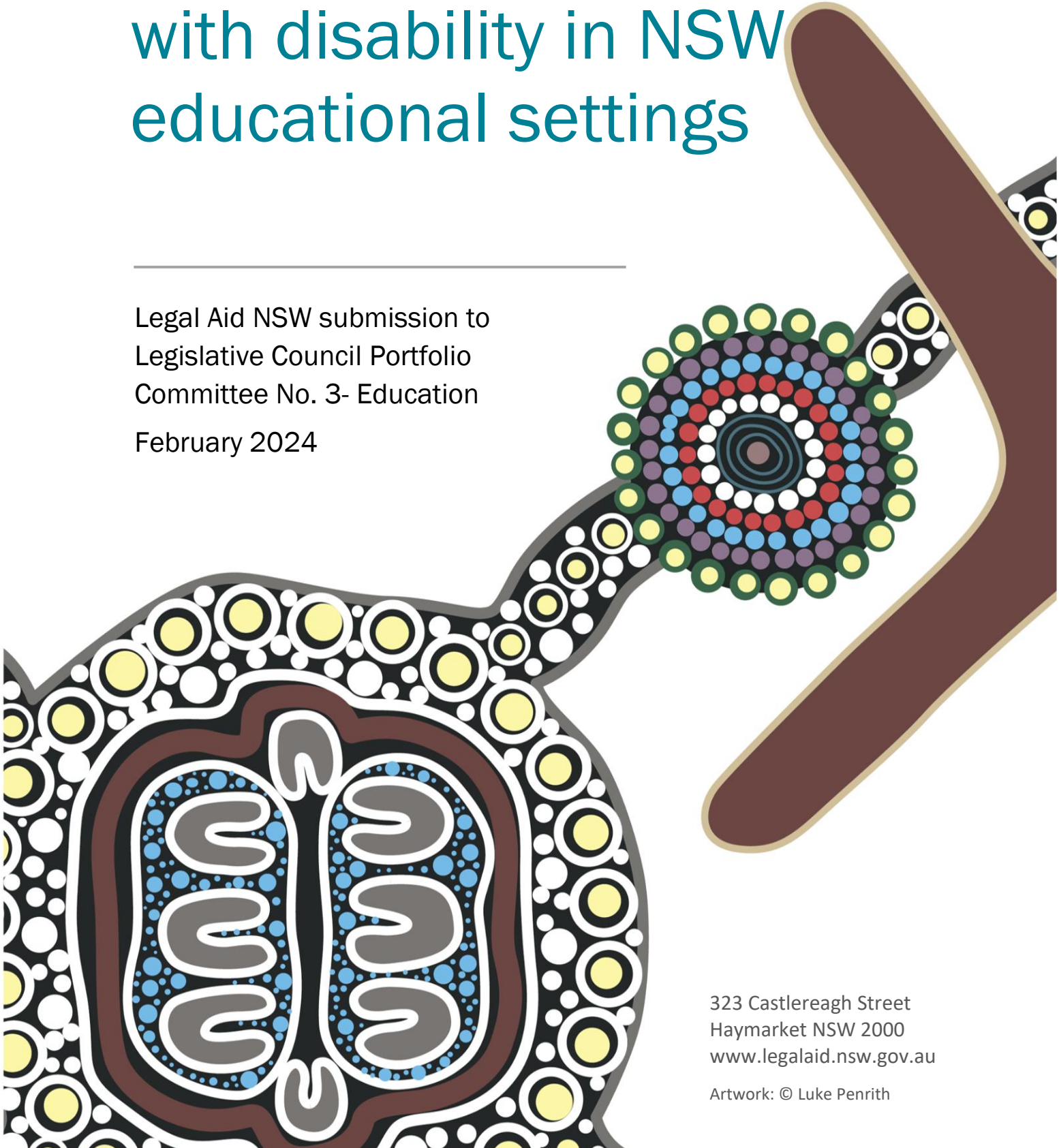


Inquiry into children and young people with disability in NSW educational settings

Legal Aid NSW submission to
Legislative Council Portfolio
Committee No. 3- Education
February 2024

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdiction

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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2. Executive summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Legislative Council Portfolio Committee No. 3 *Inquiry into children and young people with disability in NSW educational settings*.

Legal Aid NSW assists many children with legal matters. Our criminal law division provides specialised advice and representation to children involved in criminal cases in the Children's Court of NSW (**Children's Court**). Through our family law division, Legal Aid NSW provides specialist advice and representation for children in care and protection cases before the Children's Court. Our Children's Civil Law Service (**CCLS**) provides a targeted and holistic legal service to children identified as having complex needs, particularly those in out of home care (**OOHC**).¹

Legal Aid NSW supports children with disability being able to attend school and participate on an equal basis with others, and to maximise their learning, social connection and life opportunities. To enable this to occur this submission calls for:

- greater and more flexible use of adjustments²
- greater guidance and transparency around the use of adjustments
- legislative, procedural, and operational reform to overcome the existing barriers to safe, equal and inclusive education for children with disability, in line with those recommended by the Disability Royal Commission's final report on inclusive education, employment and housing (**DRC**)
- limits on exclusionary discipline for children with disability, and
- legislative reform to reduce the use of restrictive practices on children with disability, and to prohibit the use of certain dangerous restrictive practices completely.

This submission also examines:

- The overrepresentation of educational disengagement among children with disability who reside in OOHC. To address this issue we recommend greater collaboration between the NSW Department of Education (**Education Department**), NSW Health and the Department of Communities and Justice (**DCJ**).
- The prevalence of educational disengagement among disadvantaged children involved with the criminal justice system, and how this can be linked to undiagnosed disability. To address this, we recommend changes to Education Department policies, and greater access to screening to improve early diagnosis.
- Issues navigating the National Disability Insurance Scheme (**NDIS**) in educational settings. We recommend greater connection between the Education Department and the NDIS, and the establishment of foundational supports at a state level.

