BRIEFING PAPER

NSW Child Protection Update

June 2018

CompliSpace Pty Ltd 1300 132 090
www.complispace.com.au
www.schoolgovernance.net.au

ACT | NSW | NT | QLD | SA | TAS | VIC | WA

Published by:

complispace make it work

School Governance
Keeping you informed

Table of Contents

1. Executive Summary

Since September 2017 the NSW Government has been incrementally introducing various child protection legal and regulatory reforms that reflect the changing child safety landscape in Australia resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).

Changes to the Crimes Act 1900 (NSW) and Child Protection (Working with Children) Act 2012 (NSW) align NSW - with other jurisdictions and key Royal Commission recommendations, including, but not limited to:

- ✓ A new criminal offence to fail to reduce or remove the risk of a child becoming a victim of child abuse. **YET TO TAKE EFFECT**
- ✓ A new criminal offence of grooming a person for unlawful sexual activity with a child under the person's authority. **YET TO TAKE EFFECT**
- ✓ A new criminal offence of 'concealing child abuse', criminalising the failure to report information that might assist the apprehension or conviction of a child abuse offender. **YET TO TAKE EFFECT**
- ✓ A new obligation on employers to verify and record workers' Working with Children Check clearances prior to their engagement by the organisation. **IN EFFECT**

Additionally, the development and release of voluntary Principles of Child-Safe Organisations by the NSW Office of the Children's Guardian (OCG) in September 2017 and finalisation and release of the Royal Commission's 10 Child Safe Standards in December 2017 has created a high benchmark for best practice child safety compliance for child-related organisations in NSW, including non-government schools.

Collectively, these legal and regulatory reforms present a great opportunity for NSW non-government schools to develop and implement a comprehensive and integrated child protection program of strategies, systems, policies, procedures and practices benchmarked against best practice as determined by the Royal Commission, in line with other jurisdictions around Australia.

2. New Crimes Act Offences

The Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW) (Bill) proposes numerous amendments to the Crimes Act 1900 (NSW) (Crimes Act). The Readings of the Bill in Parliament make it clear that the amendments are being made to strengthen NSW's child sexual abuse laws and respond to the work of the Royal Commission and the NSW Department of Justice's Child Sexual Offences Review. That Review produced a Discussion Paper on 'Strengthening child sexual abuse laws in NSW' which outlines many areas of reform now addressed by the Bill.

The Bill signals that the NSW Government is catching up to other jurisdictions' child protection legal reform in line with the Royal Commission's recommendations. The Bill passed NSW Parliament on 21 June 2018. It is yet to receive assent and a commencement date is yet to be proclaimed. These reforms will require child-related organisations to significantly update their child protection policies, procedures and practices.

The Bill introduces significant reform to Division 10 of the Crimes Act which focuses on sexual offences. Any member of a school's community can engage in conduct which results in them being charged with an offence under that Division of the Act. While schools are not expected to be aware of and educate the school community on all forms of criminal conduct, some offences, and in particular sexual offences, are more relevant than others.

The key changes to the Crimes Act 1900 (NSW) are summarised below.

- A new section 43B offence: Failure to reduce or remove the risk of a child becoming a victim of child abuse.[1]

  - ✓ If an adult (18 years or older) works as an employee, contractor or volunteer for an organisation and that person knows of a serious risk that another adult who is engaged in child-related work at the organisation will commit a child abuse offence against a child (under 18 years) who is, or may come, under the care, supervision or authority of the organisation, and that person has the responsibility to

1 Note that this new offence has been added to Division 6 of the Crimes Act: Acts causing danger to life or bodily harm, not to Division 10 as per the majority of changes introduced by the Sexual Abuse Bill.

reduce or remove that risk and negligently fails to do so, they will be guilty of an offence punishable by two years' imprisonment.

