

Submission  
No 32

**INQUIRY INTO CHILDREN AND YOUNG PEOPLE WITH  
DISABILITY IN NEW SOUTH WALES EDUCATIONAL  
SETTINGS**

**Organisation:** Youth Law Australia

**Date Received:** 29 February 2024

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## **Submission to the inquiry into *Children and young people with disability in New South Wales educational settings***

### **Acknowledgment of Country**

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation and all the other custodians of the land on which we work. We pay our respects to their Elders past and present, and commit ourselves to the ongoing journey of Reconciliation.

### **About us**

1. Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time, and receive free and confidential legal advice and help. Youth Law Australia seeks to be as accessible as possible to children and young people, in particular through facilitating help-seeking through online means.
2. We are dedicated to addressing human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

### **Introduction**

3. We welcome this inquiry into the experiences of children and young people with disability in NSW educational settings.
4. This has long been a concern for YLA. In 1997, we published a research paper, 'Disability discrimination in schools', which found that some children and young people who live with disability 'are seriously disadvantaged in their efforts to gain equal access to education'.<sup>1</sup> Our experience advising children and young people in NSW suggests that there continues to be significant scope for both public and private schools in NSW to improve the way they support children and young people with disability, and give effect to their rights to education.<sup>2</sup>

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<sup>1</sup> Christine Flynn, National Children's and Youth Law Centre, 'Disability Discrimination in Schools', April 1997. Available here: <https://yla.org.au/wp-content/uploads/2019/12/Disability-discrimination-in-schools-1997.pdf>

<sup>2</sup> Recognised in Convention on the Rights of Persons with Disabilities, article 24 and the Convention on the Rights of the Child, article 28.



