The Hon. Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
Delivered by email: ADAreview@dcj.nsw.gov.au

The Association of Independent Schools of New South Wales

15 August 2025

Re: AISNSW submission to the Review of the *Anti-Discrimination Act 1977* (NSW)

Dear Mr Bathurst

The Association of Independent Schools of New South Wales (AISNSW), as the peak body representing Independent schools in NSW, welcomes the opportunity to provide this submission to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (ADA). The NSW Independent school sector is vibrant and diverse, employing a workforce of 40,000 people and providing the community with choice in education. The independent school sector in NSW has 430 schools across 573 campuses, educating over 245,000 students and accounting for 20% of total NSW school enrolments.

Many independent schools provide a religious or values-based education. Others promote a particular educational philosophy or educate specific cohorts of students such as those with disabilities or students at risk of disengaging with education. Parental choice in education relies on a clear and stable legal landscape, allowing families to make informed decisions with confidence.

Our submission focuses on the critical interplay between State and Commonwealth anti-discrimination frameworks and its practical implications for independent schools in NSW. A fundamental strength of education in NSW is the ability for parents to choose a school that best suits their children, in accordance with Article 26 of the Universal Declaration of Human Rights and Article 13(3) of the International Covenant on Economic, Social and Cultural Rights (of which Australia is a party), which provides:

> *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities…to ensure the religious and moral education of their children in conformity with their own convictions.*

AISNSW does not wish to make detailed comments on all aspects of the matters raised in the Consultation Paper. However, we would like to correct some fundamental misconceptions that appear to underlie some of the assumptions in the Paper.

There is a misconception that because non-government schools are exempted from the provisions of the ADA discriminatory practices must be regularly occurring in the sector. This perception ignores the fact that the sector is subject to the very stringent provisions contained in the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) (DDA) and the *Racial Discrimination Act 1975* (Cth).

We have commented in detail on disability discrimination as we have found this is an area which schools encounter most often. We have no comment on the possible conflict between the Racial Discrimination Act 1975 (Cth) and the ADA as this is an area which rarely causes any issues.

We also do not make any submissions about the provisions of the *Sex Discrimination Act 1984* (Cth) (the Act) other than to note that the exception in relation to faith based institutions is important for a number of faith based schools and gives them the ability to apply important aspects of their faith in the context of their educational offering. We note that the exception in the Act is very narrow and, while important, only affects a small number of schools.

We draw particular attention to the provisions of the DDA and how it is applied in the 430 NSW Independent schools. Section 22 of the DDA makes it clear that it is unlawful for schools to directly or indirectly discriminate because of an aggrieved person's disability. The DDA is supplemented by the Disability Standards for Education which set out in more detail what is required of education providers. The combination of the DDA and the Disability Standards for Education provide that where a student has a disability the school must make "reasonable adjustments" to enable the student to apply for admission to the school, participate in courses and to use facilities and services on the same basis as students without the disability. The only exception is where the adjustment would cause unjustifiable hardship for the school.

There are some important observations that need to be made about this process: First, it provides positive protection for students with disabilities and their associate. Once disability discrimination is claimed the onus shifts to the school to establish that it has made reasonable adjustments or that doing so would result in unjustifiable hardship (unjustifiable hardship is intended to be a high threshold and reserved for rare cases). Second, the Disability Standards for Education were first introduced in 2005 and schools are now familiar with how they operate. Third, disputes can, in the great majority of cases, be resolved without great expense to complainants.

AISNSW has prepared detailed Guidelines to assist member schools to apply the Disability Standards for Education to their processes (Attached). AISNSW engages a team of education specialists with expertise in disability and inclusion support who regularly advise schools on appropriate measures to support reasonable adjustments for individual students with disabilities. Of course, there are occasions when the parents or carers of a student may form different views to the school as to what may constitute a "reasonable adjustment". These issues can generally be resolved at school level. If the parties cannot reach agreement a complaint can be made to the Australian Human Rights Commission (AHRC) which will attempt to resolve the differences through a mediation process. If that is unsuccessful the complainant can take proceedings in the Federal Court to seek redress. It is our experience that in most cases these issues are resolved without the matter proceeding to Court. The existing system of the AHRC exists for the purpose of settling issues so they do not need to proceed to court. The AHRC has some very experienced complaints conciliation mediators who are most often able to achieve a settlement without litigation, which is usually in everyone's interests.

As far as employees seeking redress through the courts on the basis of discrimination, amendments to Commonwealth legislation in 2024 introduced cost protection measures to reduce the previously perceived cost barrier for complainants. A court must now order a respondent to pay the complainant's costs if the complainant's case is successful on one or more grounds.

We suggest that it would be a retrogressive step to now introduce new provisions which need to be followed and a second body overseeing those provisions. Such a change would provide no useful or positive outcome and would just increase complexity and create confusion. If it is thought that the requirements of the DDA need to be amended this should be done in the DDA rather than attempting to introduce them through new NSW legislation.

I trust the Commission will weigh these considerations concerning federal coverage, the administrative impact of inconsistency and the importance of parental choice.

Yours sincerely

Margey Evans

Chief Executive, AISNSW