

# Article 24

## The Right to an Inclusive Education

### E Koekoe Ana te Tūī



Implementation Report

Independent Monitoring Mechanism  
on the Rights of Persons with Disabilities

June 2016



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# Contents

Introduction	2
Executive summary	4
The right to inclusive education – components and definition	5
The legislative and policy framework	9
Opportunities to incorporate a right to inclusive education	13
Conclusion	18
Recommendations	19
Appendix 1	20
Endnotes	23

This document is an Interim Implementation Report. A final report will be released in September when the Draft General Comment on the Right to Inclusive Education is finalised.

Please note, names and details in case studies included in this report may have been changed to protect privacy.

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Cover image: Margaret Macdonald

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# Introduction

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## **E koekoe ana te tūi, e ketekete ana te kākā, e kūkū ana te kereru** **It takes a forest full of birds to make a morning chorus**

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The Independent Monitoring Mechanism (IMM) on the Convention on the Rights of Persons with Disabilities (CRPD) has prepared this CRPD implementation status report in accordance with its monitoring mandate under Article 33.2 of the CRPD.<sup>1</sup>

The IMM is made up of the New Zealand Human Rights Commission, the Office of the Ombudsman, and the Article 33 New Zealand Convention Coalition Monitoring Group (which consists of seven Disabled People's Organisations). Its role is to monitor, evaluate, report, advocate, and advise on the implementation of the CRPD in New Zealand.

This status report focuses on the current implementation status in New Zealand of Article 24 of the CRPD as regards the right of disabled persons to inclusive education. In its inaugural review of New Zealand in 2014, the UN Committee on the Rights of Persons with Disabilities recommended, among other things, that the New Zealand Government establish an "enforceable" right to inclusive education.

In 2015, the Government announced the commencement of a major review and reform of the Education Act 1989. These reforms are due to be introduced in the form of a new Education Bill later in 2016. Consideration of the current implementation status of Article 24 in New Zealand is therefore timely.

In assessing the current implementation status of Article 24 in New Zealand, this report covers the following areas:

- a The right to inclusive education under Article 24 – components and definitions.
- b The New Zealand legislative/policy context
- c A snapshot of complaints data from the Human Rights Commission and Office of the Ombudsman
- d Opportunities to incorporate a right to an inclusive education into legislation and policy
- e Recommendations

# Executive summary

This report examines the progress made in New Zealand toward the realisation of the right to inclusive education as set out in Article 24 of the CRPD. It concludes that while there have been developments made toward implementing this right, there are still barriers preventing disabled people from successfully engaging in education, such as:

- The right to an inclusive education is not legislated for, nor is it appropriately incorporated in policy strategies and plans.
- There is a lack of structured coordination and decision-making between disability and education sector groups.
- Data collection processes that enable effective assessment and monitoring of progress are not robust.

The report makes the following recommendations:

- a That a purpose statement incorporating the right to inclusive education be included in Part 1 of the Education Act 1989, including a CRPD-compliant definition and elements.
- b The right to inclusive education be reinforced at the operational level by the inclusion of inclusive education responsibilities within a statutory code of responsibilities for Boards and Principals.
- c Any amendments to legislation or policy arising out of the service delivery model proposed in the *Special Education Action Plan* should expressly incorporate inclusive education principles.
- d The Ministry of Education should establish a multi-sector Inclusive Education Advisory Group comprised of disability and education sector groups.
- e That a data strategy be developed to accurately assess and monitor the implementation of inclusive education policies and practices and enable a social investment approach which takes account of human rights principles. The strategy should be based on consistent CRPD-based understandings of disability, provide information across the life course, and be integrated into whole of government data work. It should be developed in partnership with a multi-sector stakeholder group, such as the Inclusive Education Advisory Group model suggested above.
- f Inclusive education targets and goals be included within the New Zealand Disability Strategy and Disability Action Plan.

# The right to inclusive education – components and definition

An inclusive education system that meets the requirements of Article 24 of the CRPD must demonstrate the following components:

- a Equality of access to an inclusive, quality education. [Art 24(2)(b)].
- b Reasonable accommodation of the requirements of disabled students [Art 24(2)(c)].
- c The right to receive support within the general education system [Art 24(2)(d)].
- d Support measures are effective, individualised, provided in an environment that maximises academic and social development, and consistent with the goal of full inclusion [Art 24(2)(e)].

The UN Convention on the Rights of the Child ('UNCROC') also contains a number of provisions that reinforce the principles of inclusive education, including:

- a The right to effective access to, and receipt of, education in a manner conducive to achieving the fullest possible social integration and individual development [Art 23.3].
- b The right to education on the basis of equal opportunity [Art. 28.1].

- c An obligation on the State to ensure that the provision of education is directed towards the development of the child's personality, talents and mental and physical abilities to their fullest potential [Art 29.1(a)].

The obligation to incorporate the inclusive education principles referred to in Article 24 is well-documented in government policy. The Ministry of Education has referred to the CRPD as placing a binding obligation upon New Zealand to provide an inclusive education system, an obligation that is reinforced by the New Zealand Disability Strategy and supported by the National Curriculum.<sup>2</sup>

In 2015, the UN Committee on the Rights of Persons with Disabilities ('CRPD Committee'), the UN treaty body consisting of independent experts who monitor the implementation of the CRPD, commenced development of a General Comment on the right to education under Article 24.<sup>3,4</sup>

The CRPD Committee released its draft general comment on Article 24 in January 2016. While it is yet to be finalised,<sup>5</sup> the draft General Comment provides a clear indication of the CRPD Committee's position on what constitutes the baseline elements of an inclusive education system.

