



Child Protection Update Associated Christian Schools March 2022

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Board Role in Developing a Child Safe Culture





Royal Commission Outcomes

Recommendation 13.1 - All schools should implement the Child Safe Standards identified by the Royal Commission.

- ▶ **Standard 1: Child safety is embedded in institutional leadership, governance and culture**
 - The institution publicly commits to child safety and leaders champion a child safe culture.
 - Child safety is a shared responsibility at all levels of the institution.
 - Risk management strategies focus on preventing, identifying and mitigating risks to children.
 - Staff and volunteers comply with a code of conduct that sets clear behavioural standards towards children.
 - Staff and volunteers understand their obligations on information sharing and recordkeeping.

Royal Commission Final Report – Volume 13 (Schools)

“Poor governance processes are another contributing factor to the risk of child sexual abuse, particularly in non-government schools. Good governance processes ensure that **every school and its leaders understand their obligations to keep children safe**, and are held accountable if they do not. Poor governance processes that **lack transparency** can obscure pathways of responsibility for responding to child sexual abuse and prevent school leaders and schools boards being held accountable for failures. The composition of school boards can also contribute to poor governance, such as when boards are predominantly made up of school alumni with a personal stake in upholding the reputation of the school.”

“The potential for institutions as legal entities and their leaders as individuals to be held legally accountable for damage occasioned by child sexual abuse has great potential to drive cultural change and motivate institutions to take child safety more seriously.”

Recommendation 13.2 - State and territory independent oversight authorities responsible for implementing the Child Safe Standards should delegate to school registration authorities the responsibility for monitoring and enforcing the Child Safe Standards in government and non-government schools.

- ▶ NSSAB Cyclical review – specifically looks at compliance with processes for reporting sexual abuse (mandatory reporting).
 - Required to submit copy of student protection policies and processes for compliance review.
 - Regulation section 16 – obligations on governing body (directors)

- (4) The school's governing body must ensure—
 - (a) the school's staff and students, and students' parents and guardians, are made aware of the processes; and
 - (b) the processes are readily accessible by staff, students, parents and guardians; and
 - (c) staff are trained annually in implementing the processes; and
 - (d) the school is implementing the processes.



Victorian Ministerial Order 1359

- MO1359 implements more prescriptive requirements for Victorian schools to comply with the Child Safe Standards enforced by the Victorian Commission for Children and Young People.
- *Key changes:*
 - *Expectation for family and community involvement in an organisation's efforts to keep young people safe;*
 - *Greater focus on safety for First Nations children and young people;*
 - *Active management of child safety risks in online environments, and environments adjacent to schools (e.g. boarding houses);*
 - *Greater clarity on the governance, systems and processes required to keep children and young people safe.*

“Creating organisations that properly include Aboriginal children, young people and their families, and that acknowledge and appreciate the strengths of Aboriginal culture, can make such a difference. Organisations will have requirements to ensure racism within the organisation is identified, confronted and not tolerated. We know that if Aboriginal children and young people feel safe to be themselves in an organisation, this better protects them from child abuse,” – **Justin Mohamed (Commissioner for Aboriginal Children and Young People).**



Mandatory Reporting

Child Protection Act 1999

- **Personal Obligation on teachers**
- Report to Child Safety if reasonable suspicion that child has suffered, is suffering or is at an unacceptable risk of suffering significant harm caused by **physical or sexual abuse**, and may not have a parent able and willing to protect them.

Education (General Provisions) Act 2006

- Obligation on all staff to report to **Principal or Board member**.
- Sexual abuse or likely sexual abuse (not physical).
- **Principal or Board member** required to immediately report to Police.

Child Protection Act 1999



13E Mandatory reporting by persons engaged in particular work

- (1) This section applies to a person (a *relevant person*) who is any of the following —
 - (a) a doctor;
 - (b) a registered nurse;
 - (c) a teacher;
 - (d) a police officer who, under a direction given by the commissioner of the police service under the *Police Service Administration Act 1990*, is responsible for reporting under this section;
 - (e) a person engaged to perform a child advocate function under the *Public Guardian Act 2014*;
 - (f) an early childhood education and care professional.
- (2) For this section, a *reportable suspicion* about a child is a reasonable suspicion that the child—
 - (a) has suffered, is suffering, or is at unacceptable risk of suffering, significant harm caused by physical or sexual abuse; and
 - (b) may not have a parent able and willing to protect the child from the harm.
- (3) If a relevant person forms a reportable suspicion about a child in the course of the person's engagement as a relevant person, the person must give a written report to the chief executive under section 13G.