¹ **OOHC** is defined as overnight care for children who are unable to live with their families due to child safety concerns and includes foster care, placements with relatives or kin, placements made for the purpose of providing respite for parents and/or carers and residential care (Australian Institute of Health and Welfare, *Child Protection Australia 2020-2021*, Web Report. 15 June 2022, p 43)

² This submission uses the phrase "adjustments" rather than "reasonable adjustments". From our observation, this seems to be the more acceptable term in the disability community and is reflected in the recommendations of the Disability Royal Commission to remove the requirement of "reasonableness" from the legislation.

- The overrepresentation of children with disability suffering school refusal and how this can result in compulsory schooling orders, which can be counterproductive.

Legal Aid NSW supports the implementation of many of the findings of the Disability Royal Commission, which are referred to throughout this submission.

Recommendations:

Recommendation 1:

- a) The NSW Department of Education develop and deliver training to strengthen and promote an understanding of, and compliance with, relevant laws, including anti-discrimination laws, and standards across the NSW teaching profession. Such training should also explore issues affecting the participation of students with disability, informed by data and monitoring of trends related to students with disability.
- b) The NSW Department of Education and the non-government school sector should work together to identify and implement measures to build the capacity of schools to provide adjustments for students in line with the requirements of the *Disability Standards for Education 2005*.
- c) The NSW Department of Education should develop guidelines, regulations, rules and policies to ensure adjustments are appropriately used and that schools comply with obligations under the *Disability Standards for Education 2005* (Cth).
- d) The NSW Department of Education should develop procedures to ensure greater transparency and record keeping around the provisions of adjustments.³

Recommendation 2: The NSW Government should implement the aspects of recommendations 7.1, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10, 7.12 and 7.13 of the Disability Royal Commission Volume 7 Final Report on inclusive education, employment and housing⁴ that are outlined at pages 11 and 12 of this submission.

Recommendation 3: The NSW Department of Education should undertake a thorough review of their regulations, rules and policies to ensure the inappropriate use of exclusionary discipline against students with disability is prohibited. These instruments should adopt the principle that exclusionary discipline must be avoided unless necessary as a last resort to avert the risk of serious harm to the student, other students or staff.⁵

Recommendation 4: That the NSW Government legislate to ensure that the restraint and seclusion of children in school settings is only used:

- in response to a serious risk of harm to a person with disability or others
- as a last resort, after other strategies have been explored and applied
- in the least restrictive way available
- for the shortest time possible, and
- only to the extent necessary to reduce the risk of harm.⁶

Recommendation 5: The NSW Government should enact legislation to prohibit the use of the following:

- the use of restrictive practices as a means of coercion or retaliation, or a form of discipline, punishment or threat
- the use of restrictive practices in response to property destruction
- the use of restrictive practices as a behaviour support strategy
- the use of restrictive practices for reasons of convenience
- the use of restrictive practices to enforce the compliance of a student in undertaking personal care that is non-urgent and does not present a risk to the student
- life threatening physical restraints, including:
 - physical restraints that restrict a student's breathing or harm the student by covering the student's mouth or nose, or in any way restricting breathing

³ This recommendation was adopted from recommendation 7.3 of the Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023).

⁴ A full list of the recommendations by the Disability Royal Commission that relate to inclusive education can be found [here](#).

⁵ This recommendation was adopted from recommendation 7.3 of the Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023)

⁶ Ibid recommendations 6.35 – 6.40.

- taking the student to the ground into the prone or supine position
- causing hyperextension or hyperflexion of joints or applying pressure to the neck, back, chest or joints
- deliberately applying pain to gain compliance
- causing the student to fall
- having a person sit or kneel on the student
- chemical restraints
- mechanical restraints, and
- restrictive practices that involve the denial of key needs, such as food and water.⁷

Recommendation 6: That the NSW Government develop and implement policies between Department of Communities and Justice’s Child Protection Division and the Department of Education that seeks to maximise school engagement of children in out of home care.

Recommendation 7: The NSW Department of Education should review their policies and procedures relating to student behaviour and suspension and consider whether a greater focus should be placed on investigating and addressing the cause of problematic behaviour rather than punishing it. This could include improving communication between education, child protection, and health to facilitate screening of and treatment for children at an early stage when they first show signs of complex trauma, mental health issues or disabilities.

Recommendation 8: The NSW Government should review their child health and development screening programs to identify opportunities to expand them and improve early diagnosis of disabilities.

Recommendation 9:

- a) The NDIA, the Australian Education Department, and state and territory education departments should develop a plan to better connect the NDIS and education systems to improve educational outcomes for children with disability.
- b) The NSW Government should implement the NDIS Review recommendation to establish additional foundational supports for children in educational settings including by:
 - i. investing in early supports for children with emerging developmental concerns and disabilities,⁸ and
 - ii. investing in a capacity building program for families and caregivers of children with developmental concerns and disabilities.⁹

Recommendation 10: The NSW Department of Education should develop an action plan on school refusal in collaboration with health and education professionals, service providers, and people with lived experience of school refusal. This plan should have a particular focus on neurodivergent children and children with mental health challenges.¹⁰

Recommendation 11: The NSW Department of Education should investigate ways to increase the flexibility of education delivery, including by:

- identifying ways to enhance flexibility in mainstream school settings for children experiencing school refusal
- facilitating easier access to distance education and home schooling, and
- facilitating the provision of more alternative and specialist school settings that cater for students experiencing school refusal.¹¹

⁷ This recommendation was adopted from recommendation 6.36 of Senate Committee on Education and Employment report on the national trend of school refusal and related matters. (released August 2023).

⁸ This recommendation was adopted from recommendation 1, action 1.8 of the of the NDIS Review.

⁹ Ibid, action 1.12.

¹⁰ This recommendation was adopted from recommendation 6 of Senate Committee on Education and Employment report on the national trend of school refusal and related matters (released August 2023).

¹¹ Ibid recommendation 5.

