

**Submission
No 198**

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

Organisation: People with Disability Australia

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people with disability

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People with Disability Australia (PWDA)

NSW Parliament General Purpose Standing Committee 3 Inquiry into Students with a disability or special needs in New South Wales schools

**Submission
March 2017**

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Our vision is of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution and potential of people with disability are respected and celebrated.



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About People with Disability Australia

1. **People with Disability Australia (PWDA)** is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.
2. PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.
3. We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.
4. PWDA is also a founding member of Disabled People's Organisations Australia ([DPO Australia](#)) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. DPO's are organisations that are led by, and constituted of, people with disability.
5. The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities. DPO Australia has been funded by the Australian Government to be the recognised coordinating point between Government/s and other stakeholders, for consultation and engagement with people with disability in Australia.

Introduction

6. PWDA welcomes the opportunity to provide input to the NSW Parliament General Purpose Standing Committee No. 3 inquiry into Students with Disability or special needs in NSW schools.
7. In addition to this submission, we refer the committee to PWDA's submission (No. 345) to the 2010 General Purpose Standing Committee 2 inquiry on the Provision of Education to Students with a Disability or Special Needs¹. Unfortunately, we do this

¹ PWDA's submission to the 2010 inquiry
<https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Summary/45686/Submission%20345.pdf>

because in reality little has changed in terms of outcomes for students with disability. Our recommendations made to the 2010 inquiry remain as relevant today as they did six years ago:

- The NSW Government to lead the nation in adopting and implementing inclusive education principles and practice reflecting the Convention on the Rights of Persons with Disabilities for all students with disability.
- The NSW Government to take immediate action to allocate the resources necessary for all students with disability to receive individualised inclusive education options in mainstream schools.
- Staff at all levels of the education system are educated in disability awareness, the use of appropriate augmentative and alternative modes, means and formats of communication, different educational techniques and materials to support students with disability.

8. We note the comprehensive inquiry conducted by Senate Education and Employment References Committee in 2015 into 'Current levels of access and attainment for students with disability in the school system, and the impact on students and families associated with inadequate levels of support', with the Committee report released in January 2016. This report provided extensive recommendations at a federal and jurisdictional level².

In addition to the recommendations from our 2010 submission, we make the following recommendations to this Committee inquiry:

Recommendations

- **The Committee request a report from the NSW Government detailing specific actions taken, and progress made, towards implementation of each of the recommendations made in the 2016 Senate Education and Employment References Committee Report 'Access to Real Learning: the impacts of policy, funding and culture on students with disability'.**
- **The Committee request data from the NSW Department of Education that provides a breakdown of:**
 - a. Numbers of NSW schools students suspended and for how long on each occasion**
 - b. Numbers of NSW school students expelled**
 - c. Disaggregation by gender, age, cultural and linguistic background**
 - d. Number of these students that are identified as having disability, a learning support plan in place or in support unit at the time of suspension and**

² As noted in the Senate Education and Employment References Committee Report 'Access to Real Learning: the impacts of policy, funding and culture on students with disability' http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Report

expulsion, as well as those students identified as having disability, or requiring a learning support plan following suspension or expulsion.

- e. Length of time before students recommence formal education at a different school following expulsion, including the number of school applications made before the student is enrolled at a new school
- The NSW Government ensure that all violence against children with disability in schools is subject to external oversight by amending the Class or Kind Determination and the 3A provisions
 - The NSW Government require that all potentially reportable behaviour in relation to children with disability (or with suspected disability) be subject to oversight by the NSW Ombudsman, rather than potentially excluded from the scheme by the Department of Education
 - The NSW Ombudsman be equipped with the capacity to provide systemic leadership regarding the adequacy of educational supports for children with disability
 - The Committee request that the NSW Ombudsman undertake an audit of Department of Education reportable conduct decisions made under the 'Class or Kind Determination' to inform the deliberations and recommendations of this inquiry. That the findings of this audit be made public.
 - Operational guidelines be established around the interaction between the NSW Ombudsman Reportable Conduct Scheme and the relevant arrangements developed with the implementation of the NDIS Quality and Safeguards Framework. That these guidelines be released for public consultation.

