

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

29 February 2024

Acknowledgement of Country

Anti-Discrimination NSW acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this document.

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Introduction

Anti-Discrimination NSW (**ADNSW**) thanks **the NSW Legislative Council's Portfolio Committee No. 3 – Education** (the **Committee**) for inviting submissions to the inquiry into children and young people with disability in New South Wales educational settings.

About Anti-Discrimination New South Wales

ADNSW administers the *Anti-Discrimination Act 1977* (ADA) which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities. Sexual harassment, as well as vilification on the ground of race and religion, homosexuality, transgender status, HIV/AIDS status and religion is also unlawful.

ADNSW strives to eliminate discrimination in NSW by:

- Answering enquiries
- Resolving complaints
- Raising awareness about discrimination and its impacts through its Communications and Engagement team
- Managing applications for exemptions from the ADA
- Advising the government about discrimination issues

In July 2023, the NSW Attorney General asked the NSW Law Reform Commission (**NSW LRC**) to undertake a broad review of the ADA, to consider whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards. The review is currently ongoing.¹

Coverage for disability discrimination in education in the ADA

Disability discrimination in education is protected in section 49L of the ADA:

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of disability—
- (a) by refusing or failing to accept his or her application for admission as a student, or
 - (b) in the terms on which it is prepared to admit him or her as a student.

¹ [Anti-Discrimination Act review](#), NSW Law Reform Commission, accessed 8 February 2024.

- (2) It is unlawful for an educational authority to discriminate against a student on the ground of disability—
- (a) by denying him or her access, or limiting his or her access, to any benefit provided by the educational authority, or
 - (b) by expelling him or her, or
 - (c) by subjecting him or her to any other detriment.
- (3) Nothing in this section applies to or in respect of—
- (a) a private educational authority, or
 - (b) a refusal or failure to accept a person's application for admission as a student by an educational authority where the educational authority administers a school, college, university or other institution which is conducted solely for students who have a disability which is not the same as that of the applicant.
- (4) Nothing in subsection (1) (a) or (2) (b) renders it unlawful to discriminate against a person on the ground of disability where, because of the person's disability, the person requires services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority.
- (5) Nothing in subsection (2) (a) renders it unlawful to discriminate against a person on the ground of disability where, because of the person's disability, the person requires the benefit to be provided in a special manner and the benefit cannot without unjustifiable hardship be so provided by the educational authority.

Section 4 of the ADA defines an educational authority as 'a person or body administering a school, college, university or other institution at which education or training is provided'.

Subsections 49L(4) and (5) provide exceptions for all educational authorities to discriminate against people with a disability in circumstances where the person's admission, continued attendance or access to any benefit provided by the authority would cause unjustifiable hardship on the authority. Respondents to a disability discrimination complaint can raise this as a defence and argue that the costs of accommodating a student's needs would impose financial hardship on the institution.

The ADA also has protections against disability discrimination in the area of goods and services in section 49M, which includes an exception that allows discrimination based on a person's disability if the provision of the goods or services would impose unjustifiable hardship on the provider.

ADNSW receives complaints that relate to disability discrimination in educational settings in both the areas of education (respondents can include primary and secondary education providers) and goods and services (respondents can include early childhood education centres, long day-care centres and after school care providers), which are discussed below.

Unjustifiable hardship

ADNSW supports a consideration of whether the defence of ‘unjustifiable hardship’ should be retained in its current form in the ADA, and refers to approaches in other Australian jurisdictions. The *Disability Discrimination Act 1992* (Cth) (**DDA**) includes a prohibition against the failure to make reasonable adjustments in the definitions of direct and indirect discrimination.² The DDA also has exceptions to the DDA in circumstances where avoiding the discrimination would impose unjustifiable hardship on the discriminator.³ Other legislation, such as the *Equal Opportunity Act 2010* (Vic), create a positive duty for education providers to make reasonable adjustments for people with a disability in the areas of employment, education and services.⁴ The DDA has exceptions where the adjustments are not reasonable in the circumstances, or, if even after the adjustments are made, the person could not participate or benefit from the educational program, access the service or perform the requirements of the job.⁵

