

**Submission
No 131**

**INQUIRY INTO STUDENTS WITH A DISABILITY OR
SPECIAL NEEDS IN NEW SOUTH WALES SCHOOLS**

Organisation: UNSW Australia Kingsford Legal Centre

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Inquiry on provision of education to students with a disability or special needs in NSW
General Purpose Standing Committee No. 3
Parliament House
Macquarie Street
Sydney NSW 2000

By email: gpscno3@parliament.nsw.gov.au

Dear Madam/Sir,

Submission to Inquiry into the provision of education to students with a disability or special needs in government and non-government schools in New South Wales

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to the NSW Legislative Council Inquiry into the provision of education to students with a disability or special needs in government and non-government schools in NSW.

KLC has significant experience in advising parents of children with disabilities who are dissatisfied with their child's school, or who believe their child is not receiving the same educational experience as their peers who do not have a disability. The issues and case studies highlighted in this submission have been drawn from the experiences of our clients and of our solicitors who have advised parents of children with disabilities on matters concerning NSW schools. All case studies have been de-identified to protect our clients' confidentiality.

This submission largely focuses on paragraph (e) of the Term of Reference drawing on our expertise in the area of anti-discrimination law and dispute resolution, but will also touch on some of the other Terms of Reference.

The consequences of a failure to provide equal access to and full participation in education are severe – both for the individual students, their families and society as a whole. Indeed, education has been identified as one of the most determinative elements in an individual's economic and

social future.¹ We have a particular concern that children with a disability from disadvantaged families have the best possible opportunities for education.

Note on terms

Please note that this submission adopts the broad definition of ‘disability’ from the NSW *Anti-Discrimination Act 1977* and the *Disability Discrimination Act 1992* (Cth). These definitions cover physical, sensory, intellectual and psychological disabilities and learning disorders. The definition also includes past, future and presumed disability.²

References to a child’s “parents” also refers to a child’s guardian.

Summary of recommendations

KLC recommends:

1. That a right to inclusive education for children be included in the Education Act 1990 (NSW) to support initiatives that accommodate the needs of children with disabilities in NSW schools. This could be modelled from the Education Act 2004 (ACT), which ‘recognises the individual needs of children with disabilities’ and supports the principle that ‘appropriate provision for those needs’ should be made. This would provide students, parents and educators with an alternative mechanism through which to pursue the provision of educational resources to children with a disability.
2. That the NSW government introduce a Human Rights Bill into Parliament to further strengthen the rights that children with a disability have to receive an education.
3. Funding for more advocates to assist parents to request assistance and resources, help them understand the system, and also to be an intermediary between parents and school staff to better maintain good relationships.
4. Standard and readily available information for health professionals about what kind of information is required from them to support adjustments for a student.
5. That the NSW Education Department and the Catholic Dioceses develop simple, plain language and easily accessible information for parents about their internal complaint processes.
6. That specific staff at a regional level with expertise in the needs of children with disabilities respond to all complaints about disability adjustments.

¹ John Quiggin (1999), 'Human capital theory and education policy in Australia', *Australian Economic Review* 32(2), 130-44.

² *Anti-discrimination Act 1977* (NSW) sections 4, 49A; *Disability Discrimination Act 1992* (Cth), section 4.

7. That the disability discrimination provisions in the NSW *Anti-Discrimination Act* be amended to match those in the *Disability Discrimination Act* and the *Disability Standards for Education*
8. That the exemption for private schools from compliance with the NSW *Anti-Discrimination Act* be removed
9. That BOSTES works with schools to develop a consistent approach to adjustments over the school career of students with disabilities

About Kingsford Legal Centre

Kingsford Legal Centre (KLC) is a community legal centre that has been providing legal advice and advocacy to people in the Randwick and former Botany Bay Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including disability discrimination.

KLC has a specialist employment law service and an Aboriginal Access Program. We also provide outreach and advice services to prisoners at Long Bay Correctional Centre. In addition to this work, KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC has offered a state-wide specialist discrimination law service since we were established in 1981. We therefore have considerable experience in advising in all discrimination law in all areas of life, including in education.