In the draft General Comment, the CRPD Committee defines the right to inclusive education in the following terms:

“a process that transforms culture, policy and practice in all educational environments to accommodate the differing needs of individual students, together with a commitment to remove the barriers that impede that possibility. An inclusive approach involves strengthening the capacity of an education system to reach out to all learners.

It focuses on the attendance, participation and achievement of all students, especially those who, for different reasons, are excluded or at risk of being marginalized. Inclusion involves access, permanence and progress to high-quality education without discrimination of any kind, whether within or outside the school system. It seeks to enable communities, systems and structures to combat discrimination, celebrate diversity, promote participation and overcome barriers to learning and participation for all people.

**It therefore requires an in-depth transformation of education systems, not only in legislation and policy, but also in the mechanisms for funding, administration, design, delivery and monitoring of education. The goal is for all students to learn in inclusive environments.”** [emphasis added]<sup>6</sup>

The CRPD Committee refers to the following four principles (the four ‘A’s’) as central to an inclusive education framework:

**Availability** – this requires that “functioning educational institutions and programmes must be available in sufficient quantity”.

This includes teaching staff and resources. In order to ensure that the quantity of services is sufficient to meet needs, accurate data gathering and monitoring is required.<sup>7</sup>

**Accessibility** – this requires that the entire inclusive education system is accessible; including buildings and physical infrastructure, information and communication systems (including ambient or FM assistive systems), transport systems and services, support services and reasonable accommodation in all educational environments, including sport and recreational programmes and facilities. It also requires economic accessibility in the form of free primary education and (ideally) free secondary education.<sup>8</sup>

**Acceptability** – requires “an obligation to design and implement all education-related facilities, goods and services in a way that takes full account of and is respectful of the needs, expectations, cultures, views and languages of persons with disabilities”.<sup>9</sup>

**Adaptability** – this requires an education environment that can be adapted to the diverse needs of students. To this end, the CRPD Committee encourages the application of the Universal Design for Learning (UDL) principles, which provide teachers with “a structure to create adaptable learning environments and develop instruction to meet the diverse needs of all learners”. The CRPD Committee also encourages a move away from standardised assessment and testing, towards recognition of individual progress towards broad goals, alternative routes for learning, flexible instruction, and multiple forms of student assessment.<sup>10</sup>

Linked with the 'acceptability' principle, the CRPD Committee also highlights the principle of quality requiring an inclusive education system as demonstrating "[responsiveness] to the voices of persons with disabilities; active participation of learners; positive teacher attitudes; effective teacher skills; visionary leadership; and coherent inter-disciplinary services".<sup>11</sup> This includes investing in and supporting the recruitment and training of teachers with disabilities.<sup>12</sup>

The draft General Comment also provides that an inclusive education system must be underpinned by a comprehensive and co-ordinated legislative framework for inclusive education needs to be introduced together with a clear plan for implementation. This requirement has particular resonance for New Zealand, given the CRPD Committee's 2014 recommendations and the current legislative reform that is underway.

The CRPD Committee identifies a number of elements that a legislative framework ought to incorporate:

- a A clear definition of inclusive education and its objective.
- b An enforceable right to access inclusive learning opportunities, and for individual learners to have access to the necessary support services at all levels.
- c A requirement for all new schools to be designed and built to acceptable standards of accessibility, and adaptation of existing schools to these standards.

- d Introduction of monitoring mechanisms to ensure that policy, together with the requisite investment, is implemented.
- e Recognition of the need for reasonable accommodations to support inclusion, based on human rights standards, rather than on the efficient use of resources.
- f A consistent framework for the identification, assessment and support required to enable children with disabilities to flourish in inclusive learning environments.
- g An obligation on local authorities to plan and provide for all learners, including persons with disabilities, within inclusive settings and classes, including in the most appropriate languages, modes and means of communication.
- h Establishment of legislation to guarantee all children, including children with disabilities, the right to be heard within the school system, including through school councils, governing bodies, local and national government, as well as mechanisms through which to appeal decisions concerning education.

Together with the 'four A's' and the principle of quality, these elements provide a useful basis for assessing New Zealand's current legislative framework against Article 24.

As noted above, the legislative framework governing the provision of education to people with disabilities has remained unchanged for over two decades. This stands in contrast to the advancements made in human rights law and policy over that time; in particular, the CRPD, which rejects the discourse of “special” and signals a shift to the education of children with disabilities as being business as usual. This section will explain how the relevant legislative and policy frameworks currently operate in relation to inclusive education.

In recent years, policy development initiatives, such as the 2010 Review of Special Education and the Success for All inclusive education strategy, have attempted to review and update policies and practices in order to provide for a more rights consistent education system. However, the lack of any legislative reform arising from these initiatives has meant that changes to policy and practices have been largely incremental, rather than systemic.