In its July 2022 review of Queensland’s *Anti-Discrimination Act 1991* (Qld), the Queensland Human Rights Commission (**QHRC**) recommended that although the concept of ‘unjustifiable hardship’ should be retained in the Act, it should be replaced with a positive, standalone duty to make reasonable accommodations for a person with disability in all areas. In assessing whether an accommodation is reasonable, consideration should be given to a non-exhaustive list of criteria.⁶ Similarly, the Western Australia Law Reform Commission’s (**WA LRC**) May 2022 review of the *Equal Opportunity Act 1984* (WA) recommended that there should be a positive, stand-alone duty to make reasonable adjustments (and consideration should be given to extending this to all protected attributes and areas of life), unless it would impose unjustifiable hardship on the holder of the responsibility (taking into account all the relevant circumstances of the case).⁷

ADNSW supports the NSW LRC consulting with stakeholders and the community to determine whether the current provisions in the ADA strike the appropriate balance between ensuring the provision of access to education for people with a disability with the effect of making accommodations on providers.

Exceptions for ‘private educational authorities’

The ADA provides exceptions from the ADA for ‘private educational authorities’ (including religious schools) which allow them to discriminate on the ground of disability in the areas of

² *Disability Discrimination Act 1992* (Cth) ss. 5(2), 6(2).

³ *Ibid* ss. 21B, 29A.

⁴ *Equal Opportunity Act 2010* (Vic) ss. 20(2), 33, 40, 45.

⁵ *Ibid* ss. 23, 34, 41, 46.

⁶ [Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991](#), Queensland Human Rights Commission, July 2022, p. 129. In April 2023, the Queensland Government responded to the Building Belonging report and gave in-principle support to all 122 recommendations – see [Final Queensland Government response to the Queensland Human Rights Commission’s report Building belonging: Review of Queensland’s Anti-Discrimination Act 1991](#).

⁷ [Review of the Equal Opportunity Act 1984 \(WA\)](#), Project 111 Final Report, Law Reform Commission of Western Australia, May 2022, pp. 155 to 164.

employment (section 49D) and education ([section 49L](#)). A 'private educational authority' is defined in section 4 of the ADA as:

a person or body administering a school, college, university or other institution at which education or training is provided, not being—

(a) a school, college, university or other institution established under the (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or

(b) an agricultural college administered by the Minister for Agriculture.

This means that a private educational authority is allowed to discriminate on the ground of disability against staff in employment, and students in admission, accessing benefits and subjecting students to any detriment. The exceptions for private educational institutions were introduced into the ADA in 1981 when the ground of physical impairment became a protected ground.⁸ ADNSW's view is that these broad exceptions are not justified today, and consideration should be given to limiting or removing them. Limiting access to private educational institutions for students with a disability means creating unequal access to education for children in NSW, when private schools may be better resourced and equipped to respond to the often-complex needs of students with a disability. Private schools are the recipients of public funding which should carry a responsibility to provide access to all.⁹ Similar exceptions do not exist federally and in other states and territories and NSW is the only jurisdiction in Australia that allows private educational institutions to discriminate based on disability.

Difference between the Anti-Discrimination Act (1977) and the Disability Discrimination Act (DDA)

The complex and overlapping legal protections that exist across jurisdictions in Australia can be challenging to navigate for people who experience disability discrimination in education. In NSW, a complainant can choose to pursue a discrimination complaint under the DDA with the Australian Human Rights Commission (**AHRC**) or with ADNSW.

Under [section 46PH](#) of the *Australian Human Rights Commission Act 1986*, the AHRC can terminate a complaint for several reasons, including if there is an ongoing complaint with another statutory authority. Individuals who are unfamiliar with the jurisdictions may risk losing their rights by bringing a complaint to ADNSW that would be better dealt with by the AHRC. Additionally, under [section 92](#) of the ADA, the President may decline a complaint during an investigation if she is satisfied that the complaint is being or should be dealt with by another person or body.

⁸ [Anti-Discrimination Amendment Act \(NSW\) 1981](#).

⁹ [Ending the capital funding divide in Australia's schools](#), p.33

The legal test for unlawful discrimination is different under the ADA and the DDA. Under section 5(2) of the DDA, a person (the discriminator) is deemed to have directly discriminated against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

This may be difficult to navigate for individuals who experience discrimination in education.

