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**New Zealand’s Combined 2nd and 3rd Periodic Review under the UN Convention on the Rights of Persons with Disabilities**

30 June 2022

Supplementary submission of the New Zealand Human Rights Commission

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The New Zealand Human Rights Commission (the Commission) is established and operates under the Crown Entities Act 2004 and the Human Rights Act 1993. The Commission is accredited as an ‘A status’ national human rights institution under the Paris Principles. Information about the Commission’s activities can be found on our website: [www.hrc.co.nz](http://www.hrc.co.nz)

Introduction

1. The New Zealand Human Rights Commission (the Commission) welcomes the opportunity to contribute this supplementary submission to the main report provided by the New Zealand Independent Monitoring Mechanism (IMM) under the United Nations Convention on the Rights of Persons with Disabilities (CRPD). As a member of the IMM, the Commission supports the main report provided by the IMM.[[1]](#footnote-2) This submission supplements, and is independent of, this main report.
2. The Commission is accredited as an A-status National Human Rights Institution under the Paris Principles. The Commission's purpose is to promote and protect the human rights of all people in Aotearoa New Zealand. The Commission works toward a free, fair, safe and just Aotearoa New Zealand, where diversity is valued, and human dignity and rights are respected. The Commission’s functions and status as an Independent Crown Entity are established under New Zealand’s Human Rights Act 1993 (HRA).[[2]](#footnote-3)
3. The Disability Rights Commissioner (the Commissioner), Paula Tesoriero MNZM, has a broad mandate under the Human Rights Act 1993 to protect and promote the rights of disabled people in New Zealand.[[3]](#footnote-4) The Commissioner fulfils her role in a variety of ways, through public engagements providing advice to government, monitoring policy and legislation, meeting with stakeholders, and most importantly listening to disabled individuals and their whānau.[[4]](#footnote-5)
4. The Commissioner’s work, including in relation to the issues canvassed in this submission, is informed by regular interaction with disabled people, their whānau, academics and clinicians. A small subset of these networks provided input to this submission.[[5]](#footnote-6)

Structure of the submission

1. This supplementary submission is structured under two parts:
	1. Exclusion of support for persons affected by fetal alcohol spectrum disorder – articles 5 and 31; and
	2. Fully inclusive education system – article 24.
2. This supplementary submission provides further details on these two key challenges for Aotearoa New Zealand’s implementation of the CRPD and concludes with a summary of the Commission’s recommendations which the Committee may wish to consider adopting following its second and third periodic review of New Zealand.

Exclusion from support for persons affected by fetal alcohol spectrum disorder – articles 5 and 31

*Eligibility for needs assessment to access support services*

1. The lack of adequate support for whānau affected by fetal alcohol spectrum disorder (FASD) has been a longstanding issue in Aotearoa New Zealand. For decades there have been calls for better recognition of and support for people affected by FASD. While there have been some recent developments,[[6]](#footnote-7) the New Zealand government has made no timebound commitment to recognising people with FASD as disabled people entitled to all of the rights and protections of the CRPD. This means that their needs, and those of their whānau, are not being fully met. All persons with impairments resulting from FASD should be eligible to access the necessary supports and services (including but not limited to health, community, education and employment services).
2. Aotearoa New Zealand lacks proper data on the prevalence of FASD among its population. However, evidence shows that Māori bear a disproportionate burden from alcohol harm, and, by extension, this would include FASD.[[7]](#footnote-8) This burden is exacerbated by wider inequities for Māori in the health system and is a potential breach of te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples.[[8]](#footnote-9)
3. Under the New Zealand Human Rights Act 1993, the definition of disabled people includes people experiencing “a physical, intellectual or psychological disability or impairment, loss of psychological, physiological, or anatomical structure or function, reliance on assistance or illness.”[[9]](#footnote-10) This definition covers people with FASD and is consistent with that in article 1 of the CRPD, which references disability as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

Despite these definitions, the New Zealand Ministry of Health’s (MoH) policy[[10]](#footnote-11) - ‘*Disability Support Services Operational Policy – DSS Eligibility’* (the Policy) - excludes people with probable FASD alone to access publicly-funded Disability Support Services (DSS), with the exception of DSS Child Development Services (CDS) which are accessible to all children with developmental delay, including from fetal alcohol exposure. The wider range of funded services available through DSS are aimed at supporting living and participating in community but are not available to people with FASD alone.