Pervasive low expectations for students with disability

1. The NDS highlights education as a key pillar in moving towards a more inclusive and productive Australia. Higher levels of educational attainment are linked to better employment, financial and health outcomes and “reducing the gap between students with disability and other students is essential to improve the social wellbeing and economic security of people with disability”³. The NDS also recommends “specific attention needs to be focused on the transition between education settings and in moving from education to employment.”⁴
2. Inclusive education provides significant benefits for students with and without disability. However, students with disability have much lower school completion rates (36% of students with disability compared to 55% of students without disability⁵). This in turn means that people with disability are less likely to go on to pursue further education and training.
3. The UN Committee on the Rights of Persons with Disabilities, ‘*General Comment No. 4 (2016) on Article 24: Right to Inclusive Education*’, outlines the profound barriers that continue to deny people with disability quality education in line with their peers. The General Comment reiterates 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.’⁶
4. Despite a legislative and policy framework, which provides for the inclusion of students with disability in mainstream school (the Disability Discrimination Act 1992, the Disability Standards for Education 2005, the National Disability Strategy (2010-2020), the NSW Disability Inclusion 2014), there remains a deep-rooted culture of segregation and discrimination that denies students with disability these opportunities.
5. Research conducted by Children and Young People with Disability Australia in 2015⁷, found that one in four students with disability surveyed had been denied enrolment to mainstream school, and 67% of respondents stated that students with disability do not receive adequate support. Special schools and support units continue the systemic segregation of children and young people with disability, which denies them the rights they are entitled. Parents may make this choice to protect their child, or because they do

³ National Disability Strategy p.55

⁴ NDS National Disability Strategy p. 58

⁵ Australian Bureau of Statistics (2012) *Disability – education and employment, disability, ageing and carers, Australia, summary of findings 2012*, Commonwealth of Australia: Canberra. Retrieved from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/E82EBA276AB693E5CA257C21000E5013?opendocument>

⁶ Convention on the Rights of Persons with Disabilities, General Comment 4 (2016) www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx

⁷ The results of the survey conducted by Children and Young People with Disability Australia can be accessed here <http://www.cyda.org.au/cyda-education-survey-2016>

not have a full picture of the options available to their families. Education providers may not inform parents and children with disability that they are entitled to attend mainstream school and that there are measures in place to provide support.

6. As a result of these segregated educational arrangements, and lack of adequate and available support, children and young people with disability are diverted from pursuing educational opportunities to the same degree as their peers. Rather than an active pursuit of support for students to make their own choices about the educational path they wish to follow, pervasive low expectations steer students to other options.
7. In the case study below, an assumption was made based solely on disability, which disregarded the wishes of the students. This case study demonstrates the deep-rooted discrimination that continues to limit the opportunities of students with disability.

Kathy* has mild intellectual disability. In year 11, the head of the support unit at Kathy's school informed her that she was unable to do some of the subjects she had selected due to her disability (in particular legal studies).

When Kathy approached the school Careers Advisor about accessing tutoring help offered to Year 12 students by the University of Wollongong, she was told that because she was in the support unit, she could not do her HSC, and the only subjects available were life skills and English, which was mandatory. The Career Advisor told Kathy that she would not be able to attend university due to her disability. Kathy and her mother are being supported by a PWDA advocate to meet with the Career Advisor once again this month.

*name changed

8. As highlighted by Family Advocacy in their submission to this inquiry, it appears there is a recent increase in enrolment to special schools and support units. It is noted that statistics relating to the current number or growth of support units has not be released by the NSW Department of Education, and we support Family Advocacy's recommendation that the committee seek information about the numbers of support units in NSW over the last five years, and updated information about the number of enrolments in these units.
9. Students in support units are often excluded from external educational programs offered to their peers. This not only exacerbates the feeling of exclusion and discrimination for students, but also actively disadvantages them in areas deemed important for other students.
10. One such example is the LOVE BITES program delivered by the National Association for Prevention of Child Abuse and Neglect (NAPCAN)⁸. This school-based Domestic and Family Violence and Sexual Assault prevention program provides students aged 14-16

⁸ Details of NAPCAN programs can be found on their website <http://napcan.org.au>

years old with workshops that strengthen their knowledge around respectful relationships, critical to building students confidence and awareness around prevention. PWDA understand that students in support units are often not included in this program.

11. By excluding these students, there is an assumption that they do not need this education, possibly because they will not engage in such relationships in the same way as their peers. Importantly, exclusion from these programs prevents students with disability from gaining this essential preventative knowledge that builds their awareness of risk and how to respond. This places students with disability at even greater risk of abuse and sexual assault, when data clearly shows the higher risk of violence and abuse for people over their lifetime⁹.