Mandatory Reporting Obligations



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“Reasonable Suspicion” – Common Law

- “A ‘reasonable suspicion’ is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material, or materials which may be inadmissible in evidence: *R v Rondo* (2001) 126 A Crim R 526 at [53]; *R v N* [2015] QSC 9 at [39]
- *R v N* [2015] QSC 91, [31]:
 - A suspicion is an inference or positive feeling described as a ‘slight opinion without sufficient evidence’. It is more than a hunch or pure conjecture and cannot be legally reasonable if it is arbitrary, irrational or prejudiced or is not supported by a sufficiently firm factual foundation: *Goldie v Commonwealth of Australia* (2002) 117 FCR 566

Education (General Provisions) Act 2005



366 **Obligation to report sexual abuse of person under 18 years at non-State school**

- (1) Subsection (2) applies if a staff member of a non-State school (the *first person*) becomes aware, or reasonably suspects, in the course of the staff member's employment at the school, that any of the following has been sexually abused by another person—
 - (a) a student under 18 years attending the school;
 - (b) a kindergarten age child registered in a kindergarten learning program at the school;
 - (c) a person with a disability who—
 - (i) under section 420(2), is being provided with special education at the school; and
 - (ii) is not enrolled in the preparatory year at the school.
- (2) The first person must give a written report about the abuse, or suspected abuse, to the school's principal or a director of the school's governing body—
 - (a) immediately; and
 - (b) if a regulation is in force under subsection (3), as provided under the regulation.

Maximum penalty—20 penalty units.



- (4) A non-State school's principal or a director of a non-State school's governing body must immediately give a copy of a report given to the principal or director under subsection (2) to a police officer.

Maximum penalty—20 penalty units.

- (5) A person who makes a report under subsection (2) or (2A), or gives a copy of a report under subsection (2B) or (4), is not liable, civilly, criminally or under an administrative process, for giving the information contained in the report to someone else.



Objections to Disclosure?

What if the alleged victim does not wish for the matter to be disclosed?

- **Is there a risk of harm to the child?**
 - If so reporting obligations are triggered
 - Principals have a duty of care to provide a **safe, supportive and productive learning environment**.

- **Mandatory reporting is, Mandatory**
 - Prevailing consideration – protect the child from harm
 - Section 365 and 365A *Education (General Provisions) Act 2006 (Qld) - Obligation by Staff Members to immediately make a written report if they become aware or reasonably suspect the sexual abuse or likely sexual abuse of a student under 18 years.*
 - Section 13E *Child Protection Act 1999 (Qld) - A teacher must make a report if they reasonably and honestly suspect a child has suffered, is suffering or is at risk of suffering significant harm caused by physical or sexual abuse, and may not have a parent able and willing to protect the child from harm.*
 - *New Criminal Code provisions.*



Accreditation implications

Education (Accreditation of Non-State Schools) Regulation 2017, section 16

16 Conduct of staff and students and response to harm

- (1) A school must have written processes about—
 - (a) how the school will respond to harm, or allegations of harm, to students under 18 years; and
 - (b) the appropriate conduct of the school's staff and students.
- (2) Without limiting subsection (1), the processes must include the following—
 - (a) a process for the reporting by a student to a stated staff member of conduct of another staff member that the student considers is inappropriate;
 - (b) a process for how the information reported to the stated staff member must be dealt with by the stated staff member;
 - (c) a process for reporting—
 - (i) sexual abuse or suspected sexual abuse in compliance with the *Education (General Provisions) Act 2006*, section 366; and
 - (ii) a suspicion of likely sexual abuse in compliance with the *Education (General Provisions) Act 2006*, section 366A;
 - (d) a process for reporting a reportable suspicion under the *Child Protection Act 1999*, section 13E.
- (3) For the process mentioned in subsection (2)(a), there must be stated at least 2 staff members to whom a student may report the conduct.
- (4) The school's governing body must ensure—
 - (a) the school's staff and students, and students' parents and guardians, are made aware of the processes; and
 - (b) the processes are readily accessible by staff, students, parents and guardians; and
 - (c) staff are trained annually in implementing the processes; and
 - (d) the school is implementing the processes.
- (5) The school must have a written complaints procedure to address allegations of non-compliance with the processes.
- (6) The complaints procedure may form part of any other written procedure of the school for dealing with complaints.
- (7) In this section—

harm see the *Child Protection Act 1999*, section 9.