- ✓ The terms ''knows'' and ''serious risk'' are undefined in the legislation.
- ✓ Section 43B is modelled on a Victorian 'failure to protect' offence in section 49O of the Crimes Act 1958 (Vic). However, while the Victorian offence applies to sexual offences against a child under 16 years, the new NSW offence applies to both physical and sexual abuse committed against a child under the age of 18 years.
- ✓ This addition to the Crimes Act applies to organisations engaged in child-related work within the meaning of the Child Protection (Working with Children) Act 2012 (NSW), including non-government schools.
- ✓ Organisations should ensure that they provide training to their staff, contractors and volunteers on how to identify child abuse risks, and indicators of abuse and grooming in both children and adults.

- A new section 66EC offence: Grooming a person for unlawful sexual activity with a child under the person's authority.

  - ✓ If an adult provides a person (other than a child) with any financial or other material benefit and does so with the intention of making it easier to procure a child who is under the authority of the person for unlawful sexual activity, they will be guilty of an offence punishable by 5-6 years' imprisonment.
  - ✓ ''Under the authority'' means under the care, or under the supervision or authority, of the other person.
  - ✓ The term ''grooming'' is still undefined in the legislation.
  - ✓ This addition reflects the Royal Commission's research and findings relating to grooming behaviours, including the expansion of the definition of grooming to include behaviours beyond those directed at a child[2] and the recognition of the prevalence of grooming of adults connected to a child (parents/carers), and grooming the institution.[3]
  - ✓ The existing grooming offence under section 66EB (Procuring or grooming child under 16 for unlawful sexual activity) has been amended to broaden the categories of grooming conduct from exposing a child to indecent material or provides a child with an intoxicating substance, to also include *providing any financial or other material benefit*.
  - ✓ This new offence will require the training of staff, contractors and volunteers in how to identify behavioural indicators of grooming behaviour exhibited by both the perpetrator and victim.

- A new section 73A offence: Sexual touching – young person between 16 and 18 under special care.

  - ✓ If a person intentionally sexually touches/incites a young person to touch them or another person, and the young person is under that person's "special care", they will be guilty of an offence punishable by a two or four year jail term (depending on the age of the young person).
  - ✓ A child is under a person's "special care" if the person is a member of the teaching staff of the school (a teacher, principal or deputy principal or any other person employed at the school who has students at the school under their care or authority) at which the victim is a student. A child is also under a person's "special care" if the person has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim.
  - ✓ The creation of new section 73A follows previous legal reform to existing section 73 (Sexual intercourse with child between 16 and 18 under special care), as discussed in the School Governance article NSW Closes Legal Loophole: Will other states follow?

[2] The Royal Commission has adopted a broad definition of grooming which include "The use of a variety of manipulative and controlling techniques; with a vulnerable subject; in a range of inter-personal and social settings; in order to establish trust or normalise sexually harmful behaviour; with the overall aim of facilitating exploitation and/or prohibiting exposure."

[3] O'Leary, P, Koh, E, & Dare, Grooming and child sexual abuse in institutional contexts, Royal Commission into Institutional Responses to Child Sexual Abuse, 2017

- ✓ Whereas section 73 is restricted to ''sexual intercourse'' new section 73A applies to ''sexual touching''. This is a newly defined term and means a person touching another person with any part of the body or with anything else or through anything, including anything being worn by the person doing the touching or by the person being touched, in circumstances where a reasonable person would consider the touching to be sexual.
- ✓ Organisations will need to ensure that child protection policies, procedures and practices are updated to ensure that they include staff/student professional boundaries policies and reporting procedures for breaches of codes of conduct and staff/student professional boundaries policies.
- ✓ Again, organisations should train their staff, contractors and volunteers on appropriate and inappropriate behaviours with children, and how to report suspected breaches of codes of conduct and professional boundaries by other staff members, contractors and volunteers.

- A new section 316A offence: Concealing child abuse.

  - ✓ An adult who knows, believes, or reasonably ought to know that a child abuse offence has been committed against another person, and
    - who knows, believes or reasonably ought to know that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender, and
    - fails without reasonable excuse to bring that information to the attention of the NSW Police as soon as practicable,

    will be guilty of an offence punishable by two years' imprisonment.
  - ✓ Section 316 of the Crimes Act: Concealing serious indictable offences, already imposes a positive reporting obligation on school teachers, including a principal of a school, a member of the clergy of any church or religious denomination, and other professions, to report known, or believed, acts of serious indictable offences – which includes forms of child abuse. This section has been changed by the Bill to exclude a child abuse offence. Instead, failing to report these offences is now covered by the new section 316A.
  - ✓ The provision provides a non-exhaustive list of "reasonable excuses", outlining the circumstances in which the offence does not apply, including where a person:

    - believes, on reasonable grounds the Police already know the information,
    - has made a mandatory report under mandatory reporting laws or believes on reasonable grounds that another person has done so, or
    - has reported the information to the Ombudsman under reportable conduct laws or believes on reasonable grounds that another person has done so.