Inadequacies in data collection

12. Without a full and accurate picture of the support need, circumstances and outcomes of students with disability, it is not possible to comprehensively address the systemic issues that continue to prevent students with disability from reaching their full potential. The current National Consistent Collection of Data on School Students with Disability relies on teachers using their ‘professional, informed judgement to determine’:

- ‘which of their students are being provided with a reasonable adjustment to access education because of disability, consistent with definitions and obligations under the *Disability Discrimination Act 1992* (the DDA) and the Disability Standards for Education 2005
- the level of adjustment that students with disability are being provided with, in both classroom and whole of school contexts
- the broad category of disability under which each student best fits’¹⁰.

13. This model of data collection has significant shortcomings in terms of accurately measuring the number students with disability and their individual educational experiences and outcomes. This data collection relies on the judgement of teachers to determine whether or not a student has disability. Unfortunately, as outlined above, there remains a lack of acknowledgement and understanding within the educational community around the social model of disability, and how disability affects a young person’s experience at school. A high proportion of students with disability are therefore not recognised and receive little, if any specialised support or reasonable adjustment. Therefore all students with disability will inevitably not be captured.

⁹ Refer to the Australian Cross Disability Alliance submission to the Senate Community Affairs Inquiry into Violence, Abuse and Neglect against People with Disability in institutional and residential settings <http://www.pwd.org.au/pwda-publications/submissions.html>

¹⁰ Australian Government Nationally Consistent Collection of Data Students with Disability <http://www.schooldisabilitydatapl.edu.au/data-collection-model/data-collection-model>

14. In addition, a restriction of the collection of data to students currently receiving support or adjustment is limited in scope and obscures the real extent of need. There is an immediate need for a comprehensive review of data collection around students with disability, which includes a public consultation process.
15. The Senate Education and Employment References Committee report Recommendation 8 (5.40) ¹¹ specified that the federal government should work with states and territories to establish a process for the collection and publication of information about levels and attainment for students with disability. Recommendation 1 of this submission urges the Committee to request a report from the NSW Government around progress towards implementation of the Senate Committee inquiry recommendations. We note that specific attention should be made around the area of data collection.

Expulsions and suspensions

16. One of the recommendations in the PWDA's 2010 submission to the upper house inquiry was that the Department of Education and Training Procedures for the Suspension and Expulsion of Students (2004) be immediately revised, including guidelines and training for schools so that they have a greater understanding of the appropriate considerations required when applying the policy to students with disability.
17. This recommendation was based on PWDA individual advocacy work that demonstrates that students with disability bear the consequences of behaviour that can be linked to inadequate teacher training, and an ongoing lack of understanding within the education sector of the impacts of disability and the role of specific communications and support techniques. Students with disability are often branded 'trouble makers', and expulsion considered an appropriate response for students who are deemed to difficult.
18. Students with disability experience incidents of bullying at a higher rate than other students¹². The recent survey by Children and Youth People Australia identified that 52% of respondents reported that the student had been subject to bullying¹³. This bullying may subsequently lead to behaviour that results in suspension or expulsion.

¹¹ Senate Education and Employment References Committee Report 'Access to Real Learning: the impacts of policy, funding and culture on students with disability p,10
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Report

¹² As noted in the Senate Education and Employment References Committee Report 'Access to Real Learning: the impacts of policy, funding and culture on students with disability p,34
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Report

¹³ Media around the release of survey data relating to bullying of students with disability
<http://www.smh.com.au/nsw/widespread-bullying-and-abuse-of-children-with-disability-at-school-report-to-federal-senate-inquiry-20150901-qjd3nl.html>

19. We acknowledge that a revision of Procedures was completed and note that the 'Suspension and Expulsion of School Students – Procedures 2011'¹⁴ includes further specific details around students with disability.
20. However, based on our client experiences indicate that young people with disability continue to be over-represented in the students that are disciplined through suspension and expulsion. The extent that this is occurring, the reasons behind these measures and the impact on students in terms of long term learning outcomes is unknown because this data is not available. In addition, there is no evidence to inform future policies in this area.
21. In addition to the data breakdown required relating to Recommendation 8 of the Senate Committee report (as noted above), we urge the Committee to request specific data from the NSW Department of Education relating to Recommendation 8, (j) bullying and wellbeing.