3. Barriers to safe, quality and inclusive education for children with disability in schools, early childhood education services and other educational settings

Legal Aid NSW assists clients with matters arising from the treatment of students with disability by schools, including schools failing to make adjustments to assist students with disability to fully participate in their education. We consider this is often due to factors including:

- a lack of consultation with parents and carers of children with disability in order to identify adjustments that could be made under the *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**) and the *Disability Standards for Education 2005* (Cth) (**Education Standards**)¹²
- a lack of clarity in the Education Standards regarding what is required to identify and implement adjustments for students with disability
- need for improved understanding of specific disabilities, and obligations under discrimination law and the Education Standards
- inadequate resourcing to support schools to comply with their obligations under discrimination law and the Education Standards
- a lack of clear guidance for schools, parents or students regarding when discrimination is lawful under exceptions in anti-discrimination laws and the Disability Discrimination Act, and
- assumptions that certain conduct is exempt under anti-discrimination laws such that further efforts are not made to explore adjustments.

Legal Aid NSW assists clients with legal proceedings for non-compliance with the Disability Discrimination Act and the Education Standards. The below case study highlights some of the barriers families face when requesting adjustments:

Margaret's Story¹³

Your Story Disability Legal Service¹⁴ assisted a Margaret and her teenage son Edward who was experiencing challenges at school.

Edward had numerous diagnosed disabilities and was well supported by his family and a team of specialists. Edward's team of specialists recommended that his school make adjustments to assist him with learning and practising appropriate social interactions.

Edward's school did not follow the recommendations of his treating specialists which meant Edward did not receive the support needed to ensure full participation in the school setting. Instead, the school took a punitive approach to Edward's behaviour, restricted his social interactions with other students, and pressured Margaret to agree to enrol Edward in a specialist educational setting, despite Margaret's clearly stated preference that Edward remain in mainstream schooling.

While Edward had a Personalised Learning Support Plan in place, the adjustments were not being implemented consistently by the school and the school showed no desire to work with Edward's treating team to ensure his needs were being met and he had access to education.

¹² Under the *Disability Standards for Education 2005* (**Education Standards**), schools are required to provide 'reasonable adjustments' to ensure that students with disability can access and participate in education on the same basis as students without disability.

¹³ This case study has been de-identified.

¹⁴ Your Story Disability Legal Support assist people with disability, their families, carers, supporters and advocates who wished to tell their story to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. They are a joint project of National Legal Aid and National Aboriginal and Torres Strait Islander Legal Services, funded by the Commonwealth Attorney General's Department (June 2023).

The relationship between the school and Margaret broke down and the school began limiting the input Margaret and the treating specialists had in discussing Edward's needs in the school environment.

Adjustments are a crucial tool to enable many children with disability to comfortably and meaningfully engage in education. Legal Aid NSW recommends the development of guidelines to ensure adjustments are available and appropriately used, and that schools comply with their obligations under the Education Standards. We also encourage greater transparency around the provision of adjustments and more streamlined complaint processes for when requests for adjustments are refused.

Barriers faced by children with disability can have significant impacts on school attendance. Often, by the time they are resolved, students have lost many months of education. This can lead to social isolation and adversely impact the young person's ability to fully participate in social and economic opportunities as an adult.

The below case study highlights how OOHC can contribute to instability and disengagement from education (discussed below). However, it is also an example of a school applying a discretionary policy¹⁵ in an inflexible way, resulting in exclusion from school:

Mohamed's Story¹⁶

Legal Aid NSW assisted Mohamed, an Aboriginal teenager residing in residential OOHC who had been diagnosed with a neurodevelopment disorder.

Mohamed had been disengaged from school for the previous few years due to family/care instability but was trying to enrol in a regional public primary school again.

The school asked to see various documents before accepting the enrolment. This included a Behaviour Support Plan, to enable them to complete a risk assessment.

Mohamed's carer failed to provide the paperwork for several months, resulting in Mohamed being unable to attend school during this time.

Recommendation 1

- a) The NSW Department of Education develop and deliver training to strengthen and promote an understanding of, and compliance with, relevant laws, including anti-discrimination laws, and standards across the NSW teaching profession. Such training should also explore issues affecting the participation of students with disability, informed by data and monitoring of trends related to students with disability.
- b) The NSW Department of Education and the non-government school sector should work together to identify and implement measures to build the capacity of schools to provide adjustments for students in line with the requirements of the *Disability Standards for Education 2005*.
- c) The NSW Department of Education should develop guidelines, regulations, rules and policies to ensure adjustments are appropriately used and that schools comply with obligations under the *Disability Standards for Education 2005 (Cth)*.

¹⁵ We note there is no formal requirement for students to provide behaviour support plans prior to enrolment.

¹⁶ This case study has been de-identified.

- d) The NSW Department of Education should develop procedures to ensure greater transparency and record keeping around the provisions of adjustments.¹⁷

The Disability Royal Commission's final report on inclusive education, employment and housing (**the DRC report**)¹⁸ found mainstream schools need major reforms to overcome the barriers to safe, equal and inclusive education. Legal Aid NSW supports the implementation of the following measures (recommended by the Disability Royal Commission) to address these barriers:

1. That the NSW Government undertake legislative reform aimed at ensuring students with disabilities cannot be excluded from mainstream schools and greater transparency around enrolment refusal and cancellation.¹⁹
2. That the NSW Government undertake legislative reform creating a legal entitlement for students with disability to enrol in their local mainstream school, subject only to 'unjustifiable hardship'.²⁰
3. The Education Department should end gatekeeping in mainstream schools by requiring a central record of enrolment refusal/cancellation and establishing an independent review process to enable decisions to be challenged.²¹
4. The Education Department should disseminate clear, accessible, transparent material for students with disability and their families on their rights, the obligations of schools relating to applications to attend a local school, and review processes.²²
5. Over time, non-mainstream schools should be relocated within (or near) mainstream schools, and partnerships between these schools should be created to ensure regular interactions and activities between students.²³
6. Careers guidance and transition support services should be developed for students with a disability to aid their transition from education to employment.²⁴
7. The Education Department should update their policies and guidance for schools to support the implementation and continuous improvement of requirements for student and parental communication and relationships. These should include clear and accessible material for students with a disability and be co-designed with people with a disability and their families. Material should also be developed specifically for Aboriginal students and their families.²⁵
8. An inclusive education unit should be established within the Education Department and should include Aboriginal expertise.²⁶
9. A human rights approach to inclusive education should be embedded across teachers' careers.²⁷
10. Professional development strategies based on an inclusive education capability framework should be created and implemented for principals, teachers and teaching assistants.²⁸
11. The Education Department should set employment targets for people with disability in schools to increase disability employment.²⁹

¹⁷ This recommendation was adopted from recommendation 7.3 of the Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023).