  - ✓ The offence will apply to members of the clergy, although prosecutions against clergy and other prescribed professionals must be approved by the Attorney General, as is the case with the existing section 316. The offence covers failing to report physical abuse as well as sexual abuse.
  - ✓ This offence applies to all adults, not just mandatory reporters, and as such it is critical that organisations provide training to all adults in their organisation on reporting to external authorities, and their obligations under this offence, which is broader than the existing section 316 offence.

For further detail and commentary on these new offences see the School Governance article '[Significant New Child Protection Legal Reform Proposed in NSW: Schools Must Reduce or Remove the Risk of Child Abuse]'.

3. Changes to Working with Children Check Requirements

The Child Protection (Working with Children) Amendment (Statutory Review) Act 2018 (Amendment Act) took effect 1 June 2018 and made a number of changes to the Child Protection (Working with Children) Act 2012 (NSW) (WWC Act). The Act was designed to implement the first of the recommendations from the Statutory Review of the WWC Act which was conducted in 2017 by the NSW OCG. The main recommendations of the Statutory Review Report relate to the scope of the Working with Children Check (WWCC) Scheme and strategies to improve compliance.

Significantly, the Amendment Act changes the definition of child-related work so that direct contact with children must be "a usual part of and more than incidental to the work". This change was recommended by the Royal Commission in its Final Report on Working with Children Checks.[4]

Other major changes to the WWC Act are summarised below.

- A new section 9A offence: Failure by an employer to obtain and verify the details of a worker who is employed to work with children, or to keep a record of the details so obtained. Financial penalties apply to an offence under this section.

  - ✓ A worker is defined in the WWC Act to include an employee, contractor or subcontractor, volunteer, person undertaking practical training as part of an educational or vocational course (not school student work experience), minister, priest, rabbi, mufti or other like religious leader or spiritual officer of a religion or other member of a religious organisation.
  - ✓ This mandatory verification requirement replaces an existing requirement on child-related organisations that was not an offence.

- New section 36B: Duty to keep WWCC clearance information up to date.

  - ✓ Each person who holds a WWCC clearance, or who has applied for a clearance, is required to notify the Children's Guardian of any change in their personal details (including contact and employment details) within three months of the change occurring.
  - ✓ A person will be guilty of an offence if they fail to comply with this requirement without reasonable excuse. Financial penalties apply to an offence under this section.

- Expansion of the Children's Guardian's power to require information from persons and government agencies relevant to the preparation of submissions to the NSW Civil and Administrative Tribunal under section 31.

These amendments to the WWC Act require all organisations engaging in child-related work, including non-government schools, to revise and update their Working with Children Check policies and procedures to include verification and improved record keeping measures. Details should include who maintains WWC records, where they are stored and how records are maintained for staff members who may commence mid-year.

Schools should also ensure that staff, contractors, volunteers and any religious personnel are informed of their increased reporting and information sharing obligations.

[4] Recommendation 8(a), Royal Commission into Institutional Responses to Child Sexual Abuse, Working with Children Checks Report, 2015

4. NSW Office of the Children's Guardian Child Safe Principles

In September 2017 the OCG released its Principles for Child-Safe Organisations (the Principles) to help organisations create safer environments for the children they are involved with. The Principles are designed to be flexible enough for organisations, including non-government schools, to implement child-safe strategies that address their organisation's own particular environmental risks.

The Principles are informed by the findings of the Royal Commission regarding the 10 elements of child-safe environments.[5] The Principles are:

1. The organisation focuses on what is best for children
2. All children are respected and treated fairly
3. Children's families and communities are welcome and encouraged to participate in the organisation
4. Children receive services from skilled and caring adults.