This situation was noted by the CRPD Committee in its 2014 Concluding Observations on New Zealand. The CRPD Committee noted “the steps being taken to increase inclusive primary and secondary education” yet further noted the existing challenges to providing reasonable accommodation and expressed concern at the high rates of bullying experienced by disabled students and the lack of an “enforceable” right to inclusive education in New Zealand.

# The legislative and policy framework

The central piece of legislation currently governing the primary and secondary school sector in New Zealand is the Education Act 1989 ('the Act'). The primary purpose of the Act is set out in section 3 and provides for:

## *Right to free primary and secondary education*

*...every person who is not an international student is entitled to free enrolment and free education at any State school or partnership school kura hourua during the period beginning on the person's fifth birthday and ending on 1 January after the person's 19th birthday.*

The importance of section 3 of the Act cannot be understated. It lays the foundation for the provision of free primary and secondary education for New Zealand children and young people. It also enables realisation of the right of children to education, a right contained in a number of human rights treaties ratified by the New Zealand Government.<sup>13</sup>

Section 8(1) of the Act sets out a second purpose statement affirming equal rights to primary and secondary school students who have "special educational needs":

## *Equal rights to primary and secondary education*

*(1) Except as provided in this Part, people who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education at State schools as people who do not.*

Sections 9 and 10 of the Act follow on to establish the basis for individualised special education services and a review system for reconsidering unsuccessful applications.

The scope of the rights under sections 3 and 8 was considered by the Courts in the Daniels<sup>14</sup> proceedings of 2002 and 2003, with the Court of Appeal concluding that "there is no freestanding general right, held and enforceable by each individual student under ss3 and 8...".<sup>15</sup> However, the subsequent ratification of the CRPD and subsequent amendments to the Human Rights Act<sup>16</sup> and developments in Ministry of Education policy<sup>17</sup> has had the effect of rendering the Court of Appeal's interpretation of sections 3 and 8 somewhat obsolete.

As section 8 does not include any term analogous to the CRPD principles of reasonable accommodation or inclusive education, these principles are required to be read into its meaning. The 2014 decision of the High Court in *A v Hutchinson*<sup>18</sup> is reflective of such an approach, and emphasises that schools have a duty to investigate alternatives to disciplinary measures when addressing disruptive behaviour by a student with a disability that impacts upon behaviour.<sup>19</sup>

At an operational level, *The National Education Goals* (NEGs) set by the Minister under section 60A of the Act, by way of publication in the New Zealand Gazette,

provide more specificity as to the purposive elements of the state education system, including:

- a Equality of educational opportunity, by removing barriers to achievement (NEG 2).
- b Success in their learning for those with special needs by ensuring that they are identified and receive appropriate support (NEG 7).

While the presence of these goals is commendable, their effectiveness in influencing practices in schools is questionable. The Taskforce on Regulations Affecting School Performance noted in their May 2014 report that “the NEGs are seldom considered by boards or schools”.<sup>20</sup>

It is also notable that neither the Act, nor the NEGs, address the issue of bullying – an issue highlighted by the CRPD Committee. The IMM has previously highlighted bullying as a matter of particular concern, noting that in order for disabled students to enjoy a safe and inclusive educational environment, schools must consistently act to prevent bullying from occurring or proliferating.<sup>21 22</sup>

Guidelines aimed at addressing bullying in schools have been developed by the Bullying Prevention Advisory Group (BPAG),<sup>23</sup> a cross-sector group of government agencies, Crown entities and education sector organisations. The Guidelines are recommendatory only and encourage schools to self-evaluate their current practices. While the Guidelines recognise that disabled students are at

greater risk of bullying than other students, they are yet to establish a disability-specific set of criteria.<sup>24</sup>

In summary, there are a number of frameworks which fall short of providing a right to inclusive education as set out in Article 24. Firstly, the current legislative framework does not specifically incorporate inclusive education or reasonable accommodation principles. Secondly, the NEGS are seemingly ineffective in influencing practices in schools. Thirdly, neither the Act nor the NEGs address bullying, and current guidelines do not yet incorporate disability criteria.

These shortcomings are reflected in the complaints received by the Human Rights Commission<sup>25</sup> and the Office of the Ombudsman about disability discrimination at school.

## **Complaints received by the Human Rights Commission and Office of the Ombudsman**

These shortcomings are reflected in the complaints received by the Human Rights Commission and the Office of the Ombudsman about disability discrimination at school under their respective statutory jurisdictions.<sup>26</sup> While limited data is available, the information we do have indicates complaints about disability discrimination at school make up a significant proportion of the total disability complaints, while the summaries of complaints recorded by the Ombudsman indicate certain types of impairments are overrepresented in complaints.

Complaints data from both agencies is provided in the tables set out in the Appendix to this report. The data gives an indication of how failing to incorporate inclusive education principles in the current legislative and policy frameworks negatively affects students. This complaints data shows:

- a The numbers of complaints received by the Commission regarding these issues, compared to total disability discrimination and general complaints received in each calendar year from 2011 to 31 May 2016 [Table 1 of the Appendix].
- b The proportion of complaints received by the Commission which allege disability discrimination at school in comparison to the total number of complaints, and of those, the proportion of complaints relating to stand-downs, suspensions and exclusions [Table 2 of the Appendix].
- c The numbers of these complaints received by the Office of the Ombudsman for the two-year period commencing 31 March 2013 and ending 1 April 2015 [Table 3 of the Appendix].
- d Descriptive summaries prepared by the Office of the Ombudsman of the complaints referred to in the table above that specifically regard the stand-down, suspension, exclusion or expulsion of students with special educational needs. [Table 4 of the Appendix].