1. To qualify for a needs assessment to access DSS, other than CDS, a person with FASD must have another (and separate) qualifying impairment such as an intellectual impairment (which affects only 20% of those with FASD).[[11]](#footnote-12) They are not eligible for these supports by virtue of probable FASD alone, even though all individuals diagnosed with probable FASD have severe and permanent brain impairment across at least three brain domains among the 9 to 10 domains tested in order to be diagnosed.[[12]](#footnote-13)
2. This means that people affected by FASD alone are currently excluded from most DSS supports funded by the MoH. Those who are eligible for DSS do not receive services specifically informed by FASD-related needs. The MOH is an important funder of a wide range of DSS services for eligible disabled people under 65 years and, because DSS is not easily available or catered to those with FASD, they are deprived of this central provider of funded services. This Policy is based on a Cabinet decision from 1994 which defined disabled people for the purpose of DSS eligibility as those with physical, sensory and intellectual disabilities. The understanding of neurodevelopmental disabilities, including due to fetal alcohol exposure resulting in FASD, and the needs of people with neurodevelopmental impairments, has expanded considerably since 1994 and this needs to be reflected in future eligibility policies for DSS. This criteria for DSS eligibility was also set prior to the development and Aotearoa New Zealand’s ratification of the CRPD in 2008, but it has not been reviewed and the definition of disability has not been updated since ratification.
3. The result of this Policy is that people are treated differently based on the nature of their disability, and support is made available to some disabled people and not to others. The Commission submits that this is a potential breach of the right to be free from discrimination under article 5 of the CRPD and s 19 of the New Zealand Bill of Rights Act 1990. This different treatment occurs even if the disability manifests in the same way.[[13]](#footnote-14) Moreover, the requirement in the DSS eligibility criteria for the presence of an intellectual disability results in those with impaired intellectual and adaptive function due to FASD being funded for DSS, while those with equivalent disability due to executive and adaptive brain impairment caused by FASD not receiving funded support. Given the impacts of both on the person’s life and the requirement for support, it is unclear why such a distinction is made. As a result of this arbitrary distinction, many people with FASD, and their whānau and caregivers, cannot access support. The eligibility criteria must be changed so that persons with a probable FASD diagnosis alone can access funded supports once they are assessed as needing them. This change is fundamental to meeting Aotearoa New Zealand’s commitment under article 5 of the CRPD to promote equality and eliminate discrimination on the basis of disability, and to take all reasonable steps to ensure reasonable accommodation is provided.
4. Excluding those with FASD from DSS eligibility, with the exception of CDS, means they are denied the early intervention that is key to better outcomes and the realisation of other rights under the CRPD. While some early intervention services are available through CDS, more needs to be done to improve CDS access, especially for those with mild to moderate needs, and to build CDS capacity and capability.[[14]](#footnote-15) Early intervention and supports are recognised as part of the rights to education and health services for disabled people (including disabled children and their whānau).[[15]](#footnote-16) Eligibility to access the appropriate supports is essential to facilitating the full enjoyment of the rights of disabled persons, including the rights to live independently and be included in the community and all aspects of life, and the right to work on an equal basis with others.[[16]](#footnote-17) Early intervention may prevent further substantial costs incurred in relation to persons affected by FASD within the provision of healthcare (including healthcare for whānau caregivers who suffer poor health outcomes), social services, education, and the criminal justice system. If all DSS were accessible for whānau affected by FASD, it could increase knowledge and demand for training about supporting people with FASD.
5. When viewed through a social model of disability, consistent with the definitions contained in the CRPD, there is also no basis for the MoH to deny access to DSS for other impairment types (for example, those living with attention deficit hyperactivity disorder, fetal anticonvulsant syndrome, myalgic encephalomelitis as well as a range of rare disorders), where DSS are appropriate services to meet a person’s needs.[[17]](#footnote-18) Recognition of FASD within the eligibility criteria for DSS could initiate a staged approach toward achieving greater equity for those who are currently excluded and for simplifying the system to make it easier for people more widely to access appropriate supports

*Aotearoa-specific prevalence data*

1. The government has not obtained data on the prevalence of FASD in Aotearoa New Zealand.[[18]](#footnote-19) The government declined the opportunity to take part in a World Health Organisation study that would have gathered Aotearoa-specific data. It has however, accepted estimates and models based on international data and comparative drinking behaviours (from Canada and the United States) and adopted a figure of 3 to 5 percent.[[19]](#footnote-20) However, the lack of Aotearoa-specific data makes it difficult for health and social systems to accurately plan and budget, make evidence-based decisions, and adequately support people with FASD.[[20]](#footnote-21)
2. Article 31 requires States to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the rights in the CRPD. To properly identify, plan and budget around the size and needs of the population affected by FASD within the New Zealand context, research into its prevalence here is essential.[[21]](#footnote-22) Research and accurate prevalence data is also crucial for prevention.

