposed change to the legislation to better reflect that changed role.

However, we strongly oppose the proposed name change to specialist schools and see this as retrogressive in respect of contemporary understandings of the human rights of disabled persons.

IHC affirms the Education For All submission to the Independent Task force reviewing Tomorrow's schools that states;

“A review of language is necessary, given that terms such as 'special', 'specialist', 'additional needs', 'challenges' (both within children and that children cause for schools), default to a deficit/ adjunct/add-on mentality in relation to disabled students, which obscures recognition of and undermines students' rights. The label 'special education' fails to recognise the influence of ecological and social contexts on children's learning and social experiences at school and gives people permission to use discriminatory practices (Smith, 2013). Critiquing and contesting entrenched 'special needs-ism' is essential if we are to achieve a genuinely inclusive education system for ALL students (Rutherford, 2016). Replacing 'special educational needs' with 'educational rights' means that all students are valued and their identities are upheld (MacArthur & Rutherford, 2016; Runswick-Cole & Hodge, 2009; Slee, 2018) (p.8).

Recommendations

That disabled people are consulted about the proposed name change as required by UNCRPD (4.3).

That the new name for special schools in the legislation be Resource schools/centres.

4. Conclusion

Thank you for the opportunity to consider the proposals for legislative change. We wish you well with this important work and would welcome an opportunity to discuss IHC's key points and recommendations.

5. References

- Cabinet paper: Education and Training Bill-public consultation on second tranche of policy proposals retrieved from <https://www.education.govt.nz/assets/Documents/Ministry/Information-releases/2019-releases/P-34-E-and-T-Bill-Public-Consultation-on-2nd-Tranche.pdf>
- Emily Cukaleveski&Catia Malaquias (2019): A CPRD analysis of NSW’s policy on the education of students with disabilities-a retrogressive measure that must be halted, *Australian Journal of Human Rights*, DOI:[10.1080/1323238x.2019.1609720](https://doi.org/10.1080/1323238x.2019.1609720)
- Grant, T., & Matthews, D. (2015). New Zealand failing in educating those with disabilities. *The Dominion Post*. Retrieved from <https://www.stuff.co.nz/national/education/71212213/null>
- IHC New Zealand v Attorney General* (2012) HRRT (Second Amended Statement of Claim, 18 August 2014)
- Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities. (2016). *Article 24: The Right to an Inclusive Education E Koekoe Ana te Tūi Implementation Report*. Retrieved from www.ombudsman.parliament.nz/.../imm_interim_implementation_report_word_final
- Lundy, L. (2007). ‘Voice’ is not enough.: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child. *British Educational Research Journal*, 33 (6), 927-942.
- Moran, P. (2014). No Learner Left Behind: Is New Zealand meeting its obligations under Article 24 of the United Nations Convention on the Rights of Persons with Disabilities? *Public Interest Law Journal of New Zealand*, 1-42. Retrieved from <http://www.nzlii.org/nz/journals/NZPubIntLawJl/2014/1.pdf>
- Office for Disability Issues. (2019). *Key facts about disability in New Zealand*. Retrieved from <https://www.odi.govt.nz/home/about-disability/key-facts-about-disability-in-new-zealand/>
- “Our Schooling Futures:Stronger Together” Whiria Nga Kura Tuatinitini Report by the Tomorrow’s Schools Independent taskforce <https://conversation.education.govt.nz/assets/TSR/Tomorrows-Schools-Review-Report-13Dec2018.PDF>
- Runswick-Cole, K., & Hodge, N. (2009). Needs or rights? A challenge to the discourse of special education. *British Journal of Special Education*, 36(4), 198–203.