## What the available data shows

The figures from the Human Rights Commission and the Office of the Ombudsman provide a snapshot of disability discrimination in schools. However, based on data from the Ministry of Education, ERO, and wider studies both in New Zealand and overseas, the IMM is concerned that the prevalence of disability discrimination in schools, direct or indirect, may be significantly larger than the figures indicate.

For example, 14,437 students were stood down from school for disciplinary purposes in 2014, while 2,692 were suspended.<sup>27</sup> Although the Ministry of Education does not report on how many of these students have disabilities, figures obtained in 2009 indicated that, at that time, approximately 40 percent of students subject to formal suspension procedures at school had prior support from Group Special Education or a specialist learning and behaviour teacher.<sup>28</sup> Relating this to 2014 figures indicates that over 1070 students who were suspended at that time had disabilities.

While substantial progress has been made in lowering the overall stand-down and suspension rates, the IMM is concerned that a large proportion of those students (numbering into the thousands) are likely to have learning and behavioural disabilities. The Commission has raised this issue with the Education and Science Committee as part of its submission on the Inquiry on students with dyslexia, dyspraxia and Autism Spectrum Disorder ('ASD'). Such disabilities come under the umbrella of "neurodisability" which as

well as including learning and behavioural difficulties, also includes communication difficulties, cognitive delays, and a lack of inhibition regarding inappropriate behaviour.<sup>29</sup>

As well as being overrepresented in stand-down and suspension statistics at school, young people with neurodisability are also overrepresented in youth justice settings. While data in New Zealand is not yet available, a report from the Children's Commission in the UK indicates that 40-60% of young people in youth justice facilities have neurodisabilities.<sup>30</sup> Studies have also indicated that poor educational outcomes make it more likely young people will end up in the justice system.<sup>31</sup>

The prevalence of other forms of disability discrimination in schools, such as restrictions or barriers placed on enrolment or attendance at school, or failure to provide facilities and services that reasonably accommodate the needs of disabled students, is more difficult to measure. A general inference as to prevalence may be able to be drawn from the Education Review Office's ('ERO') 2014 evaluation of *Success for All*, which found that across the sample of 152 schools ERO evaluated, 78% were "mostly inclusive" in their practices, an improvement on the 2010 figures which indicated only 50% reached this category. However, ERO also reported that only half of the *Success for All* schools were effective in promoting achievements and outcomes of students.<sup>32</sup>

From the available data, it appears that while improvements have been made, there is still a significant amount of work to be done to make New Zealand's education system inclusive. The education system is currently undergoing a number of changes which provide opportunities to incorporate a right to inclusive education.

# Opportunities to incorporate a right to inclusive education

## Reform of the Education Act 1989

It is apparent that the Education Act 1989 falls well short in providing for the elements identified by the CRPD Committee as essential components of an Article 24 compliant legislative framework (set out above).

The current update of the Act provides an important opportunity to incorporate inclusive education and reasonable accommodation principles within the legislative framework. This update of the Act is the first fundamental review of the Act since it was enacted over 25 years ago and follows the May 2014 report of the Taskforce on Regulations Affecting School Performance ('the Taskforce report'). The Taskforce examined the case for a review of the Act and accordingly issued several recommendations for its improvement and modernisation.

At present, there is little apparent focus within the update on implementing a meaningful right to an inclusive education. The Ministry of Education's consultation document on the review does not focus on this topic, nor the needs or rights of disabled students generally.

It is notable that both the Taskforce report and the Ministry of Education's consultation document advance the establishment in legislation of "national priorities about what is most important for education" so that schools "know what is expected of them" and can

focus their planning accordingly.<sup>33</sup> The IMM agrees with this general approach and would encourage the creation of a statutory code of responsibilities for Boards and Principals which incorporates inclusive education responsibilities.

However, the IMM considers that the right to inclusive education itself ought to be included in a statutory purpose statement in Part 1 of the Act alongside section 3, together with a statutory definition and elements that reflect the CRPD criteria. This would ensure the establishment of the enduring policy commitment on the part of both the Government and schools to progressively realise this right.

## Collaboration across sectors

While the Ministry of Education reports Success for All is continuing beyond 2014, there has been no public announcement of this. Further, there has been a lack of clarity about what additional policy measures the Government intends to develop and implement in order to progress its inclusive education obligations. The 2015 release of the "Special Education Update Action Plan" outlines a significant redesign of the model for accessing and allocating services and resources for students with additional learning needs.

Following the release of the plan, the Ministry of Education is currently implementing 22 locally led pilot projects. A national

service delivery model is proposed for implementation from mid-2016. Unlike Success for All, the Update Plan does not refer to the CRPD. The IMM considers that the new national service model, and any amendments to legislation or policy arising from it, should expressly refer to the CRPD and incorporate inclusive education principles.