*Recent developments*

1. There have been some recent developments in support for individuals with FASD. A new Ministry is being set up on 1 July 2022, whose responsibilities will include the national implementation of the Enabling Good Lives approach to DSS, which will give disabled people and whānau more choice and control of their lives and supports. However, due to their exclusion from the eligibility criteria for DSS, those with FASD will not be covered by these changes. No definitive information is publicly available on future directions, including timeframes, for inclusion of FASD within the services provided through new Ministry. Under existing structures, some government funding is provided to FASD-CAN Inc until the end of 2024.[[22]](#footnote-23) However, it is not enough to provide a national level of support for individuals and their whānau, and there is no direct support to individuals with FASD separate from their whānau.
2. An Action Plan “Taking Action on Fetal Alcohol Spectrum Disorder 2016–2019” (the Action Plan) has also been developed by the Government in consultation with FASD-CAN.[[23]](#footnote-24) The Action Plan is a cross-agency framework which the MoH website said would be implemented over three years. The goals of the Action Plan are on prevention and enabling people with FASD and their whānau to live the best possible lives. The Action Plan includes four priority areas (prevention, early identification, support, and evidence), with initiatives that aim to improve diagnostic capability, reconfigure existing child development support, improve support to parents of children with FASD, and to undertake research on what an effective system-wide approach to FASD would look like. While the Action Plan is commendable, it has not been fully implemented despite the three-year timeframe having expired, and those areas that have been implemented were not prioritised by whānau nor co-designed with those affected. There has been no partnership or consultation with Māori. Of particular concern is that little attention has been given to appropriately supporting people with FASD and their whānau. Consideration has also not been given to the adult FASD population, who now often have their own children.
3. Over the past year, the Disability Rights Commissioner, along with the Children’s Commissioner, has reported to the Prime Minister on FASD, and met and exchanged correspondence with Ministers on the issue of the support that is needed for those with FASD.[[24]](#footnote-25) Caregiver groups and professionals have also been active in raising the need for support for those with FASD. A claim has also been made to the Waitangi Tribunal regarding disproportionate harm caused to Māori from the introduction and regulation of alcohol, particularly in relation to FASD.[[25]](#footnote-26) Despite all this, the government has still made no timebound commitment to recognising people with FASD as a population group, or as a disabled people entitled to all the rights and protections of the CRPD.
4. The lack of supports for those with FASD and their whānau has a significant impact on the full realisation of their CRPD rights. Moreover, it can have serious ramifications for individual and whānau well-being and cohesion and, too often, lead towards health issues (including mental health and addictions, and poor health outcomes for caregivers), a lack of accommodation in education, social issues (including homelessness), unemployment, and engagement with the criminal justice system.[[26]](#footnote-27) Access to better supports would make a fundamental difference to the lives of people living with FASD and their whānau and could change the trajectory for many.

**Recommendations:**

**The Commission recommends that the New Zealand Government:**

1. **Immediately extends eligibility to funded, FASD-informed Disability Support Services for those who have a diagnosis of probable FASD (regardless of the presence of an intellectual disability).**
2. **Conducts a FASD prevalence study in Aotearoa New Zealand and identify FASD in high-risk groups such as children excluded from school, children in state care and those entering the youth and criminal justice systems, to better understand the population and appropriate targeting of resources. In the interim, and given the need for urgent action, planning should be based on currently available evidence.**
3. **Reviews progress on and completes the 2016-2019 FASD Action Plan within revised definitive timeframes, in particular the actions relating to providing supports to individuals and whānau commensurate with their needs. These should be implemented in partnership with Māori and those affected by FASD.**

