



Human Rights Commission  
Te Kāhui Tika Tangata

# Submission of the Human Rights Commission on Education and Training Bill

14 Feb 2020

**Paula Tesoriero MNZM,  
Disability Rights Commissioner**

Contact: Douglas Hancock, Senior Advisor  
[Douglash@hrc.co.nz](mailto:Douglash@hrc.co.nz)

# Submission of the Human Rights Commission on Education and Training Bill

---

## Introduction

1. The Human Rights Commission ('the Commission'), welcomes the opportunity to provide this submission on the proposed Education and Training Bill (the Bill).
2. The Bill updates and consolidates the current Education Acts (1989 and 1964). Its Explanatory Note provides that the Bill "establishes and regulates an education system to provide New Zealanders with lifelong learning opportunities so that they engage fully in society".
3. The Bill therefore constitutes significant legislative reform and has important human rights implications. Education is both a human right in itself and an indispensable means of realising other human rights.<sup>1</sup>
4. Overall, the Commission welcomes many of the reforms that the Bill introduces, which we note have arisen from an extensive education reform work programme and public consultation.
5. However, at the outset of this submission, we wish to emphasise that in its current form the Bill is a missed opportunity to make explicit the government's human rights commitment under the Convention on the Rights of Persons with Disabilities (CRPD) to provide an inclusive education system for students with disabilities.
6. The Commission therefore urges the Education Committee to amend the Bill to incorporate the right to inclusive education into its text and provide it with full, unequivocal and enforceable legal recognition, as has been recommended by the UN Committee on the Rights of Persons with Disabilities.
7. In our view, such an amendment would significantly strengthen the capability of the Bill to improve educational outcomes for disabled people and improve the disproportionately poor employment and community outcomes that they currently experience. Labour market statistics indicate that nearly 35% of disabled young people between the ages of 15 and 24 are not in employment, education or training, as compared to 10% of non-disabled young people.<sup>2</sup> Strengthening the Bill's commitment to the human rights of disabled people is therefore required if it is to meaningfully address structural discrimination on this scale.

---

<sup>1</sup> General Comment No. 13: The right to education (article 13) (1999) (*Adopted by the Committee on Economic, Social and Cultural Rights at the Twenty-first Session, E/C.12/1999/10, 8 December 1999*) Retrieved from [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/dGeneralCommentNo13Therighttoeducation\(article13\)\(1999\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/dGeneralCommentNo13Therighttoeducation(article13)(1999).aspx)

<sup>2</sup> <https://www.stats.govt.nz/information-releases/labour-market-statistics-disability-june-2019-quarter>

## General Comments

### Background on Inclusive Education

8. Under Article 24 of the CRPD, New Zealand is committed to ensuring an inclusive education system at all levels and lifelong learning. An inclusive education system that meets the requirements of Article 24 of the CRPD must demonstrate:
  - 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 delivery of support within the general education system (Art 24(2)(d))
  - d. support measures that 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)).
9. The Committee on the Rights of Persons with Disabilities has described the following four principles (the four 'A's') as central to an inclusive education framework:<sup>3</sup>
  - a. 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.
  - b. Accessibility – This requires that the entire inclusive education system is accessible, including buildings and physical infrastructure; information and communication systems; transport systems and services; and 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.
  - c. Acceptability – This entails “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”.
  - d. 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.
10. Inclusive education is not just about systems and services; it is also about teachers and the school leaders. Teachers and school leaders with positive attitudes towards inclusion are more likely to

---

<sup>3</sup> The Independent Monitoring Mechanism under the Convention on the Right of Persons with Disabilities' Report 'Article 24, The Right to an Inclusive Education' 2016, see page 6 at <https://www.hrc.co.nz/your-rights/people-disabilities/our-work/making-disability-rights-real/>

adapt the way they work for the benefit of all students and are more likely to influence their colleagues in positive ways to support inclusion.<sup>4</sup>

11. Under clause 5, the Minister may issue a statement of national learning priorities. We suggest the current wording of clause 5(4)(c)(i) could be strengthened regarding inclusive education.