Human Rights Framework

In 2008 Australia ratified the United Nations Convention on the Rights of Persons with disabilities (CRPD). This signified Australia's commitment to ensure that all levels of government work to eradicate obstacles faced by people with a disability. In particular, Article 24 of the CRPD recognises the right that persons with disabilities have to receive an education. Governments should build an inclusive education system and ensure that people with a disability are afforded the conditions and opportunities to facilitate their full and equal participation in education. This includes providing reasonable adjustments for a student's disability as well as effective individualised support measures to maximise students' academic and social development.

At present there is no specific legislative right for children with a disability to receive inclusive education, or to receive the services and facilities they require to support their education in NSW. However, NSW and Commonwealth legislation makes it unlawful for an educational authority or

provider to discriminate, either directly or indirectly, against a person on the grounds of his or her disability.³

Recommendations

KLC recommends:

1. That a right to inclusive education for children be included in the *Education Act 1990* (NSW) to support initiatives that accommodate the needs of children with disabilities in NSW schools. This could be modelled from the *Education Act 2004* (ACT), which 'recognises the individual needs of children with disabilities' and supports the principle that 'appropriate provision for those needs' should be made.⁴ This would provide students, parents and educators with an alternative mechanism through which to pursue the provision of educational resources to children with a disability.
2. That the NSW government introduce a Human Rights Bill into Parliament to further strengthen the rights that children with a disability have to receive an education.

Term of reference (a) Equitable access to resources for students with a disability or special needs in regional and metropolitan areas

In our experience many parents of children with disabilities find the process of requesting extra assistance for their child a confusing, slow and frustrating one. It can often result in hostile relationships developing between the parents and the school, leading to a downward spiral of miscommunication and mistrust. Some of the difficulties appear to be:

- Parents assume that extra resources received by the school based on the needs of their child will be devoted exclusively to their child. However, the practice appears to be that such extra resources are pooled and used across the school at the discretion of the Principal.
- Lack of clear and consistent communication with parents about what medical and other documentation is required to support requests for extra assistance and resources.
- Parents may not be able to afford the expected specialist reports to support a request for extra assistance and resources, and/or there may be long waiting periods to access medical and allied health specialists.
- In regional areas parents may not have reasonable access to such specialists.
- Medical and other reports about the child may not be clear and explicit about the adjustments the child needs in the school context.

³ *Anti-discrimination Act 1977* (NSW); *Disability Discrimination Act 1992* (Cth)

⁴ *Education Act 2004* (ACT) s 7(3).

- Some schools and/or individual teachers and/or parents are still resistant to including children with disabilities in mainstream classes and making the necessary adjustments for them.

Case study- Freya and Ben

Ben is autistic and also has severe allergies. His mother, Freya, rang us about his transition into Year 11. When Ben started High School, Freya had to provide new medical paperwork in order for the High School to make the required adjustments, even though his Primary School had already been provided this information. As Ben's High School only taught children up to Year 10, Ben had to enrol in a new High School for Years 11 and 12. Even though the new High School was aware of Ben's disability, it refused to accept him until Freya provided new medical paperwork, despite Ben requesting exactly the same adjustments in his Individual Education Plan from his previous school. This led to delays in Ben starting school and considerable distress, time and money. Freya was frustrated that the process could not be more streamlined considering that all of Ben's schools were public schools, and should have been aware of his requirements.

Recommendations

KLC recommends:

3. Funding for more advocates to assist parents to request assistance and resources, help them understand the system, and also to be an intermediary between parents and school staff to better maintain good relationships.
4. Standard and readily available information for health professionals about what kind of information is required from them to support adjustments for a student.

Term of reference (d) complaint and review mechanisms within the school systems in New South Wales for parents and carers

Most parents who are unhappy with the school experience of their child with a disability complain to the Principal in the first instance. Many of these parents have a poor relationship with the Principal as a result of repeated complaints and unresolved issues and are not aware of alternative complaint mechanisms within the school systems.

In our experience parents are not told about internal complaint mechanisms even when they are obviously unhappy and distressed about what is happening for their child at school. Some will

complain externally to the NSW Ombudsman or make disability discrimination complaints to the Australian Human Rights Commission or the NSW Anti-Discrimination Board. These external complaints are generally made out of desperation, as the parents have been unable to advocate appropriate solutions directly with the school.

