

The New Children's Protection Legislation in New South Wales: Implications for Educational Professionals¹

*Katherine Lindsay, Faculty of Law,
The University of Newcastle, New South Wales, Australia*

Introduction

In the Foreword to the 1997 edition of the NSW Child Protection Council's *Interagency Guidelines for Child Protection Intervention*, the Premier of New South Wales Mr Bob Carr stated that 'There is no more important test for judging our society than how it values and cares for children. Protection of children from abuse and neglect is a moral and ethical imperative'.²

Educators would hardly demur at this assessment, particularly in view of the relationship of trust between student and teacher which defines a core commitment of educational professionalism.³ Yet recent evidence has revealed patterns of gross and flagrant breaches of professionalism and professional ethics by educators which have shattered the integrity of the relationship between student and teacher in ways which may amount to criminal behaviour or civil wrong.⁴ In analysing the legislative response to the evidence gathered at the recent Royal Commission into the New South Wales Police Service, it is salutary not only to ponder the substance of legal change, but also to assess the impact of the new regime upon the profession's mores. High-minded, well-intentioned legal reform can produce unintended and undesirable consequences in a professional community: fear, retribution and even repression.⁵ It is in this sphere that the alliance of legal regulation with professional ethical responsibility has greatest resonance, and potential to achieve justice for students and for teachers. This article discusses the origins of the package of new child protection legislation passed in late 1998, examines the application of legislation to the teaching profession, and reflects upon the relationship between legal regulation and professional ethics.

The Genesis of the Legislative Package

The recent changes to child protection legislation in New South Wales, which include four major statutory enactments, are the direct response by the Legislature to the Final Report of the Royal Commission into the New South Wales Police Service ('Wood Royal Commission'), and in particular the 'Paedophile Inquiry'. The Commission received evidence, complaints and submissions concerning the manner in which the school education system, in both government and non-government sectors, handled allegations of sexual abuse of children.⁶ Key findings of the Wood Royal Commission in respect of the education system included;

- Mandatory reporting of suspicions of child abuse, as required by the provision of the *Children (Care and Protection) Act 1987*, had been ‘largely ignored by teachers and school principals’;⁷
- Systemic flaws were observed in the process of handling child sexual abuse allegations against teachers. The flaws extended to the inadequate or inappropriate treatment of internal informants, the persons the subject of allegations, students, parent and members of the community, and the process of investigation and resolution of allegations;⁸ and
- Provision of satisfactory statements of service to persons who had convictions for offences involving the sexual abuse of children, or who had resigned upon allegations of sexual misconduct with students.⁹

The Wood Royal Commission also considered evidence and complaints from the non-government school sector which indicated systemic problems similar to those experienced in the government sector.¹⁰ The evidence revealed that teachers, the subject of allegations of abuse, had been dealt with by transfer to another school, that allegations of sexual abuse by teachers had been concealed from parents and the police, and that positive professional references had been supplied for teachers who had been the subject of allegations of sexual misconduct.¹¹ One of the motivations in the use of these procedures was identified as a desire to protect the ‘reputation of the schools concerned’.¹² The problem of paedophile activity in schools with a boarding facility was also identified.¹³ The Recommendations of the Wood Royal Commission in respect of the education system encompassed the issues of mandatory reporting; procedures for handling allegations of child sexual abuse; the issue of employer references; teacher registration and codes of professional ethics; the pre-employment screening of teachers; the involvement of a ‘Children’s Commission’ in the process of pre-employment screening; and the issue of unacceptable risk certificates to persons judged unsuitable for the profession of teaching by reason of convictions for sexual offences involving children.¹⁴

The Legislative Policy

The government’s response to the Wood Royal Commission report is to be found in four statutes:

- Children and Young Persons (Care and Protection) Act 1998;
- Commission for Children and Young People Act 1998;
- Child Protection (Prohibited Employment) Act 1998; and
- Ombudsman Amendment (Child Protection and Community Services) Act 1998

The Acts, as bespeaks their origin, share many core concepts and some similar objectives. These have been identified in the diagram in **Appendix A**.¹⁵ However, in their drafting and potential operation, some distinct terminology emerges.

The *Children and Young Persons (Care and Protection) Act 1998* contains fundamental reform to child protection law in New South Wales and is the result of extensive review of the legislation over several years. The changes to mandatory reporting provisions are consistent with the recommendations contained in the final report of the Wood Royal Commission, as was recognised by the Minister for Community Services, Mrs Lo Po’, in the Second Reading Speech

for the Bill.¹⁶ She stated that, '[t]he needs of children, young people and their families' are the 'central focus of the legislation'.¹⁷ Of significance to the education sector is the legislative objective in s 8(b):

that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity.

This objective is complemented by the changes to mandatory reporting provisions for professionals who work with children. The Minister stated that the reform is designed to permit a 'consistent approach (to reporting) and also make a clear statement to the community about the high expectations placed on those who are in the privileged position of working with children and young people'.¹⁸

The Attorney-General presented three further bills as a package in the Legislative Council on 12 November 1998. They were *Commission for Children and Young People Bill 1998*, *Child Protection (Prohibited Employment) Bill 1998*, and *Ombudsman Amendment (Child Protection and Community Services) Bill 1998*. Exposure draft bills in response to the recommendations of the Wood Royal Commission had been presented in July 1998 and a process of community consultation on the bills occurred. The nexus between the recommendations of the Wood Royal Commission and the content of the Bills was made explicit by the Attorney-General in his Second Reading Speech in the Legislative Council.¹⁹ The creation of the Commission for Children and Young People establishes an independent body to promote respect and understanding for the interests and needs of children and young people. The government, in formulating the legislation for the Commission moved beyond the focus of the Wood Royal Commission recommendation on child protection. However, the functions of the Commission in part 7 of the Act, include employment screening of those in child-related employment. The Attorney-General indicated in the Second Reading Speech that the decentralised model for employment screening provisions would be supplemented by Ministerial Guidelines which would be prepared in consultation with representatives of government, the community and employment-related organisations.²⁰

Two further indicators of government policy on employment screening and the Commission for Children and Young People deserve mention. The first is that the government characterises the screening process as a 'stringent' check on past behaviour. The final factor is the view that the screening process will be 'complemented by other child protection strategies', which include 'the establishment of professional standards of behaviour through codes of conduct and development of appropriate work practices'.²¹ The complementary strategies should be of particular significance and interest to professional educators who might seek to contribute to the articulation of appropriate ethical standards for the profession.

The *Child Protection (Prohibited Employment) Bill* was an implementation of recommendation 139 of the Wood Royal Commission:

139. Consideration be given to the creation of a summary offence where a person convicted of child sexual abuse, or the subject of a current unacceptable risk certificate (issued by the Children's Commissioner), seeks or obtains work, or

*offers or provides services, which in any such case, involves that person having children in his care or under his supervision.*²²

The government envisage the provisions of the *Child Protection (Prohibited Employment) Act* forming an integral part of the employment screening system. They are regarded as 'low cost and easily undertaken by employers'.

It was recognised by the Attorney-General that the amendments contained in the *Ombudsman Amendment (Child Protection and Community Services) Bill* were significant, and were aimed at overcoming shortcomings and possible conflicts of interest involved in internal investigation of allegations of child sexual abuse against the staff of an agency. The extension of the oversight to non-government agencies, including non-government schools was highlighted.²³ The Ombudsman has been given a significant function both in the oversight, as well as the development of, systems and procedures to overcome past inadequacies of process in the area of complaint handling.

The Statutory Scheme

A summary of the relevant provisions of the legislation, and some indication of its potential operation in schools is now provided. Each statute is considered separately and discussion is preceded by a summary of key concepts embodied within it.

Children and Young Persons (Care and Protection) Act 1998 Part 2

Key concepts
Child at risk of harm
Reasonable grounds for suspicion
grounds arising *during the course of* or *from* work

The Mandatory Reporting provisions of Part 2 of the Act have been strengthened in comparison with those found under the 1987 Act, consistent with the recommendation of the Wood Royal Commission. Failure to comply with a mandatory reporting requirement risks a significant penalty (s 27). Section 27 applies to all educational professionals in paid employment, including classroom practitioners and those employed in the management of schools, where they bear direct responsibility or supervision of teaching staff. The reporting requirements apply in relation to children or young people who are at risk of harm. A child or young person at risk of harm is defined in s 23:

where current concern exists for the welfare or well-being of a child because of the presence of particular circumstances.

The circumstances are present where:

- basic physical or psychological needs are not met;
- parents/caregivers fail and are unwilling to arrange medical care;
- there is evidence of physical or sexual abuse or ill-treatment or risk of these;
- there is risk of serious physical or psychological harm on account of incidents of domestic violence in the child's home;
- there is risk of serious psychological harm to a child on account of actions of parent/caregiver.

The requirement for mandatory reporting by educational professionals extends beyond the reporting of child sexual abuse, and includes other manifestations of harm to children. The legislation requires a report to the Director-General of the Department of Community Services in circumstances where the staff member or head of school has '*reasonable grounds to suspect that a child is at risk of harm*', and the grounds arise '*during the course of or from the person's work*' (s 27(2)). The statute does not define 'reasonable grounds', but this term is unlikely to be given a subjective interpretation. 'Reasonable' is likely to be viewed in the context of the professional responsibilities and standards of a competent professional. To take an example, if a child of primary school age revealed evidence of physical abuse to his or her classroom teacher because the child trusted the teacher and indicated that a parent or caregiver was the abuser, the teacher would most often be in a position to assess whether the child was bona fide confiding in a trusted adult. It may be more difficult to assess risk of harm and the source of trauma to a student who does not confide directly, but reveals difficult or anti-social behaviour patterns at school. Here, educational professionals must assess carefully the scope of their professional competence and ethical responsibilities. It may be necessary for teachers or principals to invoke the assistance of parents or caregivers, and where necessary other professionals (for example, counsellors or psychologists). In these circumstances a ground for suspicion of a risk of harm may not be 'reasonable' and thus invoke the reporting requirement.

The reasonable grounds for suspicion of risk of harm must arise '*during the course of or from*' the educator's work in order to fall within the terms of section 27. This includes all suspicions of a risk of harm which arise from contact with children or young people, during the school day, during school excursions and other school-related activities, when educators are performing professional tasks. However, reasonable grounds for suspicion of a risk of harm to a child may be formed at other times. For example, if a student approaches his or her classroom teacher at a shopping centre or supermarket, and confides evidence or risk of harm because he or she trusts the teacher, the duty to report the risk of harm may arise 'from' the teacher's work. Arguably this is so because the student would have no necessary relationship in any sense with the teacher without the 'nexus' of the teacher's work. The expression 'during the course of or from' in section 27 may cast a significant responsibility upon educators.

Where a person to whom the mandatory reporting section applies makes such a report in good faith, he or she will be protected by the provisions of section 29 of the Act. This Section provides that in such circumstances, the report does not constitute a breach of professional ethics or conduct, the person cannot incur liability for defamation, it cannot be a ground for malicious prosecution or conspiracy. Further protection is provided with restrictions on the use of the report, and constraints on release of the identity of the reporter. The Director-General of the Department

of Community Services has obligations of record keeping, investigation and assessment of reports which are outlined in Part 3 of the Act.

Child Protection (Prohibited Employment) Act 1998

<p style="text-align: center;">Key concepts Prohibited person child-related employment serious sexual offence disclosure</p>

The provisions of the *Child Protection (Prohibited Employment) Act 1998* are intended to operate together with the employment screening provisions in Part 7 of the *Commission for Children and Young People Act 1998*. In conformity with recommendation 139 of the Wood Royal Commission, the statute establishes offences in respect of child-related employment. The offences are directed at two classes of persons - employers, and employees who are prohibited persons. The Act defines child-related employment as employment *which primarily involves direct contact with children where the contact is not directly supervised*. Employment in schools and other educational institutions (not being universities) is specifically included in the definition (s 3). It is clear that classroom practitioners and other educational professionals, such as librarians, specialist music/instrumental teachers, sport and leisure instructors employed in schools and boarding school staff will be covered by the legislation, it is also significant that volunteers may be covered in that the definition of employment includes 'the performance of work as a volunteer for an organisation'.

Offences of prohibited persons (employees) and obligations of disclosure

- *apply for, undertake or remain in child-related employment*
- *disclose whether or not he or she is a prohibited person*
- *make a false disclosure*

Prohibited persons under the Act are defined as persons who have been convicted of a serious sex offence before or after the commencement of the Act. Section 5 lists a range of such offences, including offences involving sexual activity or acts of indecency committed in New South Wales (or elsewhere) and that were punishable by penal servitude for 12 months or more and child pornography offences. Under the Act, it is an offence for a prohibited person to *apply for, undertake or remain in child-related employment* (s 6), unless he or she did not know that the employment was child-related employment. When requested by his or her employer, an employee must *disclose whether he or she is a prohibited person* within one month, unless the person ceases

to engage in child-related employment within that month(s 7(4), s 7(5)). It is an offence to *make a false disclosure* concerning whether a person is a prohibited person (s 7(6)). Individuals may apply under the Part 3 of the statute for a declaration exempting them from the provisions of the Act. The Industrial Relations Commission and the Administrative Decisions Tribunal are empowered to grant declarations of exemption (s 9).

Offences of employers

- *employs a person in child-related employment without requiring disclosure*
- *knowingly to employ a prohibited person in child-related employment.*

Section 7 provides that an employer commits an offence if he or she *employs a person in child-related employment without requiring disclosure* of the employee's status as a prohibited person (or not a prohibited person). It is an offence under section 8 *knowingly to employ a prohibited person in child-related employment*. The clear responsibilities of educational employers under this Act require the institution of procedures for securing disclosure of the status of employees and applicants for positions. In the conduct of the disclosure process with employees or applicants for employment, employers will need to make clear the range of offences, and the nature of convictions which would render an employee a prohibited person within the terms of the Act.

Transitional Provisions

The legislation provides for a transitional period (**Appendix C**) of three months from the commencement of the Act during which a prohibited person in child-related employment may remain in employment if he or she discloses within one month that he or she is a prohibited person and complies with requirements concerning unsupervised contact with children (s 6(3)). The requirements of employers under the transitional provisions are that disclosure by the employee is required within six months from the commencement of the section, unless the employee ceases to engage in child-related employment (s 7(2)). Employers are exempted from requiring disclosure during the transition period where they