**Recommendation:**

- That clause 5(4)(c)(i) of the Bill is amended to ‘to instil, in each child and young person, an appreciation of the importance of the inclusion of different groups, persons with different personal characteristics and disabilities and the importance of everyone’s role in making people feel included’.

**Explicit Reference to International Law**

12. Sections 3 and 8 of the current Education Act 1989 provides for the right of any person (disabled or not) to enrol and receive education at any school, while section 8(1) affirms equal rights to primary and secondary school students who have ‘special educational needs’. However, the current legislative framework does not expressly incorporate inclusive education or reasonable accommodation principles under the CRPD. Nor does the Bill (in the relevant mirror clauses such as clause 33).
13. We recommend strongly that the Bill is amended to expressly refer to the commitment under Article 24 of the CRPD to provide and uphold the right to inclusive education. As referred to in the introduction of this submission, we note that both the UN Committee on the Rights of Persons with Disabilities and the UN Committee on the Rights of the Child have respectively recommended that the New Zealand Government establish an enforceable right to inclusive education into law and establish comprehensive measures in doing so.<sup>5</sup>
14. The recent amendment of the Oranga Tamariki Act 1989 is an example of a public sector agency seeking to affirm a commitment to human rights. Section 5 (1)(b)(i) of that Act requires that “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.”
15. It is vital that our education system is implemented in accordance with New Zealand’s domestic and international human rights commitments. Our primary recommendation is therefore that a purpose statement incorporating the right to inclusive education is included in the Bill including a CRPD-compliant definition and elements.

**Recommendation:**

- Insert clause 33 (3) for the avoidance of doubt, all disabled students have the right to an inclusive education, consistent with Article 24 of the CRPD.

**Where is the transformation**

16. We note our discussion above about the features of an inclusive education system. One of the Government’s stated education objectives is to deliver a ‘world class inclusive public education’

---

<sup>4</sup> Dr Thomas Hehir, “A summary of the Evidence on Inclusive Education” Report, Harvard Graduate School of Education 2017 accessed at <http://allmeansall.org.au/research/> page 9

<sup>5</sup> CRPD/C/NZL/CO/1, 31 October 2014, paragraph 50 and CRC/C/NZL/CO/5, 21 October 2016, paragraph 30(c)

system. Creating a truly inclusive education system requires transformation to occur for many stakeholders at multiple levels. Systems and structures that recognise and incorporate diversity and diverse approaches are therefore required.

17. General Comment No. 4 (2016) of the UN Committee on the Rights of Persons with Disabilities on the right to an inclusive education under Article 24 of the CRPD (the General Comment)<sup>6</sup> provides guidance to governments on its implementation. Among other things, the General Comment provides 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 [emphasis added].*

18. Transforming the education system to be truly inclusive is not just important from a human rights perspective but also from an early investment perspective. Disabled children and young people who disengage from the education system invariably go onto disproportionately poor employment and youth justice outcomes. If we get it right for disabled students, the benefits to New Zealand as a whole will eventually be immense and quantifiable.
19. The proposed changes in the Bill do represent improvements, some significant, to the current system. These include the dispute resolution process and the Codes of Conduct. But we submit the Bill can still be significantly strengthened to transform the system.
20. For example, under clause 6, the Minister and the Minister for Māori Crown Relations: Te Arawhiti may jointly issue a statement that sets out expectations for agencies serving the education system. We endorse the intent of this section but suggest it could also be used to set expectations regarding equitable outcomes for disabled students.

#### **Recommendation:**

- That a new clause 6A be inserted which mirrors proposed clause 6:

##### 6A Statement of expectations

- (1) The Minister and the Minister for Disability Issues may, for the purposes of providing equitable outcomes for all students, jointly issue a statement that sets out expectations for agencies serving the education system.
- (2) The statement must specify what those agencies must do to give effect to public service objectives (set out in any enactment) that relate to inclusive education
- (3) Before issuing the statement, the Ministers must consult disabled people and their representative organisations
- (4) The statement must be issued to each agency specified in the statement and published in the *Gazette*.
- (5) A statement issued under this section is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act 2012 and does not have to be presented to the House of Representatives under section 41 of that Act.