In January 2017 the NSW Department of Education adopted a new Complaint Handling Policy and a School Community and Consumer Complaint Procedure. It may be that the new policy and procedure will improve the response to complaints by parents of children with disabilities. However, the documents currently available on the NSW Education website about complaints appear to be directed at NSW Education staff and how to respond to complaints rather than directed at parents who wish to make a complaint.

Case study- Maria and Jamie

Jamie is a five-year-old boy diagnosed with autism spectrum disorder, epilepsy and attention deficit hyperactivity disorder (ADHD). Jamie's mother, Maria, is a single-parent on a low income. Maria provided Jamie's school with information about his medical needs and the support and adjustments required. A number of incidents occurred at Jamie's school that Maria believed compromised his safety and adversely affected his learning. The issues were not resolved when Maria raised them with the principal and the Department of Education (DEC), so Maria made a complaint to the Australian Human Rights Commission about the unlawful discrimination her son was facing. Maria and representatives of the DEC attended a conciliation conference during which Maria's resolution proposals were discussed and agreed to in principle. Following the conciliation, the DEC refused to enter into a written agreement with Maria. This left her with no avenue for a satisfactory resolution to the situation but an action in the Federal Court. For someone in Maria's position the Federal Court is not a practical solution for resolving an issue that is an immediate concern for a parent of a child with disabilities who faces daily difficulties at school.

Recommendations

KLC recommends:

5. That the NSW Education Department and the Catholic Dioceses develop simple, plain language and easily accessible information for parents about their internal complaint processes.
6. That specific staff at a regional level with expertise in the needs of children with disabilities respond to all complaints about disability adjustments, including making clear whether any

supporting material is required to be obtained by parents before adjustments are made, and offering assistance with obtaining this material.

Term of reference (e) any other related matters

Disability discrimination laws

Some parents who are dissatisfied with the treatment of their child with a disability at school lodge a disability discrimination complaint against the school with the NSW Anti-Discrimination Board under the NSW *Anti-Discrimination Act (ADA)* or with the Australian Human Rights Commission under the federal *Disability Discrimination Act (DDA)*.

The discrimination complaint process offers an important external source of dispute resolution and accountability to those parents and students who are dissatisfied with the treatment of their children with a disability. The first stage of the discrimination complaint process at both the NSW Anti-Discrimination Board and the Australian Human Rights Commission is free and informal and focussed on resolving the dispute, and is therefore a practical option that is accessible to parents. However it needs to be kept in mind that the discrimination complaints handling framework has limited impact in addressing systemic issues, particularly as most matters are finalised in confidential conciliated agreements. They are also slow-moving processes, which often do not provide a practical mechanism for monitoring the implementation of students' Education Plans and "reasonable adjustments".

Case Study- Fey

Through our casework, KLC is aware of the experience of Fey, who lived with a congenital vision impairment that meant she needed all printed material to be provided at an enlarged font and on coloured paper. The school had been aware of this request for adjustments since Year 7, and it was included in her Education Plan. However year after year, the school neglected to provide the material to Fey at the start of each term, which meant that she fell behind the other students and had to work extra hard to catch up when the materials were finally ready. According to discrimination laws, Fey's parents would have to make a separate discrimination complaint for each and every instance that the school either did not provide or was late in providing the material. Fey's parents made external complaints as they were desperate and felt that the Principal was not listening to them. However it is clear that a better approach would have involved regular monitoring of the school's compliance with Education Plans for its students with disabilities, and better regulation of this compliance by the DET.

Unfortunately these parallel NSW and Federal systems have many inconsistencies and can leave parents without the options they need.

The federal DDA offers significantly greater protection to students with a disability than the NSW ADA. The DDA definition of indirect discrimination is easier to satisfy, the DDA imposes a specific obligation to make reasonable adjustments for students with disabilities⁵, and the Disability Standards for Education provided detailed guidance to schools about making schools accessible to students with disabilities, and gives rise to enforceable rights to students. However, if a complaint is unable to be resolved in the first stage of the process at the Australian Human Rights Commission and a parent wishes to have the Federal Court or Federal Circuit Court hear and determine their complaint, they face the risk of an adverse costs order if their claim is unsuccessful or only partly successful. This is a huge disincentive for parents to engage in the federal system.