The IMM also wishes to highlight the importance of ensuring that both policy development and monitoring is carried out in collaboration with external stakeholders and, in particular, Disabled People's Organisations (DPOs) in reflection of the "acceptability" principle enunciated by the CRPD Committee in its draft General Comment.

Currently, there is no formal mechanism to enable such collaboration or co-ordinate work towards achieving an inclusive education system.<sup>34</sup> The IMM would encourage the development of such a mechanism and considers that the BPAG provides a potential model for doing so.

## Enhanced data collection and analysis

In order to assess the extent to which the right to inclusive education is being realised across the school sector, accurate and co-ordinated data gathering, reporting and monitoring is required.<sup>35</sup>

At present, data collection processes do not enable an accurate and comprehensive assessment of the extent to which inclusive education principles are reflected in policy

and practice. Current data collection in this area is quantitative only and does not utilise an indicator framework against which outcomes data can be measured and evaluated.

Accordingly, any monitoring under the Convention is based on available data sources such as:

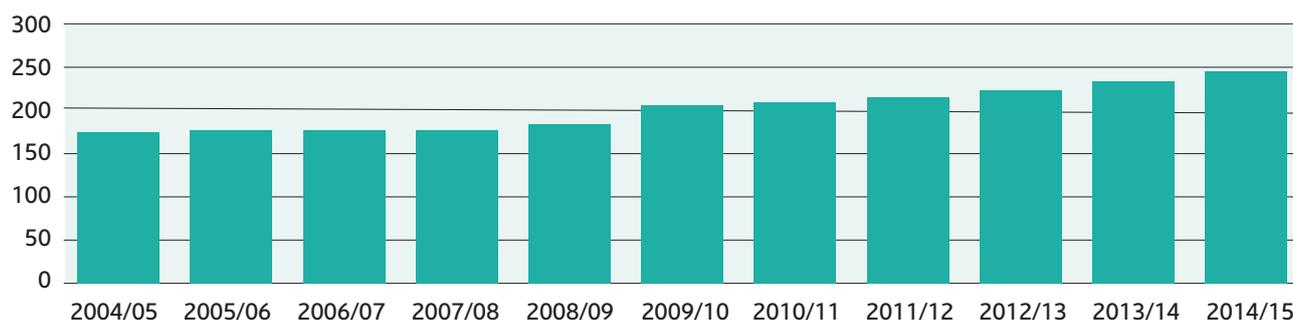
- a The number of students receiving individual resources under s 9 of the Act such as the Ongoing Resourcing Scheme ('ORS'), as well as the budgets provided and allocations made.
- b The numbers of students referred to and in receipt of Resource Teacher: Learning and Behaviour ('RTLB') support or other non-section 9 supports.
- c The number of students subject to stand-down and suspension procedures who had been referred to RTLB or other special education support services.

## Resourcing under section 9 of the Education Act

According to the Ministry of Education, the Government currently spends \$637m per year supporting students with additional support needs, with about 60,000 – 80, 000 children and young people each year accessing additional support.

ORS provides in school ongoing support for children with the highest level of disability needs in schools (about 1.1% of school age students).

## ORS Spend (\$m)



Children receiving ORS also access other support such as a high proportion of the \$36m p.a. transport assistance, access to assistive technology, NZSL@school for Deaf students, orientation and mobility services for blind students. It is also expected that the additional funding for ORS is on top of the funding and supports all other students in the system receive.

The graph above, supplied by the Ministry of Education, shows the money spent on ORS over the last 10 years starting from 2004/05. The graph indicates the money spend has increased by 28% over this period.

This increase in funding is likely to take account of the increase in the number of students in ORS. A report from September 2014<sup>36</sup> shows the increase in numbers over a five-year period, set out in the table below:

Year (July)	Total ORS <sup>37</sup>	% Increase
2010	7,363	-
2011	7,515	2.1
2012	7,619	1.4
2013	7,938	4.2
2014	8,301	4.6
	Average increase	3.1

According to data supplied by the Ministry, latest figures (taken over the 2014/15 year) indicate there are a total of 8,525 ORS students, an increase of 2.6%.

The report states the reasons for the increase in numbers are likely to be complex.<sup>38</sup> Reasons could include an increase in birth rates, an increase in net migration, an increase in the incidence of neurological conditions, an increase in the number of ORS applications, and a decrease in the numbers of students leaving the ORS.<sup>39</sup>

Further analysis of the increase in ORS numbers is beyond the scope of the report. However, it is worth noting that a further \$16.5 million will be put into the ORS over the next four years,<sup>40</sup> which going by the above figures, is likely to be in response to a predicted further increase in the numbers of students in the ORS.

## RTLB support

Data provided by the Ministry of Education shows an increase in the numbers of students receiving RTLB support since 2013:

Year	Numbers of Individual Students Receiving RTLB Support
2013	12,626
2014	13,214
2015	14,932

In addition to individual students receiving RTLB support, groups of students and schools receive support from RTLBs. However, the Ministry of Education reports this data is not reliable enough to report on yet.

Encouragingly, the Ministry reports that from 2016, RTLB clusters are starting to report on purpose of funding allocated to individual students, groups of students and schools as well as on outcomes for students as a result of RTLB involvement. Future analysis of this data could provide a clearer picture of the most pressing needs of students, how they are being supported, and what impact this support is having.