Fully inclusive education system – article 24

*Inclusive education*

1. Inclusion is key to achieving the fundamental right to education under article 24 of the CRPD.[[27]](#footnote-28) Since the last CRPD review in 2014, Aotearoa New Zealand has made some legislative changes to affirm its commitment to inclusive education.[[28]](#footnote-29) However, a gap still exists between this commitment and practice. Aotearoa New Zealand still has an ongoing need to build a fully inclusive education system for disabled children and young people.[[29]](#footnote-30) An example of this is that the government has recently proposed to change eligibility for enrolment at residential specialist schools, which has the potential to negatively impact New Zealand’s obligations under the CRPD.
2. Article 24 of the CRPD places an unequivocal obligation on State Parties to ensure that disabled people are not excluded from the general education system on the basis of their disability. The CRPD further specifies that:[[30]](#footnote-31)
	1. children with disabilities are not excluded from either primary or secondary education on the basis of disability; and
	2. persons with disabilities can access an inclusive, quality and free primary and secondary education on an equal basis with others in the community in which they live.
3. In its General Comment No.4, the Committee on the Rights of Persons with Disabilities has emphasised the importance of inclusive education:[[31]](#footnote-32)

“Inclusive education is central to achieving high quality education for all learners, including those with disabilities, and for the development of inclusive, peaceful and fair societies. Furthermore, there is a powerful educational, social, and economic case to be made. The OHCHR Thematic Study of the Rights of Persons with Disabilities to Education (2013) affirms that only inclusive education can provide both quality education and social development for persons with disabilities, and a guarantee of universality and non-discrimination in the right to education.”

1. Education is not inclusive where disabled students are segregated from their non-disabled peers, not able to attend school for the same number of hours as their non-disabled peers, or not able to participate in all aspects of school life. The Committee has made clear that education of disabled students should not be provided in separate environments in isolation from students without disabilities.[[32]](#footnote-33) Full realization of article 24 is not compatible with sustaining two systems of education: mainstream and special/segregated education systems.[[33]](#footnote-34) The Committee has also said that inclusive education is incompatible with institutionalisation of persons with disabilities.[[34]](#footnote-35) Disabled students should be able to attend primary and secondary schools within the communities where they live and should not be sent away from home.[[35]](#footnote-36)
2. Unfortunately, aspects of Aotearoa New Zealand’s education system for disabled students remain segregated. While there are only a small number of students currently segregated, the current shift towards changing criteria for accessing residential special schools is concerning. This issue has significant implications for disability rights – particularly CRPD, article 24 – in New Zealand. Moreover, some groups are more at risk of exclusion from education than others.[[36]](#footnote-37) In Aotearoa New Zealand, this includes Māori children with disabilities who are disproportionately represented in residential specialist schools.[[37]](#footnote-38)