¹⁸ Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023).

¹⁹ See Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023), recommendation 7.1.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid recommendation 7.4.

²⁴ Ibid recommendation 7.5.

²⁵ Ibid recommendation 7.6.

²⁶ Ibid recommendation 7.7.

²⁷ Ibid recommendation 7.8(a).

²⁸ Ibid recommendation 7.8(c).

²⁹ Ibid recommendation 7.8(d).

12. The Education Department should employ practitioners specialising in inclusive teaching, behavioural support and deaf education as well as qualified Auslan interpreters.³⁰
13. The NSW Education Minister, in consultation with Education Ministers from other states and territories, should develop a consistent procedure for collecting data to enable consistent and comparable reporting on educational experiences and outcomes of students with disability.³¹
14. The Education Department should make improvements to complaint management, such as including new duties and measures regarding the complaint management procedures in the Education Standards to assist in achieving national quality and consistency, and embed new complaint handling duties in registration requirements for schools.³²
15. Needs based funding should be implemented across NSW.³³
16. The NSW Education Minister, in consultation with Education Ministers from other states and territories, should develop a 'National Roadmap to Inclusive Education' for students with disability.³⁴

Recommendation 2

- The NSW Government should implement the aspects of recommendations 7.1, 7.4, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10, 7.12 and 7.13 of the Disability Royal Commission Volume 7 Final Report on Inclusive education, employment and housing³⁵ that are outlined at pages 11 and 12 of this submission.

³⁰ Ibid recommendation 7.8(e).

³¹ Ibid recommendation 7.9.

³² Ibid recommendation 7.10.

³³ Ibid recommendation 7.12.

³⁴ Ibid recommendation 7.13.

³⁵ A full list of the recommendations by the Disability Royal Commission that relate to inclusive education can be found [here](#).

4. Suspensions and expulsions

A failure to appropriately support students with disability may create or exacerbate challenging behaviours, and lead to students being excluded from school. Disability can be interpreted by schools as problematic behaviour and dealt with through discipline rather than appropriate adjustments and supports. The behaviour of students with disabilities such as autism spectrum disorder (**ASD**) or attention deficit hyperactivity disorder (**ADHD**) can be framed as 'bad behaviour' with suspensions and exclusion often seen as the only option, even though more appropriate and less restrictive alternatives may be available. The below case study provides an example of this:

Tina's Story³⁶

Tina approached Your Story Disability Legal Service for advice as she felt that the school was not making adjustments to allow her son, Josh, to participate fully in school activities. Josh had been diagnosed with ASD and mobility issues.

Josh had been attending a local independent school. Tina had requested that the school provide certain adjustments to enable Josh to fully participate in education. The school refused. Josh was then expelled from school for bad behaviour.

Tina believed Josh's behaviour was the result of the school failing to provide adjustments and sought legal advice about pursuing a discrimination complaint. However Tina eventually decided not to proceed with a discrimination complaint due to fears the school would then refuse to enroll her other child, who was due to start kindergarten at the school the following year.

In Legal Aid NSW's experience, the exclusion of children with disabilities from schools due to perceived bad behaviour is worse in rural areas where there are fewer schooling options, schools have less experienced staff and are generally less resourced than those in major cities.

Suspending children breaches the trust between them and the school and disrupts the child's routine, making it more likely they'll disengage in the future. This trust and routine is particularly important for children with disabilities.

For children who come from disadvantaged backgrounds, education is fundamentally important to breaking the cycle of disadvantage and improving future outcomes. Conversely, exclusion from education can be a precursor to poor future outcomes including unemployment and criminalisation.³⁷ A lack of engagement with education (sometimes for many years) is a common characteristic of children who end up involved in the criminal justice system. We regularly assist children charged with criminal offences who have been regularly excluded from school due to suspensions for behavioural problems that stem from complex trauma, mental health conditions and/or intellectual disabilities.

The below case study is an example of a school misusing exclusionary discipline on a child with disabilities. Fortunately in this case the child successfully appealed against their exclusion:

Clay's Story³⁸

Legal Aid NSW assisted Clay, an Aboriginal teenager with a diagnosed disability and an agreed behaviour support plan in place.

³⁶ This case study has been de-identified.

³⁷ The Victoria Institute, *Education at the Heart of the Children's Court Evaluation of the Education Justice Initiative* (Final Report, December 2015) 2.

³⁸ This case study has been de-identified.

Clay was suspended for misbehaviour on an occasion when his school was not following the agreed behaviour support plan.

After the period of suspension, the school insisted on a proposed partial attendance plan for several months. Clay preferred a full-time attendance plan because he did not want the other students to think of him as 'different'.

Clay's Legal Aid NSW solicitor wrote to the school, arguing the suspension and partial attendance plan was unfair due to the school's non-compliance with Clay's behaviour support plan. We sought that the suspension be removed. The school declined to remove the suspension.

Clay appealed the suspension and partial attendance plan and the Education Department upheld the appeal.

Your Story Disability Legal Support and Legal Aid NSW made a joint submission to the Senate Standing Committee on Community Affairs' *Inquiry into barriers to consistent, timely and best practice assessment of attention deficit hyperactivity disorder (ADHD) and support services for people with ADHD*.³⁹ The submission calls for strategies to prevent and reduce student exclusion from schools for children with disability, and for education institutions to prioritise a supportive rather than punitive approach.

Similar recommendations were made in DRC report, which recommended a review of the Education Department's regulations, rules and policies to prevent the inappropriate use of exclusionary discipline against students with disability.⁴⁰ The DRC report recommended the amendment of these instruments to adopt the principle that exclusionary discipline be used only as a last resort, when necessary to avert risk of serious harm to the student, other students or staff. We adopt this recommendation.