## Data gaps

In addition to the current lack of outcomes data available, the IMM is aware of current gaps in the collection of data on the uptake and frequency in which services are engaged in some areas. For example, there appears to be no data collected on the frequency of both referrals to Special Education Needs Co-ordinators (SENCOs) and development of Individual Education Plans (IEPs), both of

which are essential mechanisms for identifying needs and service responses.

As data collection practices in the social sector are likely to become increasingly sophisticated in the near future,<sup>41</sup> there is likely to be more capacity for better data collection and usage in this area.

The IMM encourages the development of a data strategy specifically designed to assess and monitor inclusive education practices and outcomes. This should include the development of a set of indicators that can be used to measure outcomes against the procedural and structural components of the legislative and policy framework governing the sector.

## Using enhanced data collection and analysis to take a social investment approach

Developing a comprehensive data strategy, including indicators, enable a social investment approach to be taken. This could lead to better outcomes for students with disabilities in education. The social investment approach being adopted by the government relies on the collection of detailed disaggregated data linking demographic and vulnerability criteria with outcomes, and subsequent resource allocation prioritisation to most efficiently and effectively deliver outcomes. The IMM recommends the social investment approach be combined with a human rights approach, so that “no one is left behind” to ensure all individuals identified to be ‘at risk’ are invested in early.

In the context of inclusive education, it is important that a social investment approach is taken to ensure children and young people with

disabilities and their families are given the right support at the right time in educational settings, from when an issue is first identified right throughout their life course. This relies on the collection of data on impairment disaggregated to a detailed level, along with data for other outcomes such as NCEA Level 2 achievement rates.

'Well child providers', such as Plunket, and Early Childhood Education centres in addition to primary and secondary schools must also be adequately supported to accommodate children with disabilities. This support should include the provision of adequate funding and training of teachers and support staff to ensure they are confident in supporting children with disabilities and/or disabled parents of children.

## **Disability Strategy and Disability Action Plan Revision**

The revision of the New Zealand Disability Strategy and the continued implementation of the Disability Action Plan 2014-2018 (DAP) provide an opportunity to incorporate an enforceable right to inclusive education outside the context of legislative reform.

Introduced in 2001, the Disability Strategy presented a long term vision for a society that highly values the lives and continually enhances the participation of disabled people. Under the current framework, the Minister for Disability Issues is required to report annually to Parliament on progress in implementing the Disability Strategy. The Office for Disability Issues supports the Minister by monitoring activity of government agencies.

The Strategy is currently being revised to take account of New Zealand's ratification of the CRPD and shifts in thinking and practice involving disability. The revised Strategy is expected to be launched in November/ December 2016.

There is an opportunity to include inclusive education targets in the revised Strategy. Targets could align with targets in the United Nations Sustainable Development Goal 4: to ensure the equal access to all levels of education and vocational training for persons with disabilities and to build and upgrade facilities that are "child and disability sensitive".<sup>42</sup>

Inclusive education targets should be incorporated into the DAP. The DAP sets strategic priorities that advance implementation of the CRPD and the Disability Strategy. It consists of a number of actions led by cross-government agencies, which are required to provide regular reports on progress to the Office for Disability Issues.

One of the actions in the initial DAP was to "build capability for inclusive education to improve delivery in the CRPD context" led by the Ministry of Education. However, this was removed in an updated version of the plan because it was led by a single agency. Given the importance of positive educational outcomes, the IMM recommends actions regarding inclusive education are reintroduced into the DAP. This would ensure inclusive education can sit within a CRPD framework and progress can be monitored and measured against Article 24.

# Conclusion

In conclusion, the IMM notes the Ministry's acknowledgment that Article 24 provides a binding obligation upon the Government to realise the right to inclusive education. The IMM also acknowledges the policy work that has been undertaken with a view to achieving implementation of this right, such as *Success for All*. However, the Education Act 1989 clearly needs to be amended in order to better reflect the CRPD requirements and drive implementation. The update of the Education Act 1989 provides a vital opportunity to achieve considerable progress. Related policy strategies and plans also should incorporate inclusive education principles within their frameworks and be aimed at improving co-ordination of the work of disability and education sector groups. In addition, current data collection practices need to be enhanced in order to enable effective assessment and monitoring, and a social investment approach to be taken. These changes must be made in collaboration with external stakeholders, particularly DPOs.

# Recommendations

The IMM therefore makes the following recommendations:

## Reform of legislation and policy

- a A purpose statement incorporating the right to inclusive education is included in Part 1 of the Education Act 1989, including a CRPD-compliant definition and elements.
- b This right to inclusive education is reinforced at the operational level by the inclusion of inclusive education responsibilities within a statutory code of responsibilities for Boards and Principals.
- c Any amendments to legislation or policy arising out of the service delivery model proposed in the Special Education Action Plan expressly incorporate inclusive education principles.

## Collaboration across sectors

- d The Ministry of Education should establish an Inclusive Education Advisory Group comprised of disability and education sector groups.

## Enhanced data collection and analysis

- e A data strategy should be developed to accurately assess and monitor the implementation of inclusive education policies and practices and enable a social investment approach which takes account of human rights principles. The strategy should be based on consistent CRPD-based understandings of disability, provide information across the life course, and be integrated into whole of government data work. It should be developed in partnership with a multi-sector stakeholder group, such as the Inclusive Education Advisory Group model suggested above.