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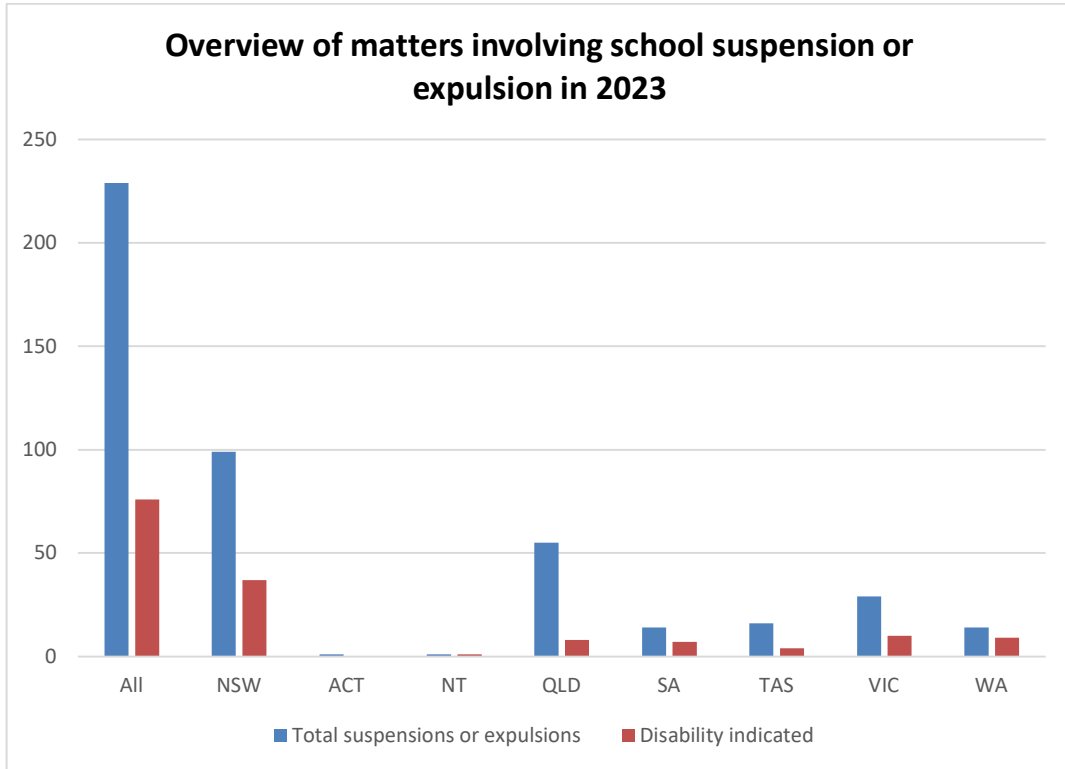
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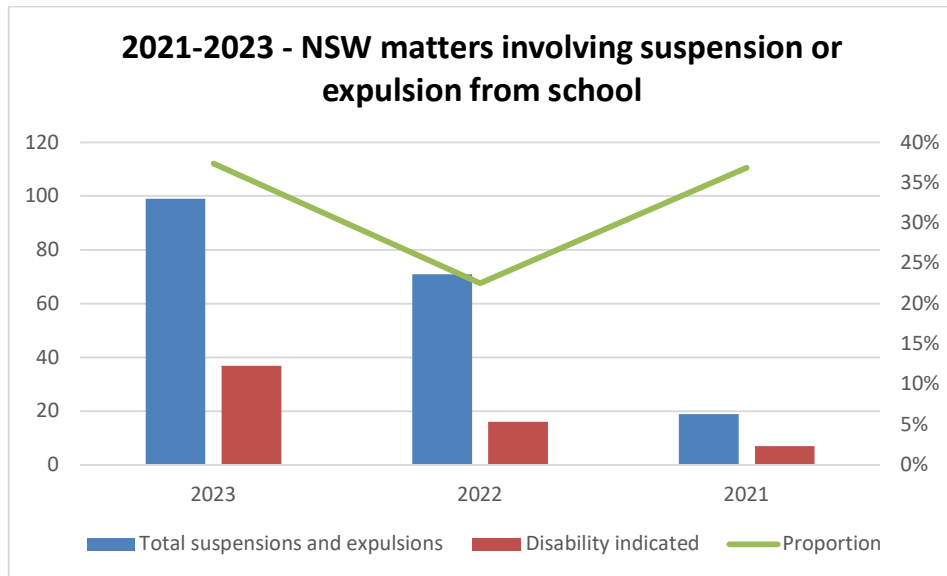
5. Our submissions are focussed on the following terms of reference: (a) the experiences of children and young people within educational settings and measures to better support students with disability; (j) the impact of policies regarding suspensions and expulsions; (m) whether existing regulatory and oversight mechanisms are sufficient to protect and promote the rights of children and young people with disability; and (p) measures to implement the Disability Royal Commission's recommendations in relation to inclusive education.
6. For the reasons set out in this submission, we recommend that the Committee consider:
  - a. reform of NSW anti-discrimination laws to provide greater protections for students who live with disability in educational settings, following the model of the *Equal Opportunity Act (2010)* (Vic)
  - b. measures for greater transparency and oversight of decisions about reasonable adjustments in NSW public schools
  - c. review of the NSW Suspension and Expulsion Procedures by or in consultation with disability education experts and students with lived experience and their families to provide greater protection for students who live with disability from exclusionary discipline
  - d. measures for greater transparency and oversight of decisions to limit the attendance of a student who lives with disability at school in circumstances where they are not suspended, including the publication of policies and procedures
  - e. review of the registration requirements for non-government schools in NSW to ensure they provide greater consideration of, and protection for, students who live with disability.
7. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) has also made detailed recommendations with respect to inclusive education in its final report. These include recommendations in relation to (among other things):
  - a. preventing the inappropriate use of exclusionary discipline against students who live with disability (recommendation 7.2)
  - b. improving policies and procedures on the provision of reasonable adjustments to students who live with disability (recommendation 7.3)
  - c. stronger oversight and enforcement of school duties (recommendation 7.11).
8. We welcome the Inquiry's consideration of measure to implement these recommendations, noting the NSW Government has yet to provide a formal response.

#### **Our work advising children and young people with disability about educational issues**

9. In 2023, the two areas in which we advised children and young people with disability (or their advocates) most were education and employment law. Our data for 2023 suggests that a high proportion of NSW clients who we advise about suspension or expulsion from school live with disability – at least 37%. Graph 1 shows a comparison of NSW with other states and territories.