For example, in *CZH v University of Technology, Sydney*, the Applicant made a complaint under the ADA and mistakenly imported a test for 'reasonable adjustments' under section 5(2) of the [DDA](#) which was not appropriate under the ADA.

The *Purvis* decision and the impact on decisions in NSW

In *Purvis v New South Wales*¹⁰, the High Court considered disability discrimination in education, in particular direct discrimination under the DDA. *Purvis* has been applied in NSW by courts and tribunals in relation to the definition of 'disability' and in applications of the 'comparator test' in direct discrimination under the ADA.¹¹

Purvis concerned the treatment of Daniel Hoggan who was a student at South Grafton High School in NSW. Daniel suffered from brain damage when he was around 6 or 7 months old causing intellectual disabilities, visual difficulties, epilepsy, and behavioural problems¹². Daniel was suspended from school 5 times and eventually excluded due to repeatedly assaulting other pupils and teachers.¹³

Mr Purvis lodged a complaint of disability discrimination with the then Human Rights and Equal Opportunity Commission (HREOC) which found that Daniel's treatment constituted discrimination in breach of the DDA. HREOC determined that it was appropriate to compare the treatment of Daniel with another student at South Grafton High School, and because no other student had been suspended or expelled in the relevant year, Daniel had been treated less favourably than other students without his disability. The State appealed the decision to the Federal court which found that the Commission erred in its decision making and set aside its

¹⁰ [Purvis v New South Wales \[2003\] HCA 62; 202 ALR 133](#) ('*Purvis*').

¹¹ [Peng v Secretary for the NSW Ministry of Health in respect of the NSW Health Service, NSW Health Pathology Division \[2018\] NSWCATAD 210](#).

¹² *Purvis* [29], [183]

¹³ *Ibid* [175-6].

decision, remitting the matter back to the Commission.¹⁴ Purvis appealed to the Full Court of the Federal Court, which dismissed the appeal.¹⁵

The legal ramifications of the *Purvis* decision are related to the definition of disability and the identification of an appropriate comparator when considering direct discrimination. In *Purvis*, there was general agreement among judges of the High Court that the definition of ‘disability’ in the DDA includes behaviour resulting from the disability.¹⁶ However, in contrast to the broader approach used by HREOC where the comparator was a student without the disability and disturbed behaviour, the majority judgement of the High Court in *Purvis* found that in determining differential treatment the comparator would be a person without a disability who engaged in the same behaviour.

The then NSW Administrative Decisions Tribunal (NSWADT) followed *Purvis* in *Chinchen v NSW Department of Education and Training*.¹⁷ The Applicant alleged that their child Rhys was discriminated on the ground of his learning disability, dyspraxia. Adopting the ‘comparator’ test in *Purvis*, the Tribunal found that “the correct comparison in the present case is between Rhys and an ‘able student’ (either actual or hypothetical) in the extension class who is in the same, or not materially different, circumstances (‘comparable circumstances’), in other words, a student that has difficulty completing their tasks in class for a reason other than the particular disability.”¹⁸

The High Court’s narrow approach to the construction of an appropriate comparator in *Purvis* has been the subject of controversy, with some commentators criticising the approach as unfavourable to the those with disabilities.¹⁹

Disability Discrimination complaints at ADNSW

A core function of ADNSW is to provide free and impartial conciliation services of discrimination complaints in NSW. Disability discrimination is the most prevalent area of enquiries and complaints at ADNSW. Data collected by ADNSW shows that since 2011 disability discrimination has consistently been the most common type of discrimination raised in enquiries. In the 2021-2022 financial year, disability discrimination accounted for approximately 40.8% of the total complaints received by ADNSW.²⁰ Between July 2018 and June 2023, ADNSW received 69 complaints on the ground of disability in the areas of goods and services

¹⁴ Ibid [83]

¹⁵ *Purvis v New South Wales (Department of Education & Training)* (2002) 117 FCR 237

¹⁶ Ibid [152–3].

¹⁷ *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180

¹⁸ Ibid [316].