Unlike other jurisdictions that have released and mandated a series of child safe standards or principles for child-related organisations, the Principles are voluntary. However, the OCG has reinforced its stance that WWCCs, while important, are only one way to keep children safe, and that organisations need to think about other things they can do to reduce the risk of harm.

The OCG encourages all child-related organisations to become 'high reliability organisations'. These are organisations that provide services where the impact of risk, such as child abuse, is serious but they have strong risk management processes to reduce the risk of children being harmed.

The Principles were based on a 2016 Royal Commission research report. Since then the Royal Commission has released its Final Report, including the final 10 Child Safe Standards, providing extended guidance on the implementation of the Standards. It is possible that, in light of this further release by the Royal Commission, the OCG will revise its Principles for Child-Safe Organisations to better reflect the Commission's Child Safe Standards.

5. Royal Commission Child Safe Standards

The Royal Commission released its Final Report in December 2017, consisting of 17 volumes and 85 recommendations. A key recommendation (recommendation 6.4) is for all child-related institutions to implement the Child Safe Standards identified by the Royal Commission.

There are 10 Royal Commission Child Safe Standards that were developed to provide a solid foundation for a consistent and best practice approach to children's safety in institutions. The Child Safe Standards are the foundation of the Royal Commission's nationally consistent approach to better protect child-related institutions.

The 10 Child Safe Standards are:

1. Child safety is embedded in institutional leadership, governance and culture
2. Children participate in decisions affecting them and are taken seriously
3. Families and communities are informed and involved
4. Equity is upheld and diverse needs are taken into account
5. People working with children are suitable and supported
6. Processes to respond to complaints of child sexual abuse are child focused
7. Staff are equipped with the knowledge, skills and awareness to keep children safe through continual education and training
8. Physical and online environments minimise the opportunity for abuse to occur
9. Implementation of the Child Safe Standards is continuously reviewed and improved
10. Policies and procedures document how the institution is child safe.

While numerous jurisdictions, including NSW, reference the Child Safe Standards in their own child safe frameworks, not one has adopted and mandated the Child Safe Standards in their entirety.

[5] Royal Commission into Institutional Responses to Child Sexual Abuse, Creating child safe institutions, 2016

6. Voluntary v. Mandatory Child Safe Standards

What's the difference and why does it matter?

In its Final Report: Volume 6, Making institutions child safe, the Royal Commission discusses the varied benefits of a voluntary or mandated system for the implementation of nationally consistent child safe standards.

Voluntary child safe standards are a form of self-regulation where a sector creates its own rules and is responsible for enforcing those rules. The National Audit Office states that self-regulation is appropriate where "risks are low or there is a reasonable expectation that regulated entities will behave appropriately and be accountable".[6] According to the Royal Commission's findings, 31.8 per cent of survivors from the Commission's Private Sessions said that they were abused in a school (75.9 per cent of those that were abused in a school were abused in a non-government school). While voluntary standards would minimise the compliance burden on institutions providing services to children (for example non-government schools that already have a significant compliance burden or 'fatigue'), it is likely not appropriate to describe non-government schools as institutions where 'risks are low'.

The Royal Commission recognises that an alternative to self-regulation is for the Government to entrust peak bodies with oversight of the child safe standards in institutions. However, the Royal Commission expresses concerns about the difficulty of ensuring consistency of implementation across sectors, information sharing between peak bodies and governments, and potential conflicts of interest for peak bodies whose main purpose is protecting the reputation of the sector or major institutions within it.

Therefore, if voluntary implementation of child safe standards, either through self-regulation or through oversight by peak bodies, is not appropriate, then mandatory standards may be the appropriate and most effective approach.

What is the Royal Commission's view?

The Royal Commission reports that institutions are seeking strong leadership from governments on child safety. Throughout their consultations, they heard that there is a desire amongst institutions for the Government to set clear standards on institutions' responsibilities and provide guidance on meeting those responsibilities.