## Disability Strategy and Action Plan Revision

- f Inclusive education targets and goals should be included within the New Zealand Disability Strategy and Disability Action Plan.

# Appendix 1

**Table 1**

**Human Rights Commission Complaints 2011-May 31 2016**

Calendar Year	Complaints alleging disability discrimination at school (general)	Complaints alleging disability discrimination at school (stand-down, suspension, exclusions etc.)	Total disability discrimination complaints received	Total complaints received
2011	47	11	383	1221
2012	42	14	390	1239
2013	33	11	363	1249
2014	47	17	393	1181
2015	30	11	356	1247
1 Jan to 31 May 2016	19	11	161	479

**Table 2**

**Human Rights Commission – breakdown of complaints by proportion<sup>43</sup>**

Calendar Year	Total number of disability discrimination complaints received	Percentage of total disability discrimination complaints alleging disability discrimination at school (general)	Percentage of complaints which allege disability discrimination at school related to stand-downs, suspensions, and exclusions
2011	383	11	23
2012	390	9	33
2013	363	12	33
2014	393	12	36
2015	356	8	37
1 Jan to 31 May 2016	161	12	58

## Table 3

### Office of the Ombudsman complaints 2013-15

Type of complaint	Total
Complaints regarding the stand-down, suspensions, exclusions and expulsions of primary or secondary students with special education needs.	11
Complaints regarding the stand-down, suspensions, exclusions and expulsions of primary or secondary students generally	25 (inclusive of the 11 cited above)
General complaints regarding actions/omissions of school Boards of Trustees.	95

## Table 4

### Office of the Ombudsman complaints relating to students with special educational needs

Special Education Needs	Anxiety, behavioural outbursts and counselling.
Details of complaint [text redacted]	[text redacted] School and student stood down for behavioural concerns.
Outcome	Referred to the school's BOT complaint process. Closed 26 June 2013.
Special Education Needs	Special learning disability.
Details of complaint (text redacted)	[text redacted] College and student removed from school due to two incidents.
Outcome	Complaint not sustained, and a meeting arranged between the parties. Closed 11 July 2014.
Special Education Needs	MOE intensive wraparound service (IWS).
Details of complaint (text redacted)	[text redacted] Intermediate School and student stood down for behaviour concerns.
Outcome	Referred to the school's BOT complaint process. Closed 13 September 2015.
Special Education Needs	Mild autism and epilepsy.
Details of complaint (text redacted)	[text redacted] student excluded for behavioural concerns.
Outcome	Investigation discontinued on the basis that the Board of Trustees took the unusual step of nullifying the student's exclusion.

Special Education Needs	Severe dyslexia and attention deficit disorder.
Details of complaint (text redacted)	[text redacted] College and student excluded.
Outcome	Ombudsman upheld one ground of complaint that the Board acted unreasonably in failing to provide access to specialist education resources for the student. Two grounds not upheld on the basis that steps were put into place to better manage students who have high educational needs. Closed 17 June 2014.
Special Education Needs	Asperger syndrome
Details of complaint (text redacted)	[text redacted] and student excluded for alleged history of taking drugs and behavioural concerns.
Outcome	Ombudsman found the exclusion to be procedurally flawed. Closed 20 February 2015.
Special Education Needs	ADHD
Details of complaint [text redacted]	[text redacted] and 8 year student excluded.
Outcome	Closed 24 July 2014, no further information by complainant.
Special Education Needs	Down syndrome
Details of complaint [text redacted]	[text redacted] and 9 year old student stood down for behavioural concerns.
Outcome	Ongoing investigation.
Special Education Needs	Co-ordination and processing issues.
Details of complaint [text redacted]	[text redacted]
Outcome	Referred to the school's BOT complaint process. Closed 13 October 2014.
Special Education Needs	Autism
Details of complaint [text redacted]	[text redacted] and student stood down for behavioural issues.
Outcome	Referred to the school's BOT complaint process. Closed 27 November 2014.
Special Education Needs	Learning difficulties awaiting medical assessment.
Details of complaint [text redacted]	[text redacted] and 8 year old student stood down for behavioural issues.
Outcome	Referred to the school's BOT complaint process. Closed 23 December 2014.