¹⁹ Colin D Campbell, *A Hard Case Making Bad Law: Purvis v New South Wales and the Role of the Comparator Under the Disability Discrimination Act 1992 (Cth)*, [2007] FedLawRw 4.

²⁰ <https://antidiscrimination.nsw.gov.au/documents/annual-reports/anti-discrimination-annual-report-2021-22.pdf>.

and education (early childhood and primary school only).²¹ Similarly, ADNSW received many enquiries related to alleged disability discrimination in early childhood settings as well as primary schools.

The ADA has a number of exceptions, some of which are not aligned with community and societal expectations. As outlined above, the ADA provides broad exceptions for ‘private educational authorities’, and as a result, disability discrimination complaints against private and religious schools are not covered by the ADA.

Financial year	Total number of complaints received by ADNSW	Complaints received on the ground of disability	Percent of total complaints on the ground of disability	Complaints on the ground of disability in the areas of education and good and services	Percent of complaints on the ground of disability in the areas of education and good and services
2018-2019	1027	254	24.7%	16	6.2%
2019-2020	943	262	27.8%	7	2.67%
2020-2021	1109	329	29.7%	12	3.64%
2021-2022	1626	664	40.8%	14	2.1%
2022-2023	1833	519	28.3%	20	3.9%
TOTAL	6538	2028	31.01%	69	3.40%

Table 1: Complaints received by ADNSW including complaints received on the ground of disability in the areas of education and good and services – July 2018 to June 2023.

Given the individualised nature of the complaints process under the ADA and the exceptions available in the ADA for ‘private educational authorities’, it is important to note that the statistics in Table 1 likely only reflect a very small proportion of issues arising in early childhood educational settings in NSW. A recurring trend in complaints received by ADNSW is the power differential between complainants and respondents. Complainants may not feel confident going through the conciliation process, particularly when they are not legally represented. 23.1% percent of complaints lodged with ADNSW reached an agreed settlement between the parties, which can involve financial compensation, an apology or a commitment by the provider to put in measures to better support children with disabilities. The outcome of a discrimination complaint can depend on the socio-economic status and resources of the family involved, access to legal advice and the complainants understanding of and ability to navigate anti-discrimination law and the complaints process. Almost one third of the complaints lodged with ADNSW were withdrawn as the complainant did not wish to proceed.

²¹ This figure does not represent the entirety of complaints as it does include complaints against private educational institutions.

Experience of children and young people with disability in educational settings

The nature of formal complaints and enquiries received by ADNSW under the ADA and the anecdotal reports received by ADNSW's Communications and Engagement team show that the experience of children and young people with a disability in educational settings varies depending on several circumstances. Complaints received by ADNSW primarily relate to children with psychosocial disabilities, rather than physical disabilities.

Australia's Disability Strategy 2021-2031 states that when children and young people with a disability have positive educational experiences, they are more likely to remain engaged in learning.²² Complaint data from July 2018 to June 2023 analysed by ADNSW highlights significant disparities between the experiences of children in rural and remote settings compared with those in metropolitan areas. More than half of the complaints that ADNSW received during this period were from remote and rural areas. This aligns with existing evidence that shows that there are access challenges regarding early childhood education and care services in regional and remote communities.²³

Trends that have emerged in complaints received by ADNSW are mostly related to behavioural issues and include:

- Termination of care without parents being notified beforehand;
- Reduction of hours of care leading to parents having to find alternative care arrangements;
- Refusal of enrolment when education centres are made aware of the special needs involved; and
- Children being refused to attend excursions or parents being called to accompany their children on excursions to provide one-on-one supervision to their children.

The following case studies demonstrate the issues parents and carers face when accessing early childhood education:

Case Study 1:

Sam attended an Early Learning Centre. Sam had been diagnosed with global development delay, which his parents stated caused "hyperbusiness" and at times impulsive behaviour. Sam's parents alleged that the Centre unlawfully discriminated against their son on the ground of disability, in the provision of goods and services, when without notice or warning, it cut his preschool hours. It later cut Sam's hours further, leaving his parents unable to physically attend work.

²² [Australia's Disability Strategy 2021-2031](#);p.23.

