



Australian Capital Territory Child Protection Requirements for Non-Government Schools – Update 2019

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1. Executive Summary

In the lead up to and following the release of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) Final Report in December 2017, the ACT Government has been incrementally introducing legislative amendments and increased regulatory guidance to strengthen its child protection legal and regulatory framework.

Key updates include:

- ✓ November 2017 - the release of an updated version of the ACT Community Services Department's '[Keeping Children and Young People Safe](#)' to include additional guidance and include information about the relatively new Reportable Conduct Scheme (introduced in the ACT in July 2017)
- ✓ December 2017 – amendments to the Reportable Conduct Scheme regarding information sharing
- ✓ February 2018 – the release of updated Reportable Conduct Scheme Practice Guides and Resources that included additional examples of conduct which should not be engaged in
- ✓ July 2018 – an amendment to the Ombudsman Act 1989 (ACT) to expand the scope of the Reportable Conduct Scheme to include religious organisations
- ✓ October 2018 – the introduction of the Australian Student Wellbeing Framework (ASWF) to replace the National Safe Schools Framework (NSSF) as a key foundational document for all Australian schools
- ✓ December 2018 – introduction of a new 'failure to protect' offence in the Crimes Act 1900 (ACT).

This paper will focus on replacement of the NSSF with the ASWF and the new 'failure to protect' offence.

For more access to the Reportable Conduct Scheme Practice Guides and the Scheme's application to religious organisations, see the [ACT Ombudsman website](#).

2. New 'Failure to Protect' Offence

Background

There are four jurisdictions in Australia (Victoria, New South Wales, Tasmania and now the ACT) that have a 'failure to protect' offence or obligation to protect as part of their child protection legislative framework. The ACT offence, based in part on the Victorian equivalent, creates a criminal offence for a person in authority in relevant institutions to fail to protect children and young people from a substantial, known risk of a sexual offence being committed against the child or young person by a person associated with the institution.

The creation of a 'failure to protect' offence was one of the 85 recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in its Criminal Justice Report, released in 2017. The Royal Commission discovered numerous occasions where perpetrators of abuse could continue in their work even after allegations were made, enabling them to continue their abuse of particular children or to abuse other children. In other cases, these individuals were moved to other schools or sites governed by the same institution, where they continued to work with, supervise or care for children or young people.

The Royal Commission determined that failure to report offences were only effective in protecting children from further abuse once a required level of knowledge of abuse existed. The 'failure to protect' offence is intended to prevent abuse from being committed once a substantial risk can be established that an "adult will commit a sexual offence against a child in the institutional context".

The Failure to Protect Offence

The Crimes Act 1900 (ACT) was amended in December 2018 by the Royal Commission Criminal Justice Amendment Act 2018 (ACT) (Criminal Justice Amendment Act) to include a new section 66A – "Failure by person in authority to protect child or young person from sexual offence" (colloquially referred to as 'failure to protect').

Section 66A makes it a criminal offence for a person in authority in a relevant institution to intentionally or negligently fail to reduce or remove a substantial risk that a sexual offence will be committed against a child or young person in the institution's care, supervision or control by a person associated with the institution if they are

aware of the risk and, because of their position in the institution, can reduce or remove the risk.

A risk will be a substantial risk if a reasonable person would have judged the risk of a sexual offence being committed against the child or young person as being substantial. Several factors could contribute to determining if a risk is a substantial risk, including:

- ✓ the likelihood or probability that a child or young person will become the victim of a sexual offence
- ✓ the nature of the relationship between a child or young person and the adult who may pose a risk to the child
- ✓ the background of the adult who may pose a risk to the child or young person, including any past or alleged misconduct
- ✓ any vulnerabilities particular to a child or young person which may increase the likelihood that they may become the victim of a sexual offence
- ✓ any other relevant fact which may indicate a substantial risk of a sexual offence being committed against a child or young person.

If a person in authority has a mere suspicion or tentative belief that a sexual offence may occur, they must investigate further to determine whether there is a substantial risk. It is not necessary to prove that a sexual offence has already been committed.

The offence carries a maximum penalty of imprisonment for five years.

Section 66A does not alter any existing reporting requirements. Necessary matters should be reported to the Principal, Board or Child Protection Officer of the institution and external reporting procedures should be followed.

The criminalisation of a 'failure to protect' is intended to encourage organisations to actively manage the risks of sexual offences being committed against children in their care to protect them from harm.

Key Definitions

Section 66A introduces a number of new terms that must be understood by schools to comply with their obligations under the section, as outlined below.

The term "**person in authority**" is not defined in the Crimes Act. However, the Act does define that a person who is "**associated**" with a relevant institution is an adult who:

- ✓ owns, manages or controls the institution;
- ✓ is employed or engaged by the institution;
- ✓ works as a volunteer for the institution; or
- ✓ engages in a regulated activity with or for the institution.