The NSW ADA has a clumsy test for indirect discrimination, does not impose any explicit obligation on schools to make reasonable adjustments for students with disabilities, and does not apply to private schools at all. This means that unlike the DDA, under the NSW ADA, schools are not necessarily unlawfully discriminating against a student by not providing “reasonable adjustments”. The NSW system does have a significant advantage in that if a complaint is not resolved in the first stage at the NSW Anti-Discrimination Board, the second stage is a hearing in the NSW Civil and Administrative Tribunal. This is a jurisdiction where the rules of evidence do not apply, making it more feasible for a party to self-represent, and the general rule is that each party bears their own legal costs, whatever the outcome.

The NSW ADA is also generally unhelpful to students with disabilities attending private schools. While it is unlawful under the NSW ADA for an “educational authority” to discriminate against a student on the ground of disability, this does not apply to a “private educational authority”⁶. This further restricts the options for students and parents in private schools to address unfavourable treatment through an external complaint. KLC does not believe there are adequate public policy reasons for this exception and clear gap in protections under the NSW ADA.

⁵ DDA section 5(2)(b)

⁶ NSW ADA, section 49L(3)(a)

Case study- Rema and Franco

Rema called KLC for advice about her 6 year old son Franco. Rema had enrolled Franco in the local independent school that his older brothers also attended. The school was aware of Franco's diagnosis of autism and request for reasonable adjustments, including the request for an Aide. In late November before Franco was meant to start Kindergarten, the Principal wrote to Rema to say that Franco could not start at the school as they could not provide the adjustments requested. All they could offer was a place in another school over 40 kilometres away. Rema was left with barely any time to find Franco a place in a local school. Even a disability discrimination complaint at this point would not have resolved the issue before Franco was due to start school. In any event, Rema would not have been able to make a disability discrimination complaint under the NSW ADA, as the school was a "private educational authority".

Recommendations

KLC recommends:

7. That the DET sets up an internal system to monitor schools' compliance with students' Individual Education Plans, and to ensure appropriate consultation with parents in developing and implementing these Plans.
8. That the disability discrimination provisions in the NSW *Anti-Discrimination Act* be amended to match those in the *Disability Discrimination Act* and the *Disability Standards for Education*
9. That the exemption for private schools from compliance with the NSW *Anti-Discrimination Act* be removed

Board of Studies, Teaching and Educational Standards (BOSTES)

KLC has advised several parents in the past year who have been dismayed to discover that BOSTES has a very different approach to adjustments for students with disabilities compared to that taken by schools.

BOSTES is the body responsible for the Higher School Certificate exam, and it makes decisions about adjustments for students with disabilities who are sitting the exams. Our clients have found that adjustments that their children have had over many years of schooling, such as using a keyboard instead of handwriting, are not generally permitted, and students are expected to use a scribe (commonly a year 11 student at their school) instead. Using a scribe is a very different skill, and one that is not quickly or easily acquired, particularly for a student with disabilities that affect their language and communication.

Case study – Oskar

Oskar was a 17 year old boy doing his HSC exams in a regional town. He had diagnoses of a number of disabilities that made it difficult for him to hold a pen and maintain a seated position at a desk.

Throughout his high school education Oskar's school had permitted him to use a computer instead of handwriting for school work and exams as an adjustment for his disabilities.

Oskar applied to BOSTES for permission to use a computer for his HSC exams. This request was refused and a number of appeals against this decision were unsuccessful.

BOSTES did recognise that he needed adjustments for his disabilities and gave permission for him to use a scribe to write his exams. Oskar and his mother was very concerned that his disabilities would prevent him from using a scribe, and also that there was little time for Oskar to learn to use a scribe successfully even if this were possible.

Oskar felt that if he used a scribe he would not be able to perform to his potential in the exams, and wanted to leave school. Oskar's mother felt that her son had been let down by the inconsistent approaches to adjustments between the school and BOSTES.

BOSTES had also asked Oskar's mother to provide updated reports from health professionals to support the application for adjustments. The time and expense of getting these reports in a regional town was a significant burden for Oskar's family, and they felt it was unnecessary when there were already numerous existing reports on his condition and the adjustments he needed.

Recommendations

KLC recommends:

10. That BOSTES works with schools to develop a consistent approach to adjustments over the school career of students with disabilities

Yours faithfully,
KINGSFORD LEGAL CENTRE

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