Recommendation 3

- The NSW Department of Education should undertake a thorough review of their regulations, rules and policies to ensure the inappropriate use of exclusionary discipline against students with disability is prohibited. These instruments should adopt the principle that exclusionary discipline must be avoided unless necessary as a last resort to avert the risk of serious harm to the student, other students or staff.⁴¹

³⁹ Your Story Disability Legal Support and Legal Aid NSW, Submission to the Senate Standing Committee on Community Affairs, *Inquiring into barriers to consistent, timely and best practice assessment of ADHD and support services for people with ADHD* (2023).

⁴⁰ Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023), recommendation 7.2.

⁴¹ Ibid.

5. Restrictive practices

As is the case with school exclusion, a failure to appropriately support students with disability may create or exacerbate challenging behaviours and can lead to students being restrained or secluded. The incorrect use of restrictive practices can breach of the right to liberty, bodily integrity, and freedom from torture or cruel, inhuman or degrading treatment or punishment. They can therefore be inconsistent with Australia's international human rights obligations under Article 15 of the United Nations Convention on the Rights of Persons with Disabilities.

Legal Aid NSW strongly support legislative reform to reduce the use of restrictive practices on children. The DRC recommends restrictive practices only be used as a last resort, in response to a serious risk of harm to a person with disability or others, and only after other strategies, including supported decision-making, have been explored and applied.⁴² They also recommended a requirement to use the least restrictive response possible and for the shortest time possible to ensure the safety of the person with disability or others; and only to the extent necessary to reduce the risk of harm. We support these recommendations.

Recommendation 4

- That the NSW Government legislate to ensure that the restraint and seclusion of children in school settings is only used:
 - in response to a serious risk of harm to a person with disability or others
 - as a last resort, after other strategies have been explored and applied
 - in the least restrictive way available
 - for the shortest time possible, and
 - only to the extent necessary to reduce the risk of harm.⁴³

Further DCR recommends the immediate elimination certain dangerous restrictive practices. Legal Aid NSW adopts this recommendation.

Recommendation 5

- The NSW Government should enact legislation to prohibit the use of the following:
 - the use of restrictive practices as a means of coercion or retaliation, or a form of discipline, punishment or threat
 - the use of restrictive practices in response to property destruction
 - the use of restrictive practices as a behaviour support strategy
 - the use of restrictive practices for reasons of convenience
 - the use of restrictive practices to enforce the compliance of a student in undertaking personal care that is non-urgent and does not present a risk to the student
 - life threatening physical restraints, including:

⁴² Ibid recommendations 6.35 – 6.40.

⁴³ Ibid.

- physical restraints that restrict a student's breathing or harm the student by covering the student's mouth or nose, or in any way restricting breathing
- taking the student to the ground into the prone or supine position
- causing hyperextension or hyperflexion of joints or applying pressure to the neck, back, chest or joints
- deliberately applying pain to gain compliance
- causing the student to fall
- having a person sit or kneel on the student

- chemical restraints
- mechanical constraints, and
- restrictive practices that involve the denial of key needs, such as food and water.⁴⁴

⁴⁴ Ibid recommendation 6.36.

6. Any other related matters

6.1 Children in out of home care

Complex backgrounds of trauma for children can often lead to health issues. Children in OOHC are more likely than their non-care peers to experience mental health conditions⁴⁵ and disabilities⁴⁶ (particularly neuro-disabilities, including foetal alcohol spectrum disorder (FASD)).^{47 48} It is estimated that, on average, 17% of children in OOHC are living with FASD, a rate that is 19 times higher than the general population.⁴⁹

Children in OOHC also have significantly poorer educational outcomes than their non care peers.⁵⁰ Recent research into the criminalisation of children with disability in child protection systems that was provided to the DRC⁵¹ found there is a link between school suspension and OOHC, with 56% of students in OOHC with ADHD experiencing school exclusion. Suspension is unlikely to be an appropriate response for children in OOHC whose behaviour may stem from complex trauma, mental health conditions and/or disabilities.

The NSW government has two policies that relate specifically to children in OOHC being the *Memorandum of Understanding between NSW Department of Education and Training (Schools) and Department of Human Services NSW, Community Services in relation to educational services for children and young people in Statutory Out-of-Home Care*⁵² and the accompanying *Out-of-Home Care in Government Schools Personalised learning and support planning procedures*. These policies state the Principal of the school must ensure that all students in OOHC enrolled in the school have a personalised learning and support plan.⁵³ However, unlike a similar Victorian policy,⁵⁴ the NSW policy does not address school exclusion or disengagement from education.

We recommend this be addressed and that the NSW Government develop and implement policy between Department of Communities and Justice's Child Protection Division and the

⁴⁵ Emma Colvin, Alison Gerard, Andrew McGrath, *Children in out-of-home care and the criminal justice system: A mixed-method study: Report to the Criminology Research Advisory Council Grant* (Report, CRG 22/16–17, September 2020) viii

⁴⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Violence and Abuse of People with Disability at Home* (Issues Paper, 2 December 2020) 5, citing Royal Commission into Institutional Responses to Child Sexual Abuse, *Contemporary Out-of-home Care* (Final Report Vol 12, 2017) 59, 123, 217. Also see Australian Institute of Health and Welfare ('AIHW'), *Child Protection Australia 2019–20* (Report, Child Welfare Series No. 74, Cat. no. CWS 78, 2021).

⁴⁷ Sarah McLean & Stewart McDougall, *Fetal alcohol spectrum disorder: Current issues in awareness, prevention and intervention: Australian Institute of Family Services* (CFCA Paper No. 29, December 2014).

⁴⁸ FASD is a diagnostic term for severe neurodevelopmental impairments caused by alcohol exposure before birth. FASD affects the ability to think, learn, focus attention and control behaviour and emotions. People with FASD can be impulsive, often have low self-esteem and mental health problems and an inability to predict the consequences of their actions- 'Telethon Kids Institute', *Fetal Alcohol Spectrum Disorder (FASD)*, (Web Page, 14 December 2022) <https://www.telethonkids.org.au/our-research/research-topics/fetal-alcohol-spectrum-disorder-fasd/>.