Examples of people in a position of authority, given the purpose of the section, may include:

- ✓ board members
- ✓ the principal
- ✓ teachers
- ✓ volunteers.

A "**relevant institution**" is an entity, or group of entities, that operate facilities for, engages in activities with, or provides services to children in their care, supervision or control. This can include:

- ✓ schools
- ✓ religious organisations
- ✓ hospitals
- ✓ child care centres
- ✓ out-of-home carers
- ✓ sports clubs
- ✓ youth organisations.

A “sexual offence” is an offence against [part 3 of the Crimes Act](#), or any other provision prescribed by regulation. This also includes an offence committed in another jurisdiction that would be considered an offence if committed in the ACT.

“Substantial risk” is not defined in the Crimes Act.

Actions to be Taken by a “Person in Authority”

Section 66A requires people in positions of authority in schools to act to protect children and young people from a risk of a sexual offence being committed against them by a person associated with the school where that risk is known and substantial.

Actions may include, for example:

- ✓ immediately removing a current employee who is known to pose a risk of sexual abuse to children in the school from contact with students and reporting the risk to appropriate authorities
- ✓ disallowing a school community member who is known to pose a risk of sexual abuse to children from volunteering in a role that involves direct contact with students
- ✓ disallowing a parent who is known to pose a risk of sexual abuse to students from attending overnight school camps as a parent helper.

Key Actions for Schools

Schools should make their staff, volunteers or other people in positions of authority aware of their potential obligations and the operation of section 66A, as well as steps they should take when they become aware of substantial risk of a sexual offence. Schools should implement policies and procedures that allow persons in authority to remove or reduce risk to children or young people, including immediately removing potential victims from contact with a potential perpetrator.

3. New Australian Student Wellbeing Framework

Summary

- ✓ The Australian Student Wellbeing Framework (ASWF) was introduced on 19 October 2018 by the Honourable Dan Tehan MP, Minister for Education.
- ✓ The Framework is a federal framework that provides a vision and a set of guiding principles “to support school communities to build positive learning environments, and to consider reviewing their current safety and wellbeing policies and support requirements”.
- ✓ The Framework supersedes the National Safe Schools Framework (NSSF).

Background

In October 2018, the NSSF was replaced with the ASWF.

The ASWF was created to act as a foundational document for Australian schools, based on “best-practice advice on developing and implementing policies and support mechanisms to help all students”. It is also aligned with the Australian Curriculum and Australian Professional Standards for Teachers and Principals.

The ASWF has been endorsed by all Ministers of Education through the Educational Council and is intended to acknowledge and support the links between student safety, wellbeing and learning outcomes. It is also designed to support children’s rights to education, safety and wellbeing under the United Nations Convention on the Rights of the Child as well as supporting disadvantaged or vulnerable students.

The ASWF supersedes the NSSF, which provided nine guiding principles that represented “fundamental beliefs about safe, supportive and respectful school communities”.

While the ASWF has a similar purpose, it provides five key elements, principle and further effective practices as outlined below:

| |  |  |  |  |  |
|----------------------------|--|---|---|---|---|
| ELEMENTS | LEADERSHIP Visible leadership to inspire positive school communities | INCLUSION Inclusive and connected school culture | STUDENT VOICE Authentic student participation | PARTNERSHIPS Effective family and community partnerships | SUPPORT Wellbeing and support for positive behaviour |
| PRINCIPLES | Principals and school leaders play an active role in building a positive learning environment where the whole school community feels included, connected, safe and respected. | All members of the school community are active participants in building a welcoming school culture that values diversity, and fosters positive, respectful relationships. | Students are active participants in their own learning and wellbeing, feel connected and use their social and emotional skills to be respectful, resilient and safe. | Families and communities collaborate as partners with the school to support student learning, safety and wellbeing. | School staff, students and families share and cultivate an understanding of wellbeing and support for positive behaviour and how this supports effective teaching and learning. |
| EFFECTIVE PRACTICES | <p>Develop the school's vision and values, building on existing strengths, to enhance student learning and sustain the safety and wellbeing of the whole school community</p> <p>Actively seek and incorporate students' perspectives about safety and wellbeing in order to promote positive learning outcomes</p> <p>Communicate the priorities for student learning, safety and wellbeing and encourage collaborative partnerships to enact the school's vision and values</p> <p>Collaboratively develop whole school policies, plans and structures for protecting the safety and promoting the wellbeing of staff, students, and families</p> <p>Regularly monitor and review school capacity to address the safety and wellbeing of the whole school community in order to identify areas of strength and those requiring improvement</p> | <p>Recognise and value the role and contribution of staff, students and families in building and sustaining school connectedness</p> <p>Respect the diversity of the school community and implement proactive strategies in order to build a cohesive and culturally safe school</p> <p>Teach, model and promote values and behaviour in order to create and maintain supportive and safe learning environments</p> <p>Foster and maintain positive, caring and respectful student-peer, student-teacher, teacher-parent and teacher-teacher relationships</p> <p>Engage in professional learning to build capacity for enhancing the social, emotional and learning outcomes of all students and in order to promote staff wellbeing</p> | <p>Provide opportunities for authentic student decision-making over matters that affect them</p> <p>Create and maintain inclusive and interactive learning environments to encourage active student participation to foster a sense of connectedness</p> <p>Actively engage students through the use of evidence-informed, strengths-based approaches to enhance their own learning and wellbeing</p> <p>Explicitly teach social and emotional skills using evidence-informed practices related to personal safety, resilience, help-seeking and protective behaviours across the curriculum</p> <p>Collaborate with students to develop strategies to enhance wellbeing, promote safety and counter violence, bullying and abuse in all online and physical spaces</p> | <p>Proactively build collaborative relationships with families and communities to create a shared understanding of how to support student learning, safety and wellbeing</p> <p>Develop strategies to sustain culturally respectful partnerships with families and communities that are welcoming and inclusive</p> <p>Build partnerships with Aboriginal and Torres Strait Islander families and community organisations to ensure a culturally safe environment and a two-way reciprocal exchange of knowledge on wellbeing issues</p> <p>Build links with community organisations, services and agencies to assist schools in the early identification of need and to collaboratively plan targeted support for all students and families, including those from vulnerable groups</p> <p>Regularly monitor and review school capacity to respond to specific instances of student and family need to protect their safety and wellbeing within the context of the school's urban, regional, rural or remote location</p> | <p>Actively seek the involvement of school staff, students and families in the promotion and recognition of positive behaviour</p> <p>Embed wellbeing and positive behaviour support strategies that are evidence-informed, promote resilience and align with the needs of the school community</p> <p>Implement a whole school systemic approach to wellbeing and positive behaviour with tiers of support to meet the diverse needs of staff, students and families</p> <p>Engage in professional learning to support the consistent implementation of the school's plan for wellbeing and support for positive behaviour</p> <p>Critically analyse and evaluate school data to inform decision-making in order to effectively respond to the changing needs of students and families</p> |

The ASWF is accessible through the [Student Wellbeing Hub website](#) which also includes practical methods for applying the elements.

While the aims of the NSSF and ASWF are similar, their guiding principles differ in their structure. The NSSF presented nine elements, each representing a practical management strategy to achieve the framework's goals. Each element was also broken down into key characteristics that outlined key strategies for implementing the elements into the school community.

The ASWF reduces the number of elements to five, each of which is more holistic and broader than the NSSF elements which are more specific. However, the ASWF supports these elements with 'principles' and 'effective practices'. The principles describe how each element contributes to the overall goal of the framework while the effective practices deliver pragmatic strategies for establishing these elements.

Overall, the ASWF aims to introduce these principles into school communities and curriculums with the participation of the whole school community to create "tiers of support that emphasise appropriate early intervention".

Schools' Obligations

In the ACT, it is a requirement of registration for non-government schools to ensure their policies, programs, procedures and guidelines that relate to the safety and welfare of students have regard to the NSSF, or its equivalent. As mentioned, the NSSF has now been superseded by the ASWF.

It is recommended that schools understand their obligations to uphold the ASWF elements and associated principles and endeavour to incorporate them into their policies, programs, procedures and guidelines. Schools should ensure that the school community, including staff, students, and families of students, are aware of the ASWF elements and how the ASWF is incorporated into their school community.

4. How CompliSpace Can Help

CompliSpace combines specialist governance, risk, compliance, and policy management (GRC&P) consultancy services with practical, technology-enabled solutions. We are the leading provider of student duty of care and child protection GRC&P services in Australia, working with leading non-government schools and educational authorities in all Australian states and territories.

Our team of lawyers and industry experts actively monitor changes to relevant laws and standards and deliver a full suite of online policies, procedures and governance programs that enable schools to continuously comply with their legal and regulatory obligations.

CompliSpace has developed a detailed Child Protection Program that systematically addresses the requirements of the ACT child protection legislative and regulatory framework, including policies and procedures regarding the new failure to protect offence and related obligations, and incorporation and mapping of the ASWF. The Program is designed to be tailored to the circumstances of each school. CompliSpace has also developed detailed online child protection training which includes information on both the failure to protect offence and the ASWF.

CompliSpace works with schools to tailor compliance and risk management systems to a school's individual needs and characteristics, ensuring meaningful compliance with their legal and regulatory obligations.

If you are looking to update your existing child protection content, contact us on:

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