Violence against students with disability in NSW schools

22. Recently, media stories about a child with disability who had been locked in a cage made of swimming pool fencing horrified the Australian community. Many of the questions raised following this situation related to oversight: how was it possible that the cage had been built and funded without anyone being notified? The fact that the principal responsible had only been moved to a non-school role raised concerns for many in the community in terms of how this incident was responded to within the department of education.¹⁵
23. This was not the only instance of inappropriate restrictive practices against children with disability in educational settings reported over the past couple of years, including in NSW, but it remains emblematic of some of the serious forms of violence that an oversight scheme like a reportable conduct scheme ought to address.
24. Children with disability have a human right to be protected from all forms of violence (Article 19, Convention on the Rights of the Child and Article 16, Convention on the Rights of Persons with Disabilities). Yet children with disability experience a prevalence of maltreatment 3.4 times higher than other children.¹⁶ They also experience a higher incidence of sexual abuse. Information accessed through a Freedom of Information request was an illustration of the alarming levels of allegations and abuse in NSW

¹⁴ NSW Government Education and Communities, Suspension and Expulsion of School Students – Procedures 2011 https://education.nsw.gov.au/policy-library/associated-documents/suspol_07.pdf

¹⁵ Emma MacDonald, 'School principal loses her job over student cage inquiry,' 9 Sept 2016, *The Canberra Times*, available at: <http://www.canberratimes.com.au/act-news/school-cage-inquiry-to-see-principal-disciplined-20150908-gjhhqa.html>

¹⁶ Sally Robinson (2012), 'Enabling and protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability,' Children with Disability Australia.

schools, including alarming reports of sexual and physical assault of students with disability¹⁷.

In 2013, 9 year old Jade* was sexually assaulted at a NSW primary school during her lunch break by 4 older boys (aged 9-11). Despite Jade being late back to her classroom from lunch (it was gated and she could not enter on her own), teachers failed to notice her absence and there was no effort made to find her. When she did return her uniform was torn and on backwards.

Jade's mother reported the assault six days later, as she was unsure if the school had done so. When the girls' mother approached the school, the school counselor told her that Jade would not remember the assault (due to disability), and it would not affect her. An investigation was undertaken by the Joint Investigation Response Team (JIRT), but was not conclusive. It appears that Jade was interviewed by JIRT on her own without support. The Principal of the school was on leave at the time of the assault, and on return would not meet with Jade's mother.

Jade moved to a different school, where she was doing well. However, in 2016 her old principal was transferred to the new school despite protests from the retiring principal who cited concerns about conflict of interest and Jade's welfare due to the open JIRT investigation at the time. Concerns were also raised with the regional DEC coordinator, but these were ignored.

In 2016, the head teacher/acting principal of IM/IO classes asked the Principal to limit his visits to Jade's classroom due to the distress it was causing her; however the Principal stated it was his school and he could go where he wanted. In week 2, term 2 2016 the Principal went to the local tennis courts, where Jade's class was taking part in sport, walked up to Jade and starting rubbing her shoulders. The tennis teacher immediately intervened.

*name changed

The role of Reportable Conduct schemes

25. Reportable conduct schemes are designed to ensure the safety of children from a range of different kinds of violence. They shift the responsibility for reporting from the child-victim to responsible adults around them. They are also designed to ensure that there is external oversight about behaviours that are considered acceptable in settings where children are overrepresented. In NSW, the reportable conduct scheme oversees conduct in schools, out of home care and other locations where children spend a substantial portion of their time.
26. As the investigations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) are progressively demonstrating, sexual abuse is frequently associated with other forms of violence against children. Children experiencing physical violence where that violence is treated as legitimate are less likely to identify other forms of violence, including sexual violence, as problematic. They are

¹⁷ Data was accessed through a FOI request submitted by Children and Young people with Disability Australia (CYDA), and is available here <https://goo.gl/aclFhG>

also unlikely to trust that reporting sexual abuse to an adult will result in action being taken, if action is not taken in relation to physical abuse.

