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Law Reform Commission
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By email: nsw-lrc@dcj.nsw.gov.au

Dear Law Reform Commission

RE: REVIEW OF THE NSW ANTI-DISCRIMINATION ACT

Thank you for the opportunity to provide a submission to the Anti-Discrimination Review. This submission is co-authored by academics in law from the University of Adelaide and Macquarie University. We specifically address question 6.3 of the Consultation Paper: Review of the Anti-Discrimination Act 1977 (NSW) Unlawful Conduct.

Dr Elpitha (Peta) Spyrou is a lecturer at Adelaide Law School, The University of Adelaide and an External Affiliate Member of QUT's Centre for Inclusive Education. As an emerging expert in disability discrimination, education policy, and dispute resolution, Dr Spyrou is deeply intrigued by the intersection of these critical areas in our society. However, her interest goes beyond this academic expertise— she draws on over eight years of industry experience as a support worker and partnered with four external bodies and agencies to undertake unique empirical research as part of her doctoral research. She is also an active member of the Australian Discrimination Law Experts Group,¹ the Public Law and Policy Research Unit ('PLPRU'),² and the Rights Resource Network SA ('Rights Network'). Additionally, from 2021 to 2023 (inclusive), she served as a director on the board of Equality Lawyers; a law firm

¹ The Australian Discrimination Law Experts Group (ADLEG), <<https://www.adleg.org.au/home>>.

² The Public Law and Policy Research Unit, The University of Adelaide
<<https://law.adelaide.edu.au/research/public-law-policy-research-unit-plpru>>.

based in Adelaide which specialises in providing legal advice to people with disability and their supporters. Dr Spyrou has also contributed to ADLEG’s submission as part of this review process.

Dr Danielle Moon is a Lecturer at Macquarie University with expertise in administrative decision-making, human rights and discrimination law. She currently leads a project with the National Justice Project focused on coding chatbots to assist with discrimination claims. Dr Moon's research focuses on government transparency, integrity, and legal design innovation. Her professional background includes seven years as a government legal advisor in the UK conducting high-profile judicial review litigation involving administrative law, public law, discrimination and human rights matters. More recently, she managed the Public Interest Disclosure team at the NSW Ombudsman, where she managed whistleblowing law reform.

The authors of this submission are conducting an empirical, multidisciplinary study that applies Legal Design thinking to co-design a prototype with primary school students, aimed at supporting neurodivergent children who require reasonable adjustments in the classroom.

Recommendation

We submit that section 49L(3)(a) of the *Anti-Discrimination Act 1977* (NSW) (*‘NSW Act’*) needs to be repealed as a matter of urgency.

Justification for recommendation

We submit that urgent reform is needed to align the *Anti-Discrimination Act 1977* (NSW) (*‘NSW Act’*) with the *DDA* and the laws of other states and territories, which do not exempt private education authorities from anti-discrimination laws, thereby ensuring all students with disability are protected at all schools.

The NSW Act remains the only Australian framework that exempts private education authorities from state-based anti-discrimination protections for students with disability.³ We suggest that this exemption is out of step with community expectations, the national policy landscape, as set by the final report of the Disability Royal Commission, and Australia’s obligations under the *Convention on the Rights of Persons with Disabilities*, namely article 24. This NSW exemption undermines the principle that all students, regardless of the type of school they attend, should be equally protected from discrimination.

In its own response to the Disability Royal Commission, the NSW Government noted that ‘[a]ccess to safe, equitable, and inclusive education profoundly impacts the life trajectories of children and young people with disability. Under the *Education Act 1990*, all students in NSW,

³ See *Anti-Discrimination Act 1977* (NSW) s 49L(3)(a); Elpitha Spyrou and Marianne Clausen, ‘Disability Discrimination in Education: Investigating the ADR Experiences of Parents and Practitioners’ (2024) 47(4) *University of New South Wales Law Journal* 1317, 1320; 9 Honey ‘Sydney Mum “shocked” over Private Daycare’s Rejection’ (21 July 2023) <[//honey.nine.com.au/latest/sydney-mum-doctor-plea-after-son-with-autism-rejected-from-private-daycare/25e9ce8c-06d1-4ac3-8e02-f27f4357ad0c](https://honey.nine.com.au/latest/sydney-mum-doctor-plea-after-son-with-autism-rejected-from-private-daycare/25e9ce8c-06d1-4ac3-8e02-f27f4357ad0c)>.

including those with disability, have a legal right to enrol in their local schools.’⁴ While it is admirable that the NSW Government holds a commitment to non-discrimination in public education, the fact remains that the presence of section 49L(3)(a) of the NSW Act means that private schools may not be held to the same standards.

This provision is particularly troubling for students with disabilities. While students with disability theoretically enjoy protection from discrimination in public schools, in practice there are systemic issues in the public education system that create barriers to education access. In a 2016 report, *Access to Real Learning: The Impact of Policy, Funding and Culture on Students with Disability*,⁵ the Commonwealth Senate Education and Employment References Committee heard extensive evidence that public schools frequently fail to meet the needs of students with disability, with many families forced to seek alternatives after experiencing inadequate support or resources. The Committee heard evidence from parents who described their children being forced to attend public school only part-time because that was ‘all his school says they can do to meet his needs’,⁶ or being told by schools that ‘There’s no resources and no funding’ for necessary adjustments and assistive technology.⁷

The Committee heard evidence that in response, to this treatment, some families seek to change schools, in search of better support. Indeed, one parent described how her son attended schools in three different states - Western Australia, New South Wales, and Queensland - each providing vastly different levels of support.⁸ In New South Wales, however, given the continued existence of the exemption for private schools, if families turn to private schools in the hope of accessing better resourced environments that can provide appropriate support, they face a critical gap in legal protection. This creates a troubling situation where students with disability may be unable to access adequate education in public schools due to resource constraints and systemic failures, yet simultaneously face lawful exclusion from private alternatives.

Irrespective of the NSW exemption, the *Disability Discrimination Act 1992* (Cth) and the *Disability Standards for Education 2005* (Cth) provide a national framework aimed at ensuring students with disability can access education on an equal basis with their non-disabled peers, without a carve-out provision for private schools. While section 109 of the *Australian Constitution* allows federal law to prevail over inconsistent state law, this requires a court ruling, which poses practical and financial barriers meaning it is likely unattainable for most people. To date, there appears to be no judicial authority resolving this inconsistency. Reforming the NSW Act to bring it in line with the *DDA* would close this gap, provide greater legal clarity, and better protect the rights of students with disability.

⁴ NSW Government, 31 July 2024 < <https://dcj.nsw.gov.au/documents/community-inclusion/disability-inclusion/royal-commission-into-violence-abuse-neglect-and-exploitation-of-people-with-disability/nsw-government-response-to-the-disability-royal-commission.pdf>>.

⁵ Senate Education and Employment References Committee, *Access to Real Learning: The Impact of Policy, Funding and Culture on Students with Disability* (Report January 2016).

⁶ *Ibid* 25.

⁷ *Ibid* 25, 39.

⁸ *Ibid* 11-12.

We would be happy to provide further commentary if that would be of value to the Commission.
We thank the Commission for the opportunity to make this submission.

Yours sincerely

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