10. Graph 2 shows the total number of NSW matters in which suspension and expulsion was an issue, and the number of these in which disability is indicated for the years 2021-2023 (we first started collecting this data in 2021). We note that our data relies on young people or their advocates disclosing a disability, and therefore likely underrepresents the true position.



11. The Disability Royal Commission found that students who live with disability are far more likely to be suspended than students without disability in public schools in all jurisdictions, and that of

the four disability types, students with a social or emotional disability<sup>3</sup> were most likely to be suspended. This is consistent with our experience. While we don't collect this data, anecdotally our experience is that the majority of NSW cases we see in which a young person has been suspended or expelled from school involve a student who lives with a disability that may impact their behaviour, such as Autism Spectrum Disorder (ASD), Attention-Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD) or a combination of these. In the vast majority of cases, these students are enrolled in mainstream public or private schools.

12. A 2023 study estimated that 1.3 per cent of children born in NSW developed ASD by age 12.<sup>4</sup> That study also found that children with ASD were more likely to live in regional and more disadvantaged areas. The NDIA has reported that for NDIS participants younger than 18, the most prevalent disability types are autism, developmental delay, psychosocial disability and intellectual disability.<sup>5</sup> These and other data speak to the importance that schools in NSW (and elsewhere in Australia) have the skills, facilities, policies, procedures and organisational cultures to ensure that children who live with ASD and other disabilities that may impact their behaviour receive and inclusive and effective education. We consider that the experiences of these students warrant particular consideration by the Committee.
13. There is evidence to suggest the significant detrimental effects that exclusionary discipline can have on students, which can include impacts ranging from decreased educational attainment and engagement to contact with the criminal justice system ('school-to-prison pipeline'). The Disability Royal Commission explains that exclusionary discipline refers to the temporary or permanent exclusion of a student from a classroom, extracurricular activities or a school as a whole in response to what is perceived as negative or disobedient behaviour. It can include suspension, exclusions and expulsions.<sup>6</sup> Given these serious effects, we have focused on suspensions and expulsions in this submission.
14. In our experience, neurodiverse students and their advocates often feel as though they are being suspended or expelled for behaviour that is directly connected with a disability. This can feel particularly unfair in circumstances where the student has experienced bullying (sometimes over a long period of time), and the behaviour is connected with, or a reaction to, that bullying. It can be difficult in these situations for schools to assess who is the primary instigator, and we have been told by some students with disability and their advocates that they feel they have received a more severe disciplinary response than students who are responsible for the bullying, and who may not live with disability.

### **1. Disability discrimination laws provide limited protection against exclusionary discipline**

15. The Disability Royal Commission's final report includes detailed discussion of disability discrimination laws, and recommends various amendments.

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<sup>3</sup> Defined as a 'disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment, or that results in disturbed behaviour'.

<sup>4</sup> Timothy C Nielsen et al, 'Estimating the Prevalence of Autism Spectrum Disorder in New South Wales, Australia: A Data Linkage Study of Three Routinely Collected Datasets (2023) *Journal of Autism and Developmental Disorders*.

<sup>5</sup> National Disability Insurance Agency, 'NDIS Quarterly report to disability ministers', Q3 2023-24, 31 December 2023, p 14.

<sup>6</sup> Disability Royal Commission, Final Report, Part A, p 161.