---

<sup>6</sup> CRPD/C/GC/4, 2 September 2016

### **The current generation needs to be counted**

21. Many of the proposed reforms in the Bill may take years to effectively implement and evaluate. This generation cannot afford to wait years for the implementation of the aspects of this Bill that are meant to make a difference for them.
22. There is a dearth of quality disaggregated data regarding disabled students in the system, particularly regarding the range of conditions and impairments in the system. This data is vital, not only for effective service delivery and effective operation of this Bill, but also for compliance with our international obligations. We acknowledge that the Ministry of Education is aware of this issue and some initiatives such as the Learning Support Action Plan will be responding in part to these matters. However, we submit a commitment to quality data collection and sharing to underpin policy and service delivery for disabled students needs to be present in legislation. This helps to give effect to our obligations under Article 31 of the CRPD.<sup>7</sup>
23. Currently, there appears to be no comprehensive or systemic process of data collection that enables an accurate picture to be formed of the prevalence of disability in the education system and current levels of uptake rates in respect of disability-related education support services.

#### **Recommendation:**

- That a subsection be inserted in clause 4: '(e) is informed by quality, secure, disaggregated data about the learning support and other needs of the student population'

### **Enforceable right to education**

24. The Commission supports clause 32 of the Bill and making the right to full time enrolment explicit. We understand that all too often disabled students have been pressured or forced to attend part time. Many other disabled students are often refused enrolment or dissuaded from enrolling by their local schools.
25. We submit however that, in order to mitigate against this, this right must be legally enforceable. There accordingly needs to be a mechanism for the Secretary of Education to direct a school to let a disabled student enrol full time. This direction would also need to ensure that the school environment for that student was accessible, welcoming and safe; as we would expect for any other student.

#### **Recommendation:**

- That clause 32 include an enforcement power for the Secretary of Education to direct a school to meaningfully support a disabled student to attend full time.

### **Co-design**

26. Article 4 (3) of the Convention on the Rights of Persons with Disabilities ('the Convention') provides that disabled people should be actively involved in the development and implementation of relevant legislation and policies. Co-design is more than just consultation. It is about disabled people as partners shaping the policy formation and implementation of matters that concern them.

---

<sup>7</sup> Under Article 31 of CRPD, State Parties are required to collect disaggregated statistics on disability to enable good policy development.

27. Disabled people to be active partners in the education system and education reform. The development of Codes of Conduct (anticipated in proposed sections 153 (for Board Members) and 565 (for teachers)) provides an opportunity to prescribe minimum standards of integrity and conduct for Boards of Trustees and teachers.
28. We suggest a Code or Codes could be used, for example to spell out obligations such as compliance with international instruments such as the Convention, as well as expectations for Board Members and Teachers operating in (and thereby helping generate and support) an inclusive education system. These instruments will be vital for increasing the visibility of disability and disability rights within mainstream education, and disabled people should be involved in their co-design.

**Recommendation:**

- That clause 153 (2) (c) be inserted 'must consult with disabled people and their representative organisations and encourage co-design'
- That clause 565 (3) (d) be inserted 'must consult with disabled people and their representative organisations and encourage co-design'

**Dispute Resolution Processes**

29. The Commission welcomes the introduction under clauses 202-215 of the Bill of an independent dispute resolution process for resolving serious disputes at school. We further welcome the broad scope of the scheme under clause 203, which includes coverage of:
- a. The rights of students to enrol and receive education at school;
  - b. Matters concerning learning support;
  - c. Stand-downs, suspensions, exclusions and expulsions;
  - d. Racism and discrimination;
  - e. Student physical and emotional safety, including regarding physical force used by school staff;
  - f. The rights of students to enrol and receive education at school;
  - g. Matters concerning learning support;
  - h. Stand-downs, suspensions, exclusions and expulsions;
  - i. Racism and discrimination; and
  - j. Student physical and emotional safety, including regarding physical force used by school staff.
30. The introduction of the scheme responds to calls for such a review process from many quarters and is testament to years of continued advocacy by children and youth advocacy organisations. We also note that aspects adopt the methodology proposed in a pilot scheme developed and promoted by

the Human Rights Commission, the Office of the Children's Commissioner and the New Zealand School Trustees Association in 2018.<sup>8</sup>

31. The Commission envisages that the availability of this independent process - via the direct accountability it provides - should enhance school practices in the areas covered under clause 203. This should, in turn, lead to better outcomes for students, particularly those with disabilities and those who experience bullying and discrimination in school.
32. The Commission submits that the dispute resolution process needs to operate in a manner consistent with natural justice and procedural fairness. Supported decision making is a foundational right of many other rights contained within the CRPD.<sup>9</sup> Disabled people who are interacting with these processes may need support or accommodation in order to meaningfully participate with them.