Amendments to Criminal Code

Section 229BB – Failure to protect child from child sexual offence

- (1) “An accountable person commits a crime if-
- a. The person knows there is a significant risk that another adult (the **alleged offender**) will commit a child sexual offence in relation to a child; and,
 - b. The alleged offender –
 - i. Is associated with an institution; or
 - ii. Is a regulated volunteer; and,
 - c. The child is under the care, supervision or control of an institution; and
 - d. The child is either:
 - i. Under 16 years; or
 - ii. A person with an impairment of the mind; and
 - e. The person has the power or responsibility to reduce or remove the risk; and
 - f. The person wilfully or negligently fails to reduce or remove the risk.” (emphasis added)



Amendments to Criminal Code (Qld)

s229BC – Failure to report belief of child sexual offence committed in relation to child

- ▶ (1) This section applies to an adult if –
 - (a) The adult gains information that causes the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a child sexual offence is being or has been committed against a child by another adult; [**NOTE – adult means a person above the age of 18 years**]
 - (b) At the relevant time, the child is or was:
 - (i) Under 16 years old; or
 - (ii) A person with an impairment of the mind.
- ▶ (2) If, without reasonable excuse, the adult fails to disclose the information to a police officer as soon as reasonably practicable after the belief is, or ought reasonably to have been, formed, the adult commits a misdemeanour. Max. penalty – 3 years.
- ▶ (4) Without limiting what may be a reasonable excuse for subsection (2), an adult has a reasonable excuse if:
 - (a) The adult believes on reasonable grounds that the information has already been disclosed to a police officer; or
 - (b) The adult has already reported the information under any of the following provisions, or believes on reasonable grounds that another person has done or will do so: (i) the *Child Protection Act 1999*; or (ii) *Education (General Provisions) Act 2006*.



- ▶ The *Failure to Report offence* differentiates itself to the *Failure to Protect offence* in that it applies to all adults and not just religious workers/volunteers. It will arise where the victim was under 16 at the time of the offence (so can apply to historical abuse claims) or suffers from a mental disability.
- ▶ The new provision provides examples of what may be considered a “*reasonable excuse*”. For example, where a person only gains the information after the child (the alleged victim) becomes an adult and the alleged victim does not want the information disclosed to a police officer.
- ▶ There are reasonable excuse defences (such as the victim is now an adult and does not want the matter reported to police). However, “religious confession” is not a reasonable excuse.
- ▶ The new provisions commenced by proclamation on **5 July 2021**.



Penalties

▶ Section 229BB

- *Failure to Protect*
- The maximum penalty for this offence is five years imprisonment.

▶ Section 229BC

- *Failure to Report*
- The maximum penalty for this offence is three years imprisonment

Amendments to Working With Children (Risk Management & Screening) Act

“No Card, No Start” Law

An individual cannot commence working with children and young people until their Blue Card application has been approved.

175 Clearance required to employ person in regulated employment

- (1) A person (the *employer*) must not employ, or continue to employ, another person (the *employee*) in regulated employment unless—
 - (a) the employee holds a working with children clearance; and
 - (b) the employer has given the chief executive a notice, under section 173, about employing the employee in regulated employment.

Maximum penalty—

- (a) if an aggravating circumstance applies to the offence—200 penalty units or 2 years imprisonment; or
- (b) otherwise—100 penalty units.



Basis for civil liability

- ▶ **Historical claims are judged based on legal principles as in effect at the time of the abuse:**
 - Vicarious Liability
 - Breach of Duty of Care

- ▶ **Vicarious Liability**
 - An employer will be vicariously liable for torts committed by employees acting ‘in the course of employment’: *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19.
 - The meaning of “in the course of employment” is not always clear.
 - “Not everything that an employee does at work, or during working hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of the employment,” per Gleeson CJ in *New South Wales v Lepore* [2003] HCA 4 at [40].
 - Vicarious liability for criminal acts?
 - Volunteers are not employees for vicarious liability.



Basis for civil liability

▶ **Negligence/Breach of Duty of Care**

3 elements in a negligence claim:

1. The defendant must have owed the claimant who was sexually abused as a child a duty of care.
 2. The defendant must have breached that duty by failing to exercise the care that a reasonable person in the same position would have exercised.
 3. The damage suffered by the claimant was caused by that failure to exercise reasonable care/ the breach of that duty caused the claimant's damage.
- Historically, claimants had difficulty meeting each of these elements.
 - Few decided cases in Australia, each is decided on the individual circumstances.
 - Evidence lacking in historical cases.
 - Appreciation of the risk of child abuse (at the time) was much less than today.



Civil Liability Act updates

▶ **33D Duty to prevent child abuse**

- An institution has a duty to take all reasonable steps to prevent the abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution. (**non-delegable duty**)

▶ **33E Proof of whether duty was breached (reverse onus of proof)**

- (1) This section applies if a person associated with an institution abuses a child while the child is under the care, supervision, control or authority of the institution.
- (2) The institution is ***taken to have breached its duty under section 33D unless the institution proves it took all reasonable steps to prevent the abuse.***
- (3) In deciding whether the institution took all reasonable steps to prevent the abuse, the matters that are relevant include—
 - (a) the nature of the institution; and
 - (b) the resources that were reasonably available to the institution; and
 - (c) the relationship between the institution and the child; and
 - (d) the position in which the institution placed the person in relation to the child, including the extent to which the position gave the person—
 - (i) authority, power or control over the child; or
 - (ii) an ability to achieve intimacy with the child or gain the child's trust.



Questions?