⁴⁹ Shannon Lange, Kevin Shield, Jurgen Rehm, Svetlana Popova, 'Prevalence of Fetal Alcohol Spectrum Disorders in Child Care Settings: A Meta-analysis' (2013) 132(4), *Pediatrics* e981.

⁵⁰ Toni Beauchamp, *Education matters – improving the educational outcomes of children and young people in care* (Centre for Research, Innovation and Advocacy UnitingCare Children Policy Report, October 2015), 2. See also Michelle Lee Townsend, *Are we making the grade? The education of children and young people in out-of-home care* (Southern Cross University PhD thesis, 2011); AIHW, *Educational outcomes for children in care, linking 2013 child protection and NAPLAN data*, (AIHW Report Cat. no. CWS 54, 21 October 2015); Joseph McDowall, *Transitioning from Care in Australia: An Evaluation of CREATE's What's the Plan? Campaign* (CREATE Report Card, 2011).; Sonia Jackson and Claire Cameron, *Final report of the YIPPEE project, young people from a public care background, pathways to further and higher education in five European countries*, (Thomas Coram Research Unit Final Report, 2011).

⁵¹ Susan Baidawi, Rubini Ball, Robyn Newitt, Lena Turnbull, Gayatri Kembhavi-Tam, Scott Avery, Rosemary Sheehan, Jade Purtell *Criminalisation of Children with Disability in Child Protection Systems. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Research Report May 2023) 61.

⁵² The Memorandum of Understanding (MOU) states that children in out-of-home care (OOHC) are entitled to receive learning and educational support whilst attending school. The MOU outlines that both Community Services and Education have a responsibility to coordinate their approaches to 'educational planning, information sharing, enrolment, engagement or attendance issues and suspension, expulsion, placement, and transition procedures': NSW Government, *Memorandum of Understanding between NSW Department of Education and Training (Schools) and Department of Human Services NSW, Community Services In Relation to Educational Services for Children and Young People in Statutory Out of Home Care*, (Memorandum of Understanding, March 2011).

⁵³ Ibid.

⁵⁴ Victoria State Government, *Out-of-Home Care Education Commitment*, (Partnering Agreement, July 2018).

Education Department that specifically seeks to maximise school engagement of children in OOHC.

Recommendation 6

- That the NSW Government develop and implement policies between Department of Communities and Justice's Child Protection Division and the Department of Education that specifically seeks to maximise school engagement of children in out of home care.

6.2 Undiagnosed disabilities

In Legal Aid NSW's experience, there is a high prevalence of children with undiagnosed disabilities being criminalised. A recent study found that for 29% of children with intellectual disability in the youth justice system, their disability was only diagnosed after they became involved with the criminal justice system.⁵⁵ Often these children have been disengaged from education for many months or years before coming into contact with the criminal justice system.

In our experience, it is often not until Legal Aid NSW funds a medical report for the purpose of court proceedings that a diagnosis is made. A lack of diagnosis excludes access to adjustments and appropriate support services that could improve educational engagement. It may also mean disability related behaviour is met with a punitive response.

We understand that the Education Department recently made positive changes by updating the 'Student Discipline in Government Schools Policy' and that it is currently conducting a review into its student behaviour policies and procedures. We recommend that in the course of this review, the Education Department consider whether a greater focus should be placed on investigating and addressing the cause of problematic behaviour rather than punishing it. This could include improving communication between education, child protection, and health to facilitate screening of and treatment for children at an early stage when they first show signs of complex trauma, mental health issues or disabilities.

Recommendation 7

- The NSW Department of Education should review their policies and procedures relating to student behaviour and suspension and consider whether a greater focus should be placed on investigating and addressing the cause of problematic behaviour rather than punishing it. This could include improving communication between education, child protection, and health to facilitate screening of and treatment for children at an early stage when they first show signs of complex trauma, mental health issues or disabilities.

Ensuring children with disability are appropriately diagnosed and provided with appropriate supports is not something that the Education Department can address alone. The health system has an important role to play in supporting children experiencing issues at school. A recent inquiry noted many school children with potential disabilities "reported significant challenges in accessing support from the health system. These challenges included shortages of health care providers, long waiting lists for services, difficulties navigating the

⁵⁵ Susan Baidawi, Rosemary Sheehan, *Cross-over kids: Effective responses to children and young people in the youth justice and statutory child protection systems* (Report to the Criminology Research Advisory Council CRG03/15-16, December 2019).

system, the cost of services, and a lack of collaboration between the health and education sectors”.⁵⁶ The inquiry acknowledged that the process of receiving a formal disability diagnosis is expensive and can have extended wait times.

A holistic approach involving the NSW Departments of Education, NSW Health and DCJ will more successfully meet the needs of families and students. We particularly support increased funding for diagnostic services within NSW schools to ensure they are available for children showing problematic behaviours at a much earlier stage.

Recommendation 8

- The NSW Government should review their child health and development screening programs to identify opportunities to expand them and improve early diagnosis of disabilities.

Despite these recommendations, we also acknowledge that some families do not want their children diagnosed due to stigma around disability and distrust of services, government and the health system. This can mean these children are not eligible for NDIS or other supports and adjustments. Legal Aid NSW support the Education Department acknowledging this reality and ensuring greater support and adjustments for children with undiagnosed disability.

6.3 Navigating the NDIS

Without a diagnosis, people with disability can be left without treatment and support due to ineligibility to access services through the NDIS. Children who do receive a diagnosis, often struggle to engage with the NDIS, both in terms of lodging a successful application and engaging with the supports they are granted.

In our submission to the Senate Inquiry into ADHD, we commented on an overall misnomer that ADHD is not covered by the NDIS. Multiple issues contribute to this impression, including that the NDIA does not report on the number of participants in the scheme with ADHD. Also, ADHD is not included in the NDIA’s List A and B conditions.⁵⁷ It is also common for people seeking access to the NDIS to do so on the basis that ADHD is among other diagnoses contributing to a neurological or psychosocial impairment.