27. Reportable Conduct schemes are therefore key to producing child safe institutions through responding to *all* forms of inappropriate conduct towards children. They act to ensure that institutional responses to all forms of inappropriate conduct towards children are held to uniform community standards. This is particularly important for children with disability, who are at heightened risk and experience higher levels of violence. In addition, there are numerous examples of treatment of children with disability in institutional settings, which are treated as legitimate within those settings, but would be, or should be, unacceptable by community standards.
28. In some circumstances, these forms of violence are used in disability-specific settings such as special schools or residential facilities where children with disability live. It should be noted that the Special Rapporteur on Torture has emphasised that certain forms of treatment used solely against people with disability fall within the Convention on Torture.¹⁸
29. However Reportable Conduct schemes also bring with them the benefits of tracking problems regarding inappropriate conduct, including violence, across a variety of settings, including in mainstream educational settings. The findings and reports of the NSW Ombudsman regarding the heightened risk for children with disability demonstrates some of the key issues, with children with disability overrepresented in substantiated reports to the Reportable Conduct Scheme in NSW.
30. 29% of all notifications closed by the NSW Ombudsman involve children with disability, but only 6% of all open matters involving a criminal charge also involve children with disability. This indicates the importance of an effective Reportable Conduct scheme, given the barriers to legal justice that children with disability experience.
31. In schools, 21% of substantiated reportable conduct reports relate to children with disability, who according to the Department of Education, constitute only 12% of the schools population. Additionally, 18% of all sustained notifications related to sexual misconduct/sexual offence matters involve a child with disability.
32. This data is likely to underestimate the violence experienced by children with disability in school settings. This is because of the design of the Reportable Conduct scheme, which results in some incidents not being reported appropriately. There are severe limitations on the NSW Reportable Conduct scheme when it comes to children with disability. Many kinds of violence, abuse and harmful behaviour against children in

¹⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, presented to the 22nd session of the Human Rights Council 1 February 2013. A/HRC/22/53, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

schools are excluded from Ombudsman oversight through the NSW scheme, predominantly because the definition of reportable conduct explicitly or implicitly excludes these forms of violence.

Defining 'Reportable Conduct'

33. It is important to understand how the NSW Scheme functions to exclude some forms of violence against children with disability within schools from oversight. The first exception to the definition in the NSW Scheme is: 'conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards.' Unfortunately, disability is frequently interpreted as one of these 'other characteristics of the children'.
34. Additionally, many school settings understand violence against children with disability as 'reasonable' in line with this definition, even when they fail to implement strategies that support a child to manage the complex demands of being in a school setting with others. In many cases, the school has been provided with detail about such strategies by parents or other professionals, but implementation may not be sufficient. This is often the background to an instance of violence against a child with disability.
35. A child with autism, for example, with inadequate supports provided, might become overstimulated and react physically, with a teacher then responding violently in turn. The use of what is euphemistically called 'physical restraint' often involves behaviour that would count as physical violence if a child without disability were subject to it. However, because this conduct is interpreted as 'reasonable for the purposes of discipline, management or care of children,' it may not be considered reportable conduct. This is despite the fact that in many such circumstances, the situation would have been entirely manageable in a non-violent way, if adequate supports were provided.
36. Indeed, a situation like this is unlikely to be subject to investigation at all without complaint by parents or guardians. This undermines the intention of the Reportable Conduct Scheme to make adults responsible for ensuring proper conduct towards children at all times. It also obscures from oversight and analysis, forms of behaviour the scheme was introduced to help address.
37. The NSW Scheme effectively allows certain organisations to assess whether or not a particular form of conduct is 'reportable'. This can undermine the oversight function granted to the Ombudsman in these circumstances. For example in NSW, decisions about whether certain behaviour within public schools is reportable conduct is made by the Employee Performance and Conduct Directorate within the Department of Education and Training. As a result, the Department of Education's perspective on

whether or not a particular behaviour is reasonable for the care of other children may preclude particular instances of violence against children with disability from even reaching the Ombudsman. In other words, the exception in the legislation tends to collude with potential reporters' failures to recognise violence against children with disability as violence.

Class or Kind Determinations

38. Under the NSW Scheme, a 'Class or Kind Determination' was agreed with the Department of Education. This provides guidance to schools regarding reportable conduct, including forms of conduct determined not to need reporting to the Ombudsman. This Determination has been identified as key to enabling schools to comply with the Reportable Conduct Scheme by reducing the 'onerous' demands it makes on schools. It has been presented as essential to the successful compliance of schools with the Scheme. The 'Class or Kind Determination' made with schools, however, has also provided greater specificity about the definition of reportable conduct:

'The amendments also make it clear that employees, particularly teachers, can take reasonable action to exercise effective classroom management and discipline. This includes actions such as reasonably restraining a student for the safety of that student or others, comforting a distressed student or raising their voices to restore order with a group of students'.¹⁹

39. This definition clearly excludes some of the forms of violence a child with disability may experience in school. In addition to the exception described above, the Class or Kind Determination excludes from 'reportable conduct':

'using reasonable force to:

- Disarm a child seeking to harm themselves or another; or
- Separate children in the act of fighting; or
- Move a child away from a place where the person may be harmed; or
- Restrain a child from causing intentional damage to property.'²⁰

