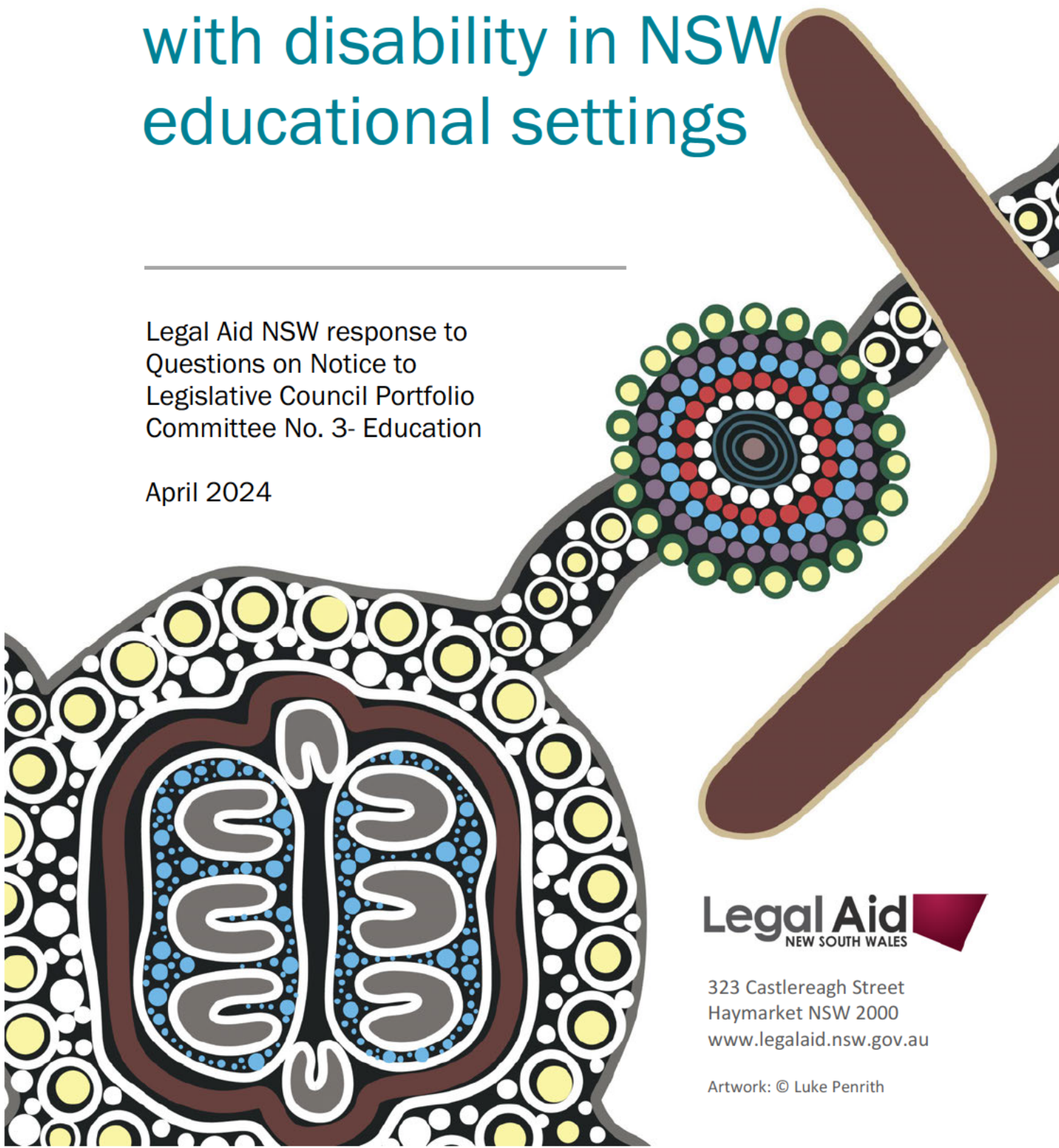


Inquiry into children and young people with disability in NSW educational settings

Legal Aid NSW response to
Questions on Notice to
Legislative Council Portfolio
Committee No. 3- Education

April 2024



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Introduction

In July 2016, Legal Aid NSW provided a submission to the Legislative Council Portfolio Committee No. 3 – Education in response to the terms of reference of the Inquiry into children and young people with disability in NSW educational settings.

A number of Legal Aid NSW practitioners contributed to the submission. On 26 March 2024 Carey Pearson of the Family Law Division, Legal Aid NSW appeared before the Committee and gave evidence. She was joined by Meredith Haggar, Principal Solicitor, General Practice, Youth Law Australia, Rebecca Belzer, Solicitor, and Sarah Abdou, Solicitor, both of Australian Centre for Disability Law.