For many children, the impacts of their ADHD are felt most in learning environments. For NDIS early intervention participants⁵⁸ as well as in all decisions to approve statements of participant supports⁵⁹ there is a requirement to show that support is most appropriately funded by the NDIS and not by another system, including early childhood development and school education systems. For the school education system, rule 7.13 excludes supports from the NDIS that are “primarily related to education or training attainment” and notes that “any supports funded by the NDIS will recognise the operational requirements and educational objectives of schools”.⁶⁰ While the rules reflect the principle that the NDIS is not designed to replace all systems for people with disability, it’s important that they don’t result in people with disability being caught between systems and unable to receive support from either. This involves decision makers considering what is actually available under early childhood development and school education systems.⁶¹

⁵⁶ Senate Committee on Education and Employment, *The national trend of school refusal and related matters* (Report, August 2023) 27.

⁵⁷ List A outlines conditions that are likely to meet the disability requirements, and List B are conditions that are likely to result in a permanent impairment (satisfying part of the requirements for access to the Scheme).

⁵⁸ See *National Disability Insurance Scheme Act (2013)* (Cth), s 25(3)

⁵⁹ *Ibid* s 34(1)(f)

⁶⁰ *National Disability Insurance Scheme (Supports for Participants) Rules 2013* r 7.13.

⁶¹ Burchell and National Disability Insurance Agency [2019] AATA 1256 at [34]-[36].

Legal Aid NSW acknowledge the recently released NDIS Review, which made recommendations around establishing foundational supports in educational settings and we urge the NSW Government to implement these recommendations.⁶²

Recommendation 9

- a) The NDIA, the Australian Education Department, and state and territory education departments should develop a plan to better connect the NDIS and education systems to improve educational outcomes for children with disability.
- b) The NSW Government should implement NDIS Review recommendations to establish additional foundational supports for children in educational settings including by:
 - o investing in early supports for children with emerging developmental concerns and disabilities,⁶³ and
 - o investing in a capacity building program for families and caregivers of children with developmental concerns and disabilities.⁶⁴

6.4 School refusal and compulsory schooling orders

The idea of going to school can cause some children severe distress and can result in a reluctance to go to school and an increase in nonattendance. This is known as school refusal.

A recent Senate Committee on Education and Employment Report titled *The national trend of school refusal and related matters (the Senate Committee Report)* found school refusal is most prevalent among students with disability (particularly neurodivergent students) and those with mental health challenges.⁶⁵ The Senate Committee noted:

While the committee understands that the drivers behind school refusal can be complex and multifactorial, it is clear that disability—especially neurodivergence—and mental health challenges such as anxiety are clear individual risk factors for school refusal. However, risk factors alone do not guarantee the outcome. Evidence provided to the committee suggested that for some children, school itself that was the catalyst for refusal.⁶⁶

The Senate Committee report pointed to the following issues experienced by children with disabilities in schools:

- schools not meeting disability needs or providing an inclusive environment
- sensory overload or unsuitable sensory environments
- a lack of appropriate support for students
- bullying
- changes in school routine
- boredom and a lack of interesting or relevant work
- students feeling like they don't belong.

⁶² Commonwealth Government of Australia, Department of Prime Minister and Cabinet, *Working together to deliver the NDIS-Independent Review into the National Disability Insurance Scheme (Final Report 2023)*.

⁶³ Ibid action 1.8.

⁶⁴ Ibid action 1.12.

⁶⁵ Senate Committee on Education and Employment, *The national trend of school refusal and related matters*, (Report) August 2023, 24[2.50].

⁶⁶ Ibid 117 [6.5].

In Legal Aid NSW's experience, school attendance issues can often be a proxy for students who are not getting the adjustments they need at school. School refusal can have consequences for a child's physical and mental health, as well as negative impacts on their social connections, educational attainment, and future employment prospects.

The Senate Committee report highlighted that in some cases, the education sector does not adequately understand school refusal and that misconceptions and the advice/actions that flow from them, can be a barrier to support and intervention. It found:

A lack of understanding of school refusal appears to underlie many of the poor experiences of students and families. This includes multiple instances where health and education professionals have provided advice that is either outdated or inappropriate for school refusal.

The committee heard that, when implemented, this advice often led to a breakdown in trust between the affected young person and adults, heightened anxiety, and increased school refusal.⁶⁷

Statistics show a significant decline in school attendance nationally between 2021 and 2022. During this period, the attendance rate dropped from 90.9 percent to 86.5 percent and the attendance level dropped from 71.2 percent to 49.9 percent.⁶⁸ The data also shows differences in school attendance between Aboriginal and non-Aboriginal students. For example, in 2022, the attendance rate and level for Aboriginal students was 74.5 percent and 26.6 percent respectively, compared with 87.4 percent and 51.5 percent for non-Aboriginal students.⁶⁹

The Senate Committee report made recommendations including the development of an action plan on school refusal that increases accessibility and awareness of alternative methods of schooling. Legal Aid NSW adopts this recommendation:

Recommendation 10

- The NSW Department of Education should develop an action plan on school refusal in collaboration with health and education professionals, service providers, and people with lived experience of school refusal. This plan should have a particular focus on neurodivergent children and children with mental health challenges.⁷⁰

The way the increase in school refusal is playing out in the care and protection jurisdiction of the Children's Court of NSW (**Children's Court**) is through an increase in applications for Compulsory Schooling Orders (**CSO**) and prosecutions under the *Education Act 1990* (NSW) (**the Education Act**). It is an offence under the Education Act if a parent fails to enrol their child at school, or where enrolled, fails to send their child to school.⁷¹

The Children's Court may, on the application of the Education Department, make a CSO in relation to a child who is not receiving compulsory schooling.⁷² CSOs can be made against both parents, and children, aged 15 or over. If the CSO is breached parents face a maximum fine of \$11,000 and children face a maximum fine of \$110.

⁶⁷ Ibid 119 [6.15].

⁶⁸ Shannon Clark, School Refusal, Research Paper, Parliamentary Library, 19 April 2023) 7.