**Recommendation:**

- That the Committee confirm in its Report to Parliament that the proposed process related to the Dispute Resolution Panels will operate in a manner consistent with obligations in domestic and international law related to procedural fairness and natural justice
- That Clause 208(7) be inserted 'all aspects of the Dispute Resolution process must reasonably accommodate the needs of disabled people'.

**Physical Force**

33. We note that the Bill proposes the following changes to the current physical restraint framework in schools:
  - a. including a requirement that physical force is used only as a last resort;
  - b. replacing the terms "physically restrain" and "physical restraint" with "physical force", with consequential amendments to relevant definitions;
  - c. changing the threshold for when physical force can be used from when a teacher or authorised staff member reasonably believes "the safety of the student or of any other person is at serious and imminent risk" to when a teacher or authorised staff member reasonably believes "it is necessary to prevent imminent harm to the student or another person";
  - d. defining "harm" for the purpose of these provisions as "harm to the health, safety, or well-being of the student or the person including any significant emotional distress suffered by the student or person". This includes harm to other students, teachers, and teacher aides; and
  - e. requiring the Secretary for Education to make rules defining 'physical force' within six months of the Bill receiving Royal Assent.

---

<sup>8</sup> [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12114349](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12114349); see also <https://www.occ.org.nz/assets/Uploads/OCC-Education-Priorities-2018-2019.pdf>

<sup>9</sup> Article 12 CRPD

34. Studies and anecdotal evidence tend to show that disabled children and young people are at greater risk of violence and abuse than their peers. A recent national 2019 survey in Australia, for example, conducted by Children and Young People with Disability Australia (CYDA) found systemic issues regarding abuse, exclusion and neglect of disabled students. Half of the students surveyed said they experienced bullying, one in four were restrained or excluded, and one in 10 children were refused school enrolment.<sup>10</sup>
35. Again, in a recent New Zealand IHC survey, 67% of education professionals surveyed said they were aware of disabled students being bullied in the last 5 years.<sup>11</sup>
36. We note the rationale for the changes and cannot, on the evidence that we have, support a relaxation of the wording regarding physical restraint. Physical restraint has a very specific, deliberately narrow meaning. While we acknowledge ‘physical force’ will be defined in Rules and that it may be clear that physical force is to be used as a last resort, on balance, we do not think disabled children will be safer due to the proposed changes. The risks of any broader wording than the status quo will fall disproportionately on disabled children.
37. We understand some proponents of these changes are suggesting that they would lead to additional clarity. We do not think the proposed wording adds anything which adds certainty for anyone, additional to existing legal frameworks and guidance. As one example, whether the word in law is ‘restraint’ or ‘force’, the exact actions a teacher has to take prior to and after a decision to intervene physically has occurred, are still not clearly prescribed in law. Changing ‘restraint’ to ‘force’ adds nothing to an understanding of quality de-escalation. This is a matter for implementation not legal reform.
38. Teachers will always need to use informed professional judgement and common sense in these matters. We submit it would be a better use of resources to invest significantly in education and guidance regarding de-escalation (before and after incidents), specific training, and support in disability for teachers and other staff.
39. Additionally, we submit the proposed definition in practice could prove to be too wide. Clause 95 (3) states ‘In subsection (2), harm means harm to health, safety, or well-being of the student or the person, including any significant emotional distress suffered by the student or person.’
40. The term ‘emotional distress’ is ambiguous and particularly for disabled students could lead to physical force being used due to misunderstandings of communication, cognition and sensory responses of some disabled students.
41. For situations of risk to people, we submit that the existing settings in the law are well established. This one example of guidance from the NZ Police provides the general position for the use of physical force in New Zealand:

*Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.” (Section 48 of the Crimes Act 1961.)*

*This means you are allowed to defend yourself from attack, but use your common sense. The idea is to defend yourself, not to cause injury or get revenge. If you use unreasonable force, you are committing a crime.*

---

<sup>10</sup> <https://probonoaustralia.com.au/news/2019/10/children-with-disability-face-bullying-and-exclusion-in-aussie-schools/>

<sup>11</sup> IHC Education Survey Results 2019 accessed at <https://ihc.org.nz/sites/default/files/documents/results.pdf>

*Your first concern should always be for your own safety and that of others with you. Never take the law into your own hands or take unnecessary risks.*<sup>12</sup>

42. We need to address the systems-level issues (as said, the training and support of teachers in being inclusive, why de-escalation is or isn't working in specific circumstances, how to respond to specific disabilities) before we loosen up the use of force in schools. This sends completely the wrong signal to our children and our society about the use of violence as a problem-solving technique.
43. We note we have seen the Children Commissioner's submission on this Bill and we endorse their comments on this topic.

**Recommendation:**

- That the Committee reject the Bill's proposed amendments to the current physical restraint provisions and retain the current wording. We recommend that emphasis is placed on implementing the existing framework, including increasing support for de-escalation techniques, improving understanding about inclusion education and increasing understanding about the current legal framework, in particular the human rights obligations that apply.

**Discriminatory Direction to Enrol**

44. Clause 36(1) gives the Secretary of Education a power to direct a parent to ensure that a student has education or help from a special service. It carries over section 9 (1) of the Education Act 1989. This section creates an unfair, if not discriminatory, duty on parents of disabled children or be potentially be convicted. Parents of non-disabled children only need to ensure that their child enrolls in any registered school.
45. No student should be forced to attend a specialist school, or a particular school, against their wishes. Disabled peoples' access to education must be on an equal basis with others. To do otherwise suggests not every school is suitable for disabled people which is not consistent with one of the stated aims of the recent education reform process, which is to create 'world class inclusive public education'.
46. With what service providers understand now about tailoring services to individuals in a modern and diverse education setting and with careful planning and preparation, it should be extremely unlikely a disabled student would be unable to have their needs met in the mainstream environment.

**Recommendation:**

- That Clause 36(1) be removed from this Bill.

**Other Specific Comments**

47. In Clause 5(4)(c)(i) we note that one of the intents of education is that all children and young people should gain an appreciation of the importance of the 'inclusion of different groups and persons with different personal characteristics'.

---

<sup>12</sup> <https://www.police.govt.nz/advice/personal-community/keeping-safe/out-about>

**Recommendation:**

- Clause 5(4) (c) include ‘inclusion of different groups and persons with different personal characteristics, **including disabled people**’.
48. Clause 10 ‘special programme’ where it says any “other type of specialised education to overcome educational disadvantage” we note that to create a fully inclusive public education system, there needs to be a common understanding (based on the social model of disability) of what root causes lead to groups experiencing educational disadvantage. We do not propose a specific recommendation here but note this.
49. Clause 33 (1) can be strengthened to make it absolutely clear that disabled students must be allowed to attend the school of their first choosing.

**Recommendation:**

- Suggest Clause 33(1) be amended to read: ‘Except as provided in this Part, students who have special educational needs (whether because of disability or otherwise) have the same rights to enrol, attend, and receive education at State schools as students who do not. **For the avoidance of doubt, these rights apply regardless of the identity, nature of the impairment or the accommodations required so that a disabled person can participate fully and meaningfully in a quality education**”
50. Clause 76 relates to stand downs and suspensions. We understand disabled children are disproportionately represented in stand downs, suspension and exclusions. Disengagement with education is a significant factor in young people ending up in the youth justice system. Again, there is a disproportionate overrepresentation of disabled people (particularly those with neurodisabilities) in the youth justice system.<sup>13</sup>
51. It should be clarified in this Bill that disabled children and young people will not be excluded, suspended or stood down simply because of their disability.

**Recommendation:**

- Insert clause 74 (d) “the decision-makers to ensure the rights and needs of disabled students are upheld/protected/accommodated throughout the process”; and
- Insert clause 76(4) “For the avoidance of doubt no student should be excluded, suspended or stood down only because of their disability”.