There were four outstanding Questions on Notice for Legal Aid NSW following the hearing. These responses were prepared by Carey Pearson, in consultation with Ruth Carty, Senior Law Reform Officer, and Rebecca McGrath, Acting Senior Legal Project Officer, Compulsory Schooling Orders.

If there are any questions regarding this submission please contact Carey Pearson Legal Aid NSW, by email at

Questions on Notice

Question on Notice: Children and young people in out of home care

Transcript p. 6

The Hon. NATASHA MACLAREN-JONES: I might jump in, because my question follows on from suspension, particularly in relation to young people in out-of-home care. In the past in budget estimates we've asked about some of that data. We're told that the Department of Education and DCJ will be starting to share it, but really only on enrolment. I'm interested to know, in your experience, is data available to be able to fully know how many young people have been suspended from school and what impact that's having?

CAREY EVELYN PEARSON: I understand that there is some work being done in this area. I can't answer that question today, but if I can take it on notice?

The Hon. NATASHA MACLAREN-JONES: That's fine. Thank you.

Legal Aid NSW response

According to results from the NSW Child Development Study in 2022¹, children in out-of-home care (“OOHC”) are four times more likely to be suspended from primary school than their peers who have had no contact with the child protection services, as were children who had a substantiated risk of significant harm (“ROSH”) report. Children who had contact with child protection services, at any level, by the end of Year 2 (approximately 8 years of age) all showed an increased risk of suspension from primary school during Years 3 to 6.

Legal Aid NSW has requested from the Department of Education statistics on children and young people in OOHC who may have Attendance Improvement Plans or be engaged with the Home School Liaison Officer because of non-attendance and understands that this data is currently being gathered.

Legal Aid NSW understands that the Department of Education do not currently make applications for Compulsory Schooling Orders against children and young people in OOHC or their carers. As such, these children and young people do not come to the attention of Legal Aid NSW and we have no involvement or oversight into how these non-attendance issues are dealt with.

¹ NSW Department of Communities and Justice, *Are Children Who Are Known to Child Protection Services More Likely to Be Suspended from School? Findings from the NSW Child Development Study* (Evidence to Action Note, November 2022) 2.

Question on Notice: Supervision of children and young people on suspension

Transcript p. 13

The Hon. NATASHA MACLAREN-JONES: This follows on from my colleague's earlier question, and also a comment Ms Pearson made earlier about homeschool officers. I just wanted to get a better understanding about when a young person is suspended, particularly in an environment where one or both parents are working. How is that supervision maintained at home for that young person, if the parents or parent is working, and who is ultimately responsible? Is it something that school should be ensuring, that the young person is getting the resources and learning materials, or does it fall back onto parents who are already under a lot of pressure and stress with everything that's going on?

CAREY EVELYN PEARSON: I don't know that I can actually answer that question, but I can take it on notice, or it may be that one of the other witnesses is able to answer that question in terms of the actual obligations.

Legal Aid NSW response

The Department of Education “*Suspension and Expulsion of School Students – Procedures*” provides that it is the parents’ responsibility for the care and safety of the child or young person while under suspension.² This includes any person or persons who have the custody or care of the child or young person.³ The policy also makes clear that children are expected to continue with their studies during any period of suspension.⁴

The Department of Education resource for parents, “*What do I need to know if my child is suspended?*” states that the school will provide the child with support to keep learning during the suspension and will check in with the parent and child.⁵

² NSW Department of Education, *Suspension and Expulsion of School Students – Procedures* (2011) 10

³ *Ibid.*, 42.

⁴ *Ibid.*, 42.

⁵ NSW Department of Education, *What do I need to know if my child is suspended?* (webpage, 29 February 2024)

Question on Notice: Risk of Harm

Transcript p. 14

The Hon. ANTHONY D'ADAM: In recommendation 3 of your submission, you talk about exclusionary discipline being avoided "unless necessary as a last resort to avert the risk of serious harm to the student, other students or staff." Obviously serious harm is a higher test than harm. Are you suggesting in that submission that we should tolerate some level of harm to other students or the student or staff? Maybe you'd might want to elaborate on why you think a serious harm threshold is the appropriate one rather than a harm threshold.

CAREY EVELYN PEARSON: This recommendation and area is not within my scope of expertise either, but I can take this on notice as it is something that Legal Aid NSW would be able to answer.