Of the 29 experts surveyed in the Royal Commission's research, 27 supported a mandatory, government-regulated approach.[7] This is because:

- child abuse is a high-risk and major public health issue
- multiple industries are involved, with sub-sectors within those industries, for example government, Catholic and independent sectors in schools (and therefore government regulation, rather than peak body regulation, would provide greater consistency)
- the industries have a wide geographical spread
- the community requires the certainty of legal sanctions
- highly specialised subject matter knowledge and skills are needed, for example in professional education efforts
- institutional interests and values may conflict with the ideal form and content of regulation
- some institutions do not have the capacity or commitment to reduce the risk of child abuse without regulation
- the risk of non-compliance or active subversion is high
- change might be resisted because of economic pressure on the regulated industries.

For non-government schools, the Royal Commission recommends (recommendation 13.2) that responsibility for monitoring and enforcing child safe standards should be delegated from state and territory governments to school registration authorities. This already occurs in Victoria, where the Victorian Child Safe Standards have been

[6] Australian National Audit Office, Administering regulation: Achieving the balance, best practice guide, 2014

[7] K Valentine, I Katz, C Smyth, C Bent, S Rinaldis, C Wade & B Albers, Key elements of child safe organisations – research study, report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, p 35

incorporated into school registration requirements. Queensland[8] and South Australia[9] have also implemented mandatory approaches to child safe principles and requirements.

In NSW, there is no such requirement; neither the Principles nor the Royal Commission Child Safe Standards are mandatory for child-related organisations. However, with other jurisdictions introducing reform through the adoption of best practice child safe practices benchmarked against the Royal Commission's 10 Child Safe Standards[10], it is timely for NSW non-government schools to rethink their approach to child safety. Schools that make a conscious decision to adopt the NSW Principles and Royal Commission Child Safe Standards as if they *were* mandated will no doubt be commended, presumably for their proactive approach to such an important issue.

7. What Does all of This Mean for NSW Schools

In short, these changes require all NSW non-government schools to make a decision: proactively develop their child protection policies, procedures and practices to meet best practice, benchmarked against the Royal Commission, which is spreading across the country - or wait until this approach is mandated by the NSW Government?

There is no correct answer, however looking to previous 'phase-in' or commencement periods provided to other jurisdictions when similar mandated schemes have been introduced, it makes sense to be proactive now. Victoria, for example, introduced mandatory Victorian Child Safe Standards in December 2015, which included requirements such as applying Enterprise Risk Management to a school's child protection approach, development and publication of several policies and procedures, and the training of staff, contractors and volunteers. Schools in Victoria were required to sign an attestation of compliance by 1 August 2016 – a mere seven months after the Victorian Child Safe Standards were introduced. *If your organisation had to begin to implement a completely new child protection framework now, would you be able to sign an attestation of compliance on 31 December 2018?*

The combination of legal and regulatory reforms outlined in this paper present schools with no choice but to update their child protection approach, to at least comply with their new legal requirements. Hopefully, guidance will be issued by a NSW authority, such as the Department of Justice, on how organisations should comply with the new criminal law offences, given the significance of the changes and some ambiguity about the interpretation of key phrases. Compliance with the new Crimes Act offences will require training of various members of the school community and updating existing policies and procedures (or developing new ones). The WWC Act changes similarly require updates to policies, procedures and training. However, it would be a missed opportunity if schools did not use these legal and regulatory drivers to step-up to best practice in line with the country's leaders in child protection and safety – before they're required to do so, with a tight deadline to meet.

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

T: 1300 132 090 **E**: contactus@complispace.com.au **W**: www.complispace.com.au

CompliSpace Media is the publisher of the school governance news site: www.schoolgovernance.net.au

DISCLAIMER

[8] In 2005, Queensland became the first jurisdiction to include child safe institution requirements in legislation under the Working with Children (Risk Management and Screening) Act 2000 (QLD) for all institutions covered by their state working with children check scheme – the Blue Card System.

[9] In 2006, South Australia legislated under the Children's Protection Act 1993 (SA) that institutions must establish codes of conduct and meet seven child safe principles.

[10] The child safe principles, requirements and standards developed by Queensland, South Australia, Western Australia and Victoria are generally consistent with the Royal Commission's 10 Child Safe Standards.