⁶⁹ Ibid 9.

⁷⁰ This recommendation was adopted from recommendation 6 of Senate Committee on Education and Employment report on the national trend of school refusal and related matters (released August 2023).

⁷¹ *Education Act 1990* (NSW), s 23.

⁷² Ibid s 22D.

Legal Aid NSW provides legal representation to parents and children responding to applications for CSOs. We also provide representation in criminal proceedings, where parents and children are prosecuted for breaching a CSO.

Legal Aid NSW have observed that children with disabilities are overrepresented in CSO matters and that it is often the disability itself that is impacting school attendance. For many students going through school refusal, the inflexibility of the education system is problematic. To enable some students to successfully engage in education, the education system needs to embrace inclusive education principles and be flexible when required (as discussed above).

There needs to be an acknowledgement that the traditional mode of delivering school education does not work for all children, all of the time. We are concerned that applications for CSOs are being made without the Education Department first taking steps to engage with families and treating teams to develop flexible and realistic educational plans for children. The below case study involves an application for a CSO despite a recommendation from a paediatrician that the child engage in distance education and homeschooling.

John and Jackie's Story⁷³

Legal Aid NSW represented John and Jackie, defendants in an application for a CSO made by the Education Department.

The application related to John and Jackie's 12-year-old son, Patrick. Patrick had been diagnosed with ASD, ADHD, severe anxiety and depression, emotional dysregulation and a speech and language delay.

Patrick had a self-managed NDIS plan with a significant amount of funding, reflecting his complex needs. Patrick engaged with multiple treatment providers, including a psychiatrist, general practitioner, paediatrician, psychologist, behavioural support practitioner, speech pathologist, and physiotherapist.

Due to concerns over Patrick's school attendance the Education Department filed an application for a CSO. After the CSO application was filed Patrick's paediatrician assessed him and determined that he was incapable of attending school. Instead, the paediatrician outlined an alternative proposal for the Education Department to consider which involved distance education and homeschooling. The paediatrician's report specifically stated that John and Jackie were doing everything they could to engage and utilise all available supports for Patrick and encouraged him to attend school.

Patrick is now engaged with both homeschool and distance education and the CSO application was withdrawn.

We support the Education Department considering ways to increase the flexibility of education within mainstream school settings before making an application for a CSO.

Recommendation 11

- The NSW Department of Education should investigate ways to increase the flexibility of education delivery, including by:

⁷³ This case study has been de-identified.

- identifying ways to enhance flexibility in mainstream school settings for children going through school refusal
- facilitating easier access to distance education and home schooling for students experiencing school refusal, and
- facilitating the provision of more alternative and specialist school settings that cater for students experiencing school refusal.⁷⁴

The Education Department should recognise the negative impact CSO applications have on relationships between parents and school staff and already poor attendance. The below case study highlights this issue:

Trudie's Story⁷⁵

Legal Aid NSW is representing Trudie, a single mother with three children:

- James, aged 10, who has ASD and attends a local public school in year four,
- Nathan, aged eight, who has ASD and is in year two at a specialist school, and
- Adam, aged seven, who has ASD, ADHD and an intellectual disability, and who attends the same school as James and is in year one.

Adam (with Trudie's assistance) is engaged with appropriate therapies and supports outside of school including regular appointments with a paediatrician, a speech pathologist and an occupational therapist. Adam has a behavioural support plan that was developed by his occupational therapist.

Despite these supports, Adam's disabilities have resulted in significant behavioural issues that impact his ability to attend school. Adam has been suspended from school on multiple occasions due to his behaviour and his failure to comply with school policies that relate to the safety of teachers and students.

The school determined that Adam requires one on one support from a teacher's aid while at school. The school can only arrange this for two hours per day and they informed Trudie that Adam can only attend school between the hours of 9:30am and 11:30am.

Discussions about Adam going into a supported class occurred between Trudie and the Education Department. While there is an ASD support class at Adam's current school, the Education Department instead offered Adam a place at another school, which is a 30-minute drive away from his home. Trudie was not happy with this option but was told by the Education Department that a panel had decided that Adam would attend the supported class at a different school. Trudie was told the decision was final.

Trudie refused to enrol Adam in the new school due to difficulties with transport and the practical reality of having three children in three separate schools. Adam remains enrolled at his current school, but his attendance continued to be poor, with Adam attending school about 43 percent of the time. After a period of poor attendance, the Education Department filed a CSO application in relation to Adam. The CSO application came to court but was adjourned for two months to allow for Adam's attendance to improve.

After two months the matter came back before the court. Adam's attendance had dropped to 32 percent.

⁷⁴ This recommendation was adopted from recommendation 5 of Senate Committee on Education and Employment report on the national trend of school refusal and related matters (released August 2023).

⁷⁵ This case study has been de-identified.

Trudie continues to defend the application and is seeking more support to allow Adam to remain at his current school. The matter is still before the court.

Prior to the CSO application Trudie always had a positive relationship with Adam's school and was in regular communication with the Principal. Since the CSO application Trudie's relationship with the school and Principal has deteriorated..

Legal Aid NSW is concerned about the impact of CSO application proceedings on families already under immense stress. CSO application proceedings can be time consuming and stressful for both parents and children. This often occurs within the context of other significant stressors and without the Education Department having proper regard to the practical difficulties parents might face in getting their teenage children to attend school. The below case study provides an example of this:

Matilda's Story⁷⁶

Legal Aid NSW acts for Matilda, a single mother of two boys, Stephen and William. William has recently been diagnosed with ASD and severe depression and anxiety.

William recently began receiving NDIS funding and Matilda is in the very early stages of understanding the diagnosis and navigating the NDIS and other supports available to William.

William's recent diagnoses has had a significant impact on the family unit and has negatively impacted William's school attendance.

William regularly refuses to attend school. He is 6ft tall and weighs over 90 kgs. Matilda is smaller and cannot physically force William to attend school. Despite this, the Education Department filed an application for CSO against Matilda.

Matilda intends to defend the application which is still before the court.



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⁷⁶ This case study has been de-identified.