²³ [Dickinson, H., Smith, C., Yates, S., Faulkner, A. \(2022\) Taking the first step in an inclusive life – experiences of Australian early childhood education and care. Report prepared for Children and Young People with Disability Australia \(CYDA\), Melbourne; p.41.](#)

Sam was approved for funding under NDIS; however, the Centre did not consider this, due to an alleged unilateral decision to cut attendance hours. The matter was resolved at a conciliation conference and the parties agreed to a reinstatement of hours and extra-gratia payment to the complainant to cover her loss.

Case Study 2

Adam and Karen lodged a complaint on behalf of their son Troy, against a long day care centre. Troy had a range of disabilities including Global Development Delay, hearing loss, ADHD, and physical dyspraxia. Adam and Karen felt the centre had discriminated against Troy when the centre decided to move Troy to another class, away from his peers and friends without consultation. Adam and Karen said the move occurred without any consideration or interventions being implemented which had a disruptive and negative impact on Troy, causing him to lash out at educators and peers. The centre responded to Troy's reaction by threatening to reduce the number of attendance days, and ultimately expelled Troy from its centre.

Adam and Karen said that the centre refused their requests for a meeting and failed to implement the agreed Individual Support Program. The centre denied that it had unlawfully discriminated against Troy and stated that the decision to move Troy to another class was due to frequent and lengthy one-on-one support, which resulted in educators being unable to adequately supervise the rest of the children in their care. The centre said that it advised Adam and Karen of the move six months in advance and explained that the enrolment was ultimately terminated due to escalating behaviours, which posed a significant risk to the health and safety of other children in their care.

The complaint was resolved at a conciliation conference where the parties agreed to a number of undertakings. These included:

- training for educators on working with children with additional needs;*
- commitment to an agreed process for advising parent when moving a child to another part of the centre;*
- amending the centre's "end of care" policy and process; and an undertaking that the complaint would not impact on the centre's care provided to Adam and Karen's daughter Emily who was also enrolled at the centre.*

Experience of teachers, educators and learning support staff

ADNSW's analysis of complaint data indicates that early childhood educational institutions face several challenges due to lack of expertise and strategies to deal with behavioural disorders, limited resources and the need to preserve the health and safety of other children and staff. Respondents have advised that at some point they had to terminate care or reduce hours of attendance to maintain the recommended staff- children ratio in centres. This is common in early childhood education centres and in Outside School Hours Care. However, most respondents to complaints advise they have responded appropriately to accommodate students

with additional needs and have contacted specialist service providers to provide extra support to children.

NSW Department of Education initiatives like [Disability and Inclusion Program](#) and [Early Childhood Inclusive Education Scholarships Program](#) assist to mitigate these issues.

ADNSW stakeholders have expressed their concerns about the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability related to inclusive education, in particular the abolition of special schools, which removes choice for students with significant disability needing substantial support.

Impact of inadequate levels of support and the benefits of having appropriate support

Complainants alleging disability discrimination in educational settings in complaints to ADNSW have highlighted the problems they face when educational institutions do not provide adequate support to their children. Access to assistance through the National Disability Insurance Scheme (**NDIS**) is random and variable and often smaller, less well-resourced childcare centres will raise the defence of unjustifiable hardship when they are not aware of the support they can access through the NDIS. Parents have described the mental and physical burden when their children are expelled from or have restricted access to care and the economic impacts on their family income when they have to stop working to care for their children.

Another issue raised in complaints is the unreliable communication channels between education centres and families who have children with disabilities. In some instances, families will only be made aware of incidents occurring in educational settings when they are called to pick up their children or when care is terminated without notice. Families also claim in complaints that their child's enrolment in care has been refused due to not having a medical diagnosis.

As suggested in the Australia's Disability Strategy 2021-2031, parents and families with children with disability need support and assistance to achieve the child's health and development goals. This will also help families and parents manage their complex parenting responsibilities and environment.²⁴

ADNSW thanks the Committee for the opportunity to provide a submission in response to the Inquiry into children and young people with disability in New South Wales educational settings.



Jackie Lyne
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Anti-Discrimination NSW

²⁴ [Australia's Disability Strategy 2021-2031](#); p.22

We are committed to eliminating discrimination and promoting equality and equal treatment for everyone in New South Wales, including by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change.

Enquiries and complaints

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