---

<sup>13</sup> See ‘What were they thinking: A discussion paper on brain and behaviour in relation to the justice system in New Zealand’  
Dr Ian Lambie at  
<https://www.pmcsa.ac.nz/2020/01/29/what-were-they-thinking-a-discussion-paper-on-brain-and-behaviour-in-relation-to-the-justice-system-in-new-zealand/>

## **Additional Matters**

### **Human rights education in schools**

52. The Commission notes that clause 5 of the Bill carries over the Minister's power under s 1A of the current Act to issue a statement of national education and learning priorities (NELP) for early childhood education, primary and secondary education.
53. The inaugural NELP is due to be released in 2020. The Commission considers that the NELP provides an ideal platform with which to promote awareness and appreciation of human rights in schools. Human rights laws and norms, including the New Zealand Bill of Rights Act 1990 and the State's obligations under human rights treaties, comprise an important part of New Zealand's constitutional framework.
54. The current wording of section 1A(3), carried over by clause 5 of the Bill provides that a NELP, among other things, should:
- Promote participation in community life and fulfilment of civic and social responsibilities; and
  - Instil in children and young people an appreciation of social inclusion, diversity and cultural knowledge and identity.
55. These are vitally important attributes and values, particularly in light of the Christchurch attacks of March 2019 and the urgent need to counter the promotion of violent extremism and hatred, much of which proliferates on-line.
56. The Commission supports the current provisions that are carried over by the Bill. However, we recommend that an amendment is made to directly reference human rights. We note that UN treaty bodies have recommended that the New Zealand government increase its efforts to raise awareness of human rights among children and educators.<sup>14</sup>
57. Human rights laws and norms underpin civic and social responsibility, social inclusion and diversity. Knowledge of human rights is therefore an essential component of any educational strategy that seeks to promote and instil these values in current and future generations.
58. The Commission accordingly recommends that clause 5(4)(c)(iv) of the Bill to:

*...instil in each child an appreciation of the importance of the following:*

*(ii) human rights, including the diversity of society and democratic values and principles.*

### **Religious instruction and observance in schools**

59. The Commission notes that the Bill introduces amendments to the religious instruction and observances provisions that are currently in force under sections 78-80 of the Education Act 1964.

---

<sup>14</sup> Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of New Zealand*, 21 October 2016, CRC/C/NZL/CO/5, paragraph 12

There is currently a legal challenge to those provisions.<sup>15</sup> The Commission is appearing as an intervener in those proceedings.

60. Chief among these amendments is a shift from an opt-out model of participation to an opt-in model.<sup>16</sup>
61. The Commission notes that this amendment brings New Zealand law more closely in line with similar jurisdictions. Canadian case law, for example, has found that an opt-out model is discriminatory and in breach of the Canadian Charter of Rights.<sup>17</sup>
62. However, under the Bill, state primary and intermediate schools will still be able to close in order to hold religious instruction courses. We recommend that the Committee consider whether other methods, that do not require the closure of the school, are available. This could include holding religious instruction courses outside regular school opening hours and specifying that it not take place during inclusive extracurricular activities such as school camp.
63. The Bill is also silent on whether state secondary schools may or may not provide religious instruction to students. The Commission also notes that that the Bill does not extend the requirement under the 1964 Act that education in state primary (and intermediate) schools be secular to state secondary schools.<sup>18</sup> The rationale for this distinction is unclear, particularly in light of the application of the New Zealand Bill of Rights Act 1990 to all state schools.
64. We recommend that the Committee give careful consideration to these matters. In doing so, it will be important for the Committee to note that the Bill does not impact on religious instruction currently undertaken in state integrated or private schools.

---

<sup>15</sup> *Hines & Jacob v Attorney-General* CIV-2018-404-001809, Auckland High Court

<sup>16</sup> Clause 56 of the Bill

<sup>17</sup> see *Zylberberg et al v Director of Education of Sudbury Board of Education* [1988] O.J No. 1488, at 4; *Bal v Ontario (Attorney-General)* [1994] OJ No 2814 at 27

<sup>18</sup> Clause 93 of the Bill