# Endnotes

- 1 Notice of Designation of Independent Monitoring, Minister for Disability Issues Hon. Tariana Turia, 4 October 2011, published in the New Zealand Gazette, 13 October 2011.
- 2 Ministry of Education, *Supports and Services for Learners with Special Education Needs/Disabilities*, April 2012.
- 3 Commenced at the UN Committee on the Rights of Persons with Disabilities, Day of General Discussion, May 2015.
- 4 UN treaty bodies regularly produce General Comments on human rights treaty articles in order to provide interpretative guidance for States on their obligations. General Comments also contribute to the body of jurisprudence on how a specific treaty article is interpreted.
- 5 The finalised version of the General Comment is due for release in September 2016.
- 6 Para 9.
- 7 Para 20.
- 8 Paras 21-23.
- 9 Para 24.
- 10 Para 25.
- 11 Para 26.
- 12 Para 36.
- 13 Article 28 UNCROC, Article 24 UNCRPD, Article 13 ICESCR.
- 14 *Daniels v Attorney-General* [2003], *Attorney-General v Daniels* [2003] CA84/02, 19 February 2003.
- 15 *Attorney-General v Daniels* [2003] CA84/02, 19 February 2003, at [87].
- 16 Section 60 Human Rights Act.
- 17 Ministry of Education, *Supports and Services for Learners with Special Education Needs/Disabilities*, April 2012.
- 18 *A v Hutchinson* [2014] NZAR 387.
- 19 *A v Hutchinson* [2014] NZAR 387 at [75]-[78].
- 20 Considering Education Regulation in New Zealand: Report of the Taskforce on Regulations Affecting School Performance, May 2014, p 18.
- 21 IMM p78.
- 22 Disabled students surveyed as part of New Zealand research into inclusive educational practices have identified bullying and friendship opportunities at school as two of the main issues affecting them, and have reported feeling fearful of the school environment and critical of a perceived lack of responsiveness from teachers and principals. Disabled students have also reported feelings of loneliness, particularly during recreational or break times, with research suggesting that schools struggle to accord much priority to addressing this issue. See MacArthur and Kelly, *Inclusion from the perspectives of students with disabilities*, 2004, [www.nzcer.org.nz](http://www.nzcer.org.nz) p46.
- 23 Comprising of Ministry of Education, New Zealand Police, Ministry of Social Development, Human Rights Commission, Children's Commissioner, School Trustees Association, Education Review Office, New Zealand Principals' Federation, Secondary Principals' Association of New Zealand, New Zealand Post Primary Teachers Association, New Zealand Council for Educational Research, New Zealand Association of Intermediate and Middle Schools, Netsafe.
- 24 Ministry of Education, *Bullying Prevention and Response: A Guide for Schools*, page 16.
- 25 Disability is one of 13 grounds in the Human Rights Act against which the Human Rights Commission may progress a complaint of discrimination.
- 26 The Human Rights Commission receives complaints regarding alleged discrimination pursuant to its jurisdiction under Part 1A, Part 2 and Part 3 of the Human Rights Act 1993; the Office of the Ombudsman may consider complaints regarding the actions and omissions of school staff and Boards of Trustees pursuant to s 13 and Schedule 1, Part 2 of the Ombudsman Act 1975.

- 27 See [http://www.educationcounts.govt.nz/\\_\\_data/assets/pdf\\_file/0011/147764/Stand-downs-Suspensions-Exclusions-Expulsions-Indicator-2014.pdf](http://www.educationcounts.govt.nz/__data/assets/pdf_file/0011/147764/Stand-downs-Suspensions-Exclusions-Expulsions-Indicator-2014.pdf).
- 28 Action for Children and Youth Aotearoa, *Children and Youth Aotearoa 2010*, para 7.17, para 30 – refers to Ministry of Education data dated 23 September 2009. The data referred to was obtained under the Official Information Act 1982.
- 29 *Nobody Made The connection: The Prevalence of Neurodisability in Young People who Offend*, UK Children’s Commission, 2012, page 8.
- 30 *Nobody Made the Connection* report.
- 31 For example, K L McLaren, *Tough is Not Enough – Getting Smart about Youth Crime* Ministry of Youth Affairs, Wellington, New Zealand, June 2000; Hawkins et al, 1992; Brewer et al, 1995; Catalano and Hawkins, 1996 quoted in *Risk and Protective Factors*, Research undertaken by “Communities that Care” on behalf of the Youth Justice Board, Youth Justice Board for England and Wales, London, 2005, 26.
- 32 Education Review Office, *Inclusive practices for students with special needs in schools*, March 2015, page 2, page 28 accessed <http://ero.govt.nz/National-Reports/Inclusive-practices-for-students-with-special-needs-in-schools-March-2015/National-report-summary>
- 33 *Have Your Say about Updating the Education Act 1989*, <http://www.education.govt.nz/assets/Documents/Ministry/consultations/UpdatingTheAct-Fact-sheet-FINAL.pdf>.
- 34 The IMM notes the Ministry’s acknowledgement that its role “includes collaborating and cooperating to make the whole system support better collective efforts and outcomes for learners” and commends the Ministry on its emphasis on collaboration and cooperation.
- 35 CRPD General Comment, para 20.
- 36 *Increasing Numbers in ORS*, <http://www.documentcloud.org/documents/2157891-increasing-numbers-is-ors.html#document/p1>.
- 37 The number of students in ORS and ORS Extension attending an education facility.
- 38 Page 2.
- 39 Pages 2-4.
- 40 See <http://www.education.govt.nz/ministry-of-education/budgets/budget-2016/highlights-budget-2016/>.
- 41 Such as the social sector data-use innovations to be introduced by the Data Futures Partnership.
- 42 The Sustainable Development Goals (SDGs) are a set of universal goals, targets, and indicators that all UN member states are expected to use to frame their policies until 2030.
- 43 The table above sets out the proportion of complaints which allege disability discrimination at school in comparison to the total number of complaints, and of those, the proportion of complaints relating to stand-downs, suspensions and exclusions. The table shows the proportion of complaints the Commission has received in this area has remained relatively consistent over the last five years.