16. In NSW, private schools are excluded from the operation of the provisions in the Anti-Discrimination Act relating to disability discrimination in education,<sup>7</sup> although the Commonwealth disability discrimination laws apply.<sup>8</sup> Disability discrimination laws in other states and territories do not all have this limitation.<sup>9</sup> Among other things, it means that the NSW Anti-Discrimination Board is limited in the extent to which it has a comprehensive overview of the experiences of disability discrimination in educational settings in NSW.
17. NSW and Commonwealth disability discrimination laws also include a ‘comparator’ requirement. That is, to establish direct discrimination it must be proven that the educational authority treated the person with disability less favourably in similar circumstances than they treat or would treat a person without that disability.<sup>10</sup> The High Court’s decision in *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 has meant that it is extremely difficult for students who live with disabilities that affect their behaviour to establish that exclusionary discipline constitutes discrimination in NSW. The Disability Royal Commission also found that the comparator test is ‘complex and a barrier to people with disability proving they have experienced discrimination’.<sup>11</sup>
18. The NSW disability discrimination laws can be contrasted with the Victorian *Equal Opportunity Act (2010)*, which:
  - a. does not include the comparator test for direct discrimination,<sup>12</sup> and
  - b. includes an explicit requirement that an educational authority make reasonable adjustments for a person with a disability.<sup>13</sup>
19. Having regard to the Victorian legislation, and the Disability Royal Commission’s recommendations for amendments to the Commonwealth Disability Discrimination Act, we consider that there is significant scope for the NSW anti-discrimination laws to be strengthened to provide greater protection for students who live with disability.
20. **We recommend that the Committee consider reform of NSW anti-discrimination laws to provide greater protections for students who live with disability in educational settings, following the model of the *Equal Opportunity Act (2010)* (Vic).**

## 2. There is limited transparency over reasonable adjustments

21. In our experience there is limited transparency over reasonable adjustments in educational settings, and in particular in relation to:
  - a. what students and parents can reasonably request
  - b. the extent to which schools are implementing reasonable adjustments
  - c. review of decisions to deny or fail to implement requests for reasonable adjustments.

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<sup>7</sup> Anti-Discrimination Act 1977 (NSW), s 49L(3)(a).

<sup>8</sup> See for example, recommendations 7.1 and 7.2.

<sup>9</sup> See for example the Equal Opportunity Act 2010 (Vic).

<sup>10</sup> Anti-Discrimination Act 1977 (NSW), s 49B(1)(a); Disability Discrimination Act 1992 (Cth), s 5.

<sup>11</sup> Disability Royal Commission, Final Report, Part A, p 63.

<sup>12</sup> Equal Opportunity Act 2010 (Vic), s 8.

<sup>13</sup> Equal Opportunity Act 2010 (Vic), s 40.

22. In a public hearing into decision-making processes in NSW on the provision of adjustments for students who live with disability, the Disability Royal Commissions found that this is 'largely left to the judgment and discretion of educators, with very little departmental oversight'.<sup>14</sup> The Commission also observed it had received information that 'students with autism or barriers to communication can experience significant delays in receiving supports or may not receive them at all'.<sup>15</sup>
23. The Disability Royal Commission made a detailed recommendation about the provision of reasonable adjustments to students who live with disability (Recommendation 7.3).
24. While every case must be decided on its own merits, we consider that there would be significant benefits to:
- a. the publication of deidentified information about reasonable adjustments that have been made in relation to different types of disability in educational settings;
  - b. oversight within the Department of decisions relating to reasonable adjustments in public educational settings, and clear pathways for students or their parents to request a review of decisions;
  - c. the publication of deidentified information about review decisions made about reasonable adjustments by the Department.
25. **We recommend that the Committee consider measures for greater transparency and oversight of decisions about reasonable adjustments in NSW public schools.**

### **3. NSW suspension and expulsion policies for public schools provide limited oversight and alternatives for students who live with disability**

26. In NSW, suspensions and expulsions for public school students are governed by the 'Suspension and expulsion procedures' (Procedures).
27. Despite being updated in October 2022, and again in January 2024, these Procedures have not evolved to provide greater protection or alternatives for students who live with disability. These procedures only mention 'disability' four times, and in three of these disability is just one among a number of other factors (including developmental age, trauma etc) that need to be taken into account. The other reference requires decision-makers to consider reasonable adjustments.
28. The newest version of these Procedures has also removed the maximum number of suspensions allowed, and while appeals can be made against suspensions, there is no automatic Departmental oversight where students are suspended for a certain number of days, or receive a certain number of suspensions. This means that students whose parents or carers may not be in a position to challenge the way they are treated are likely to be disadvantaged.
29. While, under the Procedures, the purpose of a suspension is to allow the school appropriate time to implement appropriate supports to address complex or challenging behaviour/s, it is unclear whether this is effectively the outcome in all cases. Suspensions are also still viewed by

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<sup>14</sup> Disability Royal Commission, Final Report, Part A, p 175.