*Enrolment criteria for residential specialist schools*

1. The issue of an inclusive education system in Aotearoa New Zealand has been brought into focus again this year with the government engaging on draft proposals to review the eligibility criteria and processes to access residential specialist schools, which may have the effect of increasing enrolments in these schools. This is a retrograde step contrary to the CRPD.
2. Currently there are three residential specialist schools in Aotearoa – Halswell Residential College (Christchurch), Salisbury School (Nelson, girls only) and Westbridge Residential School (Auckland). The schools have had steadily declining rolls over the past decade or so. In 2010 there were 182 students enrolled across these three schools. In 2021 there were just 17 students enrolled across these schools.[[38]](#footnote-39) Despite these low numbers, the schools receive government funding for many more students.[[39]](#footnote-40)
3. In recent years, the government has progressively adjusted enrolment criteria for residential specialist schools in a manner that is inconsistent with inclusive education. In 2018, the government created a direct-access pathway to enrolment, alongside an existing referral process. This included changing the entry criteria from requiring that the child “requires support at school, at home and in the community” to just “requires support at school.” This change meant that children with lower needs for support could now directly access residential specialist schools. Changes implemented in 2021 mean that it is no longer necessary to show that local learning support services had been “fully utilised” and found unable to meet the needs of the child. Rather, all that is required is that these supports have been “considered or tried” and a residential specialist school is believed to be the best way of meeting the child’s needs.[[40]](#footnote-41)
4. This year, in March 2022, the government proposed more changes to the direct access pathway for residential specialist schools, including further adjustments to the entry criteria and enrolment processes. This proposal has been developed despite the Disability Rights Commissioner raising serious concerns with the Ministry of Education, in meetings and correspondence, and emphasising the ongoing need to focus on building a truly inclusive education system. Disabled people and their representative organisations have raised similar concerns.
5. Under the government’s proposal, three of the four current entry requirements would be removed. Students would no longer need to have “highly complex and challenging” needs, require community intervention or intensive services, and their whānau would not have to have considered or tried local learning support services. These factors would instead become “explicit considerations” rather than preconditions for entry. The result of this proposal would mean that disabled children and young people currently living with their whānau and receiving education at their local school would have further pathways for entry to residential specialist schools.
6. On 4 May 2022, the Commissioner wrote to the Minister for Education, the Associate Minister for Education, and the Minister for Disability Issues regarding her concerns at the proposal to expand eligibility for enrolment at residential specialist schools and its potential to negatively impact Aotearoa New Zealand’s obligations under the CRPD. Despite this correspondence, the response from the government was not reassuring. In particular, the Commissioner is concerned that:
	1. The proposed changes remove baseline criteria such as the requirement for local solutions to be considered first before offering residential schooling. In her view, this is likely to lead to enrolments at residential specialist schools that do not adequately consider local and less disruptive services.
	2. The residential specialist schools are potentially masking gaps in respite care. The Commission is concerned that in the absence of appropriate comprehensive support for families, residential accommodation in specialist schools will be seen as the only viable option for them. We consider a CRPD-consistent approach requires that disabled children and their whānau be afforded appropriate supports so that children can live and learn in their local communities.
	3. Continuing to invest in residential options entrenches the long-standing lack of innovation and creativity in supporting and resourcing local inclusive solutions. As a result, whānau experience little real choice and lack the genuine option of supporting their disabled children and young people in their communities and local schools.
	4. Residential settings give rise to risk of abuse, including the disproportionate use of physical restraint, alongside the long-term impacts of social, familial, and cultural disconnection people experience when separated from their whānau, peers, communities, and cultures.[[41]](#footnote-42)
7. Disabled people and their representative organisations have raised similar concerns about the government proposals. Education for All and its associated forum members – which include representative organisations of disabled people – have spoken collectively against the government proposal to expand enrolments in residential specialist schools.[[42]](#footnote-43) Their view is that financial resources used to support residential specialist schools would be better used for effective educational inclusion. In an open letter dated 28 April 2022, they said:

‘We believe that this is a serious equity issue. Financial resources that could be directed at effective educational inclusion are being used to support an outdated model of how to care for young disabled New Zealanders. Currently children and young people attending Residential Specialist Schools receive between ten and twenty times the highest average level of resourcing as a child or young person attending their local school.’

1. In addition to the right to inclusive education, disabled people have the right to be consulted and actively involved with the development and implementation of policies that affect them and others.[[43]](#footnote-44) Disabled people and their whānau must be recognised as partners and not merely recipients of education.[[44]](#footnote-45) However, relevant groups including disabled adults, children and their whānau have not been publicly or comprehensively engaged with. Instead, the Ministry of Education has undertaken ‘targeted engagement’ over a short time period.

**Recommendations:**

**The Commission recommends that the New Zealand Government:**

1. **Does not progress with the proposal to remove three of the four current entry requirements for direct access pathways to enrolment in residential specialist schools.**
2. **Commits to investing in a truly inclusive education system, including through the provision of proper respite care and options for disabled children to remain with whānau, in their local communities, with reasonable accommodation to learn in their local schools.**

Summary of Recommendations

1. By way of summary, the Commission recommends that the Committee consider adopting the following recommendations in Aotearoa New Zealand’s combined second and third periodic review under the UNCRPD.
2. In order to meet its obligations under the Convention, with particular respect of articles 5, 24 and 31, the New Zealand Government should:
	1. Immediately extend eligibility to funded, FASD-informed Disability Support Services for those who have a diagnosis of probable FASD (regardless of the presence of an intellectual disability).
	2. Conduct a FASD prevalence study in Aotearoa New Zealand, and identify FASD in high-risk groups such as children excluded from school, children in state care and those entering the youth and criminal justice systems, to better understand the population and appropriate targeting of resources. In the interim, and given the need for urgent action, planning should be based on currently available evidence.
	3. Review progress on and completes the 2016-2019 FASD Action Plan within revised definitive timeframes, in particular the actions relating to providing supports to individuals and whānau commensurate with their needs. These should be implemented in partnership with Māori and those affected by FASD.
	4. Not progress with its proposal to remove three of the four current entry requirements for direct access pathways to enrolment in residential specialist schools.
	5. Commit to investing in a truly inclusive education system, including through the provision of proper respite care and options for disabled children to remain with whānau, in their local communities, with reasonable accommodation in their local schools.
1. The New Zealand government established an IMM in 2011 to fulfil the requirements of article 33 of the