40. The exclusion of these forms of conduct from being reported can collude with the ongoing failure across a range of institutions to understand that these forms of 'reasonable force' can constitute violence against children with disability. In some circumstances, it may even be understood to permit solitary confinement of a child

¹⁹ NSW Department of Education and Training (2004), 'Responding to Allegations against Employees in the Area of Child Protection' available at http://www.dec.nsw.gov.au/detresources/pd04_08_alleg_childprot_Mk2_GSPuJAJdZT.pdf

²⁰ Class or Kind Determination by the NSW Ombudsman under section 25CA of the Ombudsman Act 1974 concerning the Association of Independent Schools of NSW Limited and its member schools (2012) available at [https://www.aisnsw.edu.au/Services/ChildProtection/Documents/Class%20or%20Kind%20Determination%20\(2012\).pdf](https://www.aisnsw.edu.au/Services/ChildProtection/Documents/Class%20or%20Kind%20Determination%20(2012).pdf)

without reporting such conduct to the NSW Ombudsman. It also obscures that such conduct frequently results from a lack of supports provided in educational settings. The scheme must be amended to protect against breaches of human rights, such as the solitary confinement evidenced in the 'child in the cage' incident.

41. The NSW Ombudsman has the authority to conduct investigation into the Department of Education reportable conduct decisions made under 'Class or Kind Determination', but it is our understanding that to date this has not been done.
42. An audit of this kind could provide valuable information relating to the matters that are currently excluded from reporting under 'Class or Kind Determination', and the representation of students with disability within these decisions. If an audit were to be undertaken however, it would need to be with a broad understanding of disability, not just those students with current support programs in place, in order for a full picture to be gained.

Developing responses to children with disability

43. For children with disability to be safe, institutional settings must have good understanding of disability, of the heightened risk of violence for children with disability, and how to respond to both. This, however, is rare in most service settings. A Reportable Conduct scheme should be designed to maximise the education sector's development in relation to disability. This means that the scheme must intervene in and not inadvertently support misperceptions about disability or double standards regarding acceptable conduct towards children with disability.
44. In NSW, the Scheme operates in schools that often do not have positive records of recognising and responding appropriately to disability. There is, in general, a poor understanding of disability and impairment in our society. In many cases, a disability or a support need will not be recognised or fulfilled without a formal diagnosis of impairment. A child with disability may instead be understood as recalcitrant, as refusing to comply, or as having 'challenging behaviour'. Alternately, where a diagnosis has been made, it may be used to 'explain away' distress, leading to the dismissal of the cues that reportable conduct may have occurred.

A child with disability was at an out of school hours (OOSH) centre held in a building on school grounds. When her mother arrived to pick her up, she was told that her daughter had 'had a temper tantrum' and refused to move. This sounded very unlike her child, and on investigation, the mother found that actually her daughter couldn't move her legs. When she was taken to the hospital, it was found that her hip was broken.

The mother was then investigated by Child Protection due to an unexplained injury. Eventually, with much advocacy from the mother and the child's advocates, a Department of Education and

Training interview with the centre staff found that there were compliance issues on the part of the OOSH centre specifically in documenting and reporting the incident.

Eventually, the OOSH centre was compelled to undertake an investigation, and found no wrongdoing. The NSW Ombudsman's investigations similarly found that there was no available evidence of wrongdoing on the Centre's part. Essentially, as no one documented this incident, there was no trail to follow. And the characterisation of the child as 'having a temper tantrum' when it is likely that she was in severe pain exemplifies the way that disability can be used to dismiss signs of reportable conduct.

45. Perhaps one of the most important benefits of the NSW Reportable Conduct Scheme has been to provide some data about violence and other inappropriate behaviours against children with disability, which demonstrates the need for change in the education sector, particularly in ensuring adequate and active supports to children with disability.
46. Additionally, the data from the Reportable Conduct Scheme in NSW has demonstrated that – even with the issues outlined above with respect to exceptions, Determinations and the limited reach – children with disability experience a very disproportionate rate of violence. It also demonstrates that violence against children with disability only very rarely results in criminal charges.
47. We note that the National Disability Insurance Scheme (NDIS) National Quality and Safeguards Framework proposes a number of regulatory, preventative and corrective mechanisms under which NDIS funded support services will fall. However, it also proposes that child safety will remain a state or territory matter. It remains unclear how oversight mechanisms, such as the proposed NDIS reportable conduct scheme and the NSW Ombudsman Reportable Conduct Scheme will interact around safeguarding and protecting children, and it is of upmost important that this is clarified as soon as possible.