Legal Aid NSW response

The Disability Royal Commission ("DRC") recommends exclusionary discipline only be used as a last resort and recommends policy amendments to adopt the principle that education providers should avoid the use of exclusionary discipline on students with disability unless exclusion is necessary as a last resort to avert the *risk of serious harm* to the student, other students or staff.⁶ The requirement for a *risk of serious harm* is consistent with this recommendation.

As stated in our submission, Legal Aid NSW supports the recommendations of the DRC. The DRC heard multiple examples of inappropriate use of exclusionary discipline including suspensions.⁷ It was noted that there was a link between a lack of adjustments and the inappropriate use of exclusionary discipline⁸ and that the assumption that this form of discipline will lead to behaviour change may not be appropriate for children with a disability whose behaviour is not intentional.⁹

⁶ Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023), recommendation 7.2.

⁷ Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023) 163-167

⁸ Ibid

⁹ Ibid

It is the view of Legal Aid NSW that if appropriate adjustments and alternative education options for children and young people with disabilities were made available, that any risk of harm would be minimised.

We support shifting the focus away from mandatory, lengthy and repeated suspensions towards ensuring that exclusionary discipline is used as a last resort and takes account of the needs of the student with disability and the effect of any discipline on the student's education and ability to learn. For this reason we support a higher threshold than simply a risk of *harm*. We support a threshold of a *risk of serious harm*, or, alternatively an *unacceptable risk to the health, safety or wellbeing of any person*.

Question on Notice: Pipeline to Prison

Transcript p. 14

The CHAIR: Ms Pearson, in your submission—and also, Ms Hagger—you talk about the pipeline to prison from exclusion in particular. Can you talk a bit more about that given that you are lawyers? This is a good opportunity to ask about that aspect.

MEREDITH HAGGER: I don't know that I have a lot of expertise there. I know that there is research around the effects of exclusionary discipline that links it to the school to prison pipeline and that's what we would be referring to in our submission more than my personal experience advising clients.

The CHAIR: Do you have any case studies or any personal experiences at all in that?

CAREY EVELYN PEARSON: Unfortunately, that's also not within the scope of my experience. I understand that it would be something that, again, would be within the experiences of people at Legal Aid NSW. Obviously, as I've said before, our criminal law service does provide advice and representation to children and young people and also adults in criminal matters, and our children's civil or legal service also provides a holistic assistance for children and young people who are experiencing complex legal and non-legal issues that sort of encompass those issues, but it's not something that I can personally speak to.

Legal Aid NSW response

As stated in our submission, a lack of engagement with education (sometimes for many years) is a common characteristic of children who end up involved in the criminal justice system. There is a wealth of research available that supports this proposition.¹⁰

In the 2015 NSW Young People in Custody Health Survey, 95.8% of participants had been suspended from school on at least one occasion.¹¹ More recently, in a 2019 report, long and multiple suspension were identified by children and young people in the NSW juvenile justice system as a reason for their conflicts with the law.¹²

¹⁰ Australian Institute of Health and Welfare, *Australia's Children* (Report, 2020); Julie Gerlinger et al, 'Exclusionary School Discipline and Delinquent Outcomes: A Meta-Analysis' (2021) 50 *Journal of Youth and Adolescence* 1493; Linda J Graham et al, *Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian Government Schools* (Final Report, Centre for Inclusive Education, 26 October 2020); Victorian Ombudsman, *Investigation into Victorian Government School Expulsions* (Report, August 2017);

¹¹ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report* (November 2017) 15.

¹² Advocate for Children and Young People (NSW), *What Children and Young People in Juvenile Justice Centres Have to Say* (Report, 2019) 6.

Case Study: Brian¹³

Legal Aid NSW represented Brian, a 13-year-old Aboriginal child who is under the parental responsibility of the Minister for Families and Communities. He usually resides in residential out of home care.

Brian had a diagnosis of Foetal Alcohol Spectrum Disorder.

Brian had been disengaged from school for some time and last attended school in year 5. Before disengaging from school Brian had been suspended for behavioural issues.

Brian began to get in trouble with police shortly after he stopped attending school.

Brian is currently bail refused at a youth detention centre.

Since being taken into custody, Brian has been attending the school, at the centre, where he has extra supports, and he is doing well. He recently received a 'student of the month award'.

¹³ This case has been de-identified.

Case Study: Tony¹⁴

Tony is a young person with challenging behaviours resulting from a cognitive disability.

These behaviours have led him to being granted only a partial attendance plan at his primary school, and then high school. As a result of his exclusion from school (via partial attendance plans), Tony has significantly more unsupervised free time than other young people his age.

This has led to him mixing with people not engaged in school or employment during the day, increased contact with police and allegations of criminal offending during school hours.



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¹⁴ This case has been de-identified.