<sup>15</sup> Disability Royal Commission, Final Report, Part A, p 172.

some students and their parents as punitive, and for this reason can seem particularly unfair when imposed for behaviour that is connected with a disability.

30. Given the close connection between some disabilities and a student's behaviour, and the concern that students who live with certain disabilities are being suspended for exhibiting behaviours that are directly connected with a disability, we submit there is greater scope for these Procedures and the Student Behaviour Policy to adopt an approach that is more inclusive of students who live with disability. We recommend that these Procedures be reviewed with professionals with expertise in working with young people with Autism Spectrum Disorder and other disabilities, and students with lived experience and their families, to consider:
- a. greater guidance on the circumstances in which suspensions are appropriate for students who live with disability
  - b. effective and inclusive alternatives to suspensions for students who live with disability
  - c. greater guidance on resolving suspensions for students who live with disability, including when it may be appropriate to seek professional or expert advice
  - d. provisions for automatic Departmental oversight when the number of suspensions or days a student who lives with disability is suspended reaches a certain threshold.

31. We refer also to the Disability Royal Commission's recommendation 7.2 on preventing inappropriate use of exclusionary discipline against students who live with disability.

**32. We recommend that the Committee consider review of the NSW Suspension and Expulsion Procedures by or in consultation with disability education experts and students with lived experience and their families to provide greater protection for students who live with disability from exclusionary discipline.**

#### **4. Young people with disability and limited school hours**

33. We have in the past been contacted by parents or carers of children with disability who have expressed concern that their children are only allowed to attend school for a certain number of hours each day. In one case, the student was only allowed to attend school for one hour in the afternoon.

34. While in some cases this might be a reasonable adjustment or may be in the student's best interests, it is unclear whether there are Departmental policies or procedures that schools must follow when making decisions that limit a student's ability to attend school, in circumstances where they aren't suspended.

35. Given that such restrictions seriously impinge on a student's right to education, we submit that the Department should have clear and publicly available policies and procedures that schools must follow in these situations. These should include:
- a. circumstances in which this can be imposed, including consultation requirements with students and their parents or carers
  - b. measures to ensure that the student's right to education is upheld to the extent possible in the hours they aren't attending school



- c. automatic review after a certain period of time
- d. procedures to ensure Departmental oversight.

**36. We recommend that the Committee consider measures for greater transparency and oversight of decisions to limit the attendance of a student who lives with disability at school in circumstances where they are not suspended, including the publication of policies and procedures.**

#### **5. Accreditation requirements for private schools in NSW**

37. The Disability Royal Commission recommended that state educational authorities ‘review provisions governing the registration of non-government schools to impose obligations relating to exclusionary discipline in the non-government sector that are commensurate with those of the government sector’ (recommendation 7.2).
38. In NSW, the primary guide to registration requirements for non-government schools is the NSW Registered and Accredited Individual Non-government Schools Manual (September 2023) (the Manual). In our view there is scope for this Manual to promote more inclusive education for students who live with disability in non-government mainstream schools.
39. For example, while schools are required under the Manual to have and implement policies and procedures on behaviour management, identifying and providing support for students who live with disability, there is no requirement for these policies and procedures to be made publicly available. This is unlike the requirements for other policies such as policies on anti-bullying and on complaints.
40. Further, while the NSW Education Standards Authority does publish advice on Students with disability, this focuses on the disability discrimination legislation and the Disability Standards for Education 2005, and is very general in nature.
- 41. We recommend that the Committee consider review of the registration requirements for non-government schools in NSW to ensure they provide greater consideration of, and protection for, students who live with disability.**

#### **6. Conclusion**

42. We welcome the Committee’s work in this important area, and we look forward to reading the Committee’s report.

**Youth Law Australia**

29 February 2024

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