CRPD. The IMM consists of three independent partners: the Ombudsman, the Commission and the Convention Coalition. [↑](#footnote-ref-2)
2. The long title to the HRA states that the Commission’s role is to provide better protection of human

rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights. [↑](#footnote-ref-3)
3. Disabled people is the preferred language of people with impairment in New Zealand, and includes

tāngata whaikaha Māori (Māori persons with disabilities), and reflects the social model of disability on which the [New Zealand Disability Strategy](https://www.odi.govt.nz/nz-disability-strategy/about-the-strategy/new-zealand-disability-strategy-2016-2026/) 2016-2026 is based. In this context, disabled does not refer to a feature of a person. It refers to the result of social and environmental barriers which interfere with peoples’ full participation in society. It is therefore our systems that need to change to achieve equality and non-discrimination. [↑](#footnote-ref-4)
4. The term whānau is used throughout this submission to be inclusive of individuals, their families and

caregivers. [↑](#footnote-ref-5)
5. In relation to Education: [Inclusive Education Action Group](https://ieag.org.nz/), and in relation to FASD: [FASD-Can](https://www.fasd-can.org.nz/). [↑](#footnote-ref-6)
6. For example, the New Zealand government adopted An Action Plan “Taking Action on Fetal Alcohol

Spectrum Disorder 2016–2019”, which is discussed further below. [↑](#footnote-ref-7)
7. According to the Ministry of Health’s ‘[New Zealand Health Survey: Alcohol Use 2012/2013](https://www.health.govt.nz/system/files/documents/publications/alcohol-use-2012-13-new-zealand-health-survey-feb15-v2.pdf) (February

2015), Māori are 1.6 times more likely to be hazardous drinkers than non-Māori. Women with unplanned pregnancies who regularly drink in a risky way will be at greater risk of causing harm to the foetus. The highest rates for drinking during pregnancy in New Zealand were for Māori women with 34 percent reporting drinking alcohol at some time during their most recent pregnancy. [↑](#footnote-ref-8)
8. Te Tiriti o Waitangi requires partnership in decision-making, proactive support from the government

for Māori self-determination (tino rangatiratanga), alongside ensuring equity of outcomes for Māori. See Waitangi Tribunal ‘[Hauora – Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_152801817/Hauora%20W.pdf)’ (2019), at pp. 29, 32, 37, 67 and 164. See also P King ‘[Māori with lived experience of disability Part I. Waitangi Tribunal for Stage Two of the Wai 2575 Health Services and Outcomes Kaupapa Inquiry](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_150437272/Wai%202575%2C%20B022.pdf)’ (June 2019), p. 35. [↑](#footnote-ref-9)
9. Section 21(1)(h). [↑](#footnote-ref-10)
10. Note that from 1 July 2022, DSS will transition to the new Ministry, as discussed further below. [↑](#footnote-ref-11)
11. The policy excludes eligibility for “… support services needed primarily as a result of behavioural

problems (e.g., associated with Foetal Alcohol Syndrome or substance abuse) except where the person has a co-existing disability that meets DSS eligibility criteria (some services are funded by other government agencies, in other situations this is a funding gap)” (p.10). [↑](#footnote-ref-12)
12. This can be contrasted with the treatment of people with another neurodevelopmental disorder –

autism spectrum disorder (ASD). Since 2014, people with ASD have been made eligible for a needs assessment and therefore potential DSS. [↑](#footnote-ref-13)
13. For example, a person with ASD whose impairment may manifest or be labelled as behaviour

problems will be able to access DSS, whereas a person whose impairment manifests in the same way but was caused by FASD will not. [↑](#footnote-ref-14)
14. Note the need to improve CDS has been acknowledged by MOH and is part of the CDS Improvement

Programme. [↑](#footnote-ref-15)
15. Articles 23(3) and 25(b). [↑](#footnote-ref-16)
16. Articles 19, 26 and 27. [↑](#footnote-ref-17)
17. The Commission acknowledges that in some instances people from these other group may need more

specialist general and mental health services. [↑](#footnote-ref-18)
18. The Growing up in New Zealand study is an *estimate* of incidence, rather than a prevalence study,

which uses the internationally recognised case ascertainment method. See Growing Up in New Zealand ‘Prevalence of Foetal Alcohol Spectrum Disorders’ (2017) at <https://www.growingup.co.nz/node/1741>. [↑](#footnote-ref-19)
19. Ministry of Health ‘Fetal alcohol spectrum disorder’ (March 2022) at <https://www.health.govt.nz/our-work/diseases-and-conditions/fetal-alcohol-spectrum-disorder>. [↑](#footnote-ref-20)
20. For example, it is important to collect Aotearoa-specific data on the prevalence of FASD among

persons within the prison and youth justice systems, and among school exclusion rates. [↑](#footnote-ref-21)
21. Reliance on a 3 to 5 percent estimate of prevalence based on international data and research should

only be used as an interim planning measure, pending the availability of Aotearoa-specific data. [↑](#footnote-ref-22)
22. FASD-CAN Inc is a charity which was established in 2013 and comprises parents, caregivers, extended

whānau and professionals working alongside persons them. It is a non-profit incorporated society and charity and run by volunteers. It receives limited government funding. [↑](#footnote-ref-23)
23. Ministry of Health “[Taking Action on Fetal Alcohol Spectrum Disorder: 2016–2019: An action plan](https://www.health.govt.nz/publication/taking-action-fetal-alcohol-spectrum-disorder-2016-2019-action-plan#:~:text=The%20FASD%20Action%20Plan%20aims,with%20FASD%20and%20their%20families)” (16

August 2016). [↑](#footnote-ref-24)
24. The Disability Rights Commissioner and Children’s Commissioner both have a statutory mandate to

report to the Prime Minister on certain matters. See HRA, s5(2)(k) and Children’s Commissioner Act 2003, s12(1)(k). This statutory mandate is not used often and invoked only where concern is of sufficient magnitude to warrant bringing to the attention of the Prime Minister. [↑](#footnote-ref-25)
25. This claim is part of a broader inquiry into breaches of Te Tiriti o Waitangi in health services and

outcomes for Māori: the Wai 2575 Health Services and Outcomes Kaupapa Inquiry. [↑](#footnote-ref-26)
26. See Stuff NZ ‘[Disordered The shame of how New Zealand treats people with FASD](https://interactives.stuff.co.nz/2022/03/circuit/disordered-fasd-new-zealand-alcohol-disability/) (March 2022). [↑](#footnote-ref-27)
27. Committee on the Rights of Persons with Disabilities *General Comment No.4* (CRPD/C/GC/4) (25

November 2016) at [2] and [10(a)]. The United Nations Convention on the Rights of the Child also stresses that, regarding children with disabilities, assistance must be provided to ensure that they have ‘effective access to … education … in a manner conducive to achieving the fullest possible social integration and individual development’ (article 23). [↑](#footnote-ref-28)
28. For example, Parliament’s Education and Science Committee held an [inquiry on ASD, Dyspraxia and Dyslexia in schools](https://www.parliament.nz/resource/en-NZ/51DBSCH_SCR71769_1/cd88907f3c87d07b8b1db046417ed1e43fcd3e85) (November 2016) and made several recommendations, including extending inclusive education (recs 3 and 4).

The Education and Training Act 2020, ss 5 and 127 and the [Statement of National Education Learning Priorities](https://assets.education.govt.nz/public/Documents/NELP-TES-documents/FULL-NELP-2020.pdf) (set by the Minister) also contain language that is generally affirming of inclusive education. [↑](#footnote-ref-29)
29. For example, IHC currently has a claim before the HRRT regarding equal access to education. See IHC

“Human rights experts hear from parents” (20 July 2021) at <https://ihc.org.nz/strong-voices/human-rights-experts-hear-parents>. [↑](#footnote-ref-30)
30. Article 24(2). [↑](#footnote-ref-31)
31. *General Comment No.4,* above n 24, at [2]. [↑](#footnote-ref-32)
32. Ibid at [11]. [↑](#footnote-ref-33)
33. Ibid at [39]. See also A Byrnes “[Analysis of Article 24 of the Convention on the Rights of Persons with Disabilities and its Relation to Other International Instruments](https://disability.royalcommission.gov.au/system/files/2022-06/Public%20hearing%2024%20-%20Andrew%20Byrnes%20%282020%29%20Analysis%20of%20Article%2024%20of%20the%20CRPD%20and%20note%20on%20the%20travaux%20pr%C3%A9paratoires_1.pdf?fs=e&s=cl)” (September 2020), at pp.2 – 4 which states that article 24 “obliges states to transition to a system of fully inclusive education, involving in the medium-term to long-term the allocation of resources to general schools to support this transition and the eventual abolition of special schools or other forms of segregated education for children with disability”. This analysis further found that States’ obligations under article 24 are not inconsistent with article 13(3) of the ICESCR and article 26(3) of the UDHR, which do not guarantee parents the liberty to choose separate schooling on the basis of their child’s disability. [↑](#footnote-ref-34)
34. Ibid at [64]. [↑](#footnote-ref-35)
35. CRPD, article 24(2)(b); *General Comment No.4*, above n 24, at [26]. [↑](#footnote-ref-36)
36. *General Comment No.4* at [6] gives the examples of persons with intellectual disabilities or multiple

disabilities, persons who are deafblind, persons with autism or persons with disabilities in humanitarian emergencies. [↑](#footnote-ref-37)
37. Data from 2017 to 2020 shows that, across the remaining three residential specialist schools in New

Zealand, 48% of children were Māori. See Jan et al “[International Literature Review on Residential Specialist Schools for Learning and Behaviour Prepared for the Ministry of Education, New Zealand](https://assets.education.govt.nz/public/Documents/our-work/information-releases/responses-to-Official-Information-Act-requests/1284544-Appendix-A.pdf)” (2021), p.18. [↑](#footnote-ref-38)
38. Also Education for All “An open letter on the plans to expand enrolments in residential special schools” (28 April 2022). [↑](#footnote-ref-39)
39. It was reported in March 2022 that Halswell and Westbridge had a combined roll of 23 students but

received funding for a ‘notional’ roll of 64, while Salisbury School was reported as having four students but receiving funding for 20. See Sam Sachdeva *Newsroom* “Expanding special schools ‘preys on vulnerable families’” (18 March 2022) at <https://www.newsroom.co.nz/expanding-special-schools-preys-on-vulnerable-families>. IEAG also says that the remaining three Residential Specialist Schools “have been funded for years on a notional roll of 84 students which has far exceeded actual rolls. The actual enrolments have averaged 31 or fewer over the last 5 years, from 2020 total enrolments have been less than 20.” See Education for All “An open letter”, above n 35.

In 2019, the government also committed $8million NZD to rebuild classrooms and residential accommodation at Salisbury School. See Salisbury School “[Board “Thrilled” about School Rebuild Plans](https://www.salisbury.school.nz/the-latest-updates/2yelp6xwomsgrmviw4x8xo59ll22gi)” (13 November 2019). [↑](#footnote-ref-40)
40. Ministry of Education ‘[Residential specialist school enrolment – RSS only pathway](https://www.education.govt.nz/school/student-support/special-education/specialist-schools-for-students-with-high-needs/residential-special-school-enrolment-rss-only-pathway/)’ (May 2022). [↑](#footnote-ref-41)
41. Ministry of Education data, released through Official Information Act 1982 requests, show that

incidents of restraint occurred 35 times between August 2021 and February 2022 in one residential specialist school with a reported role of 8 students. This compares to 523 incidents of restraint across all mainstream schools over the same period, with over 800,000 students enrolled. Physical restraint is 5,732 times more likely to occur in a residential specialist school than in a regular school. The ongoing Royal Commission of Inquiry into Abuse in Care has also highlighted the risks to children of residential care, for example the abuse that occurred of learning disabled boys at Marylands <https://www.abuseincare.org.nz/our-inquiries/abuse-in-the-care-of-the-catholic-church/marylands-school/> and the treatment of disabled children at the Kimberley Centre <https://www.abuseincare.org.nz/our-progress/library/v/68/statement-of-sir-robert-martin-mnzm> and <https://www.abuseincare.org.nz/our-progress/library/v/148/statement-of-gay-rowe-for-paul-beale-for-state-redress-hearing>. [↑](#footnote-ref-42)
42. Education for All “An open letter”, above n 35. [↑](#footnote-ref-43)
43. CRPD, Article 4(3). [↑](#footnote-ref-44)
44. *General Comment No.4*, above n 24, [7]. [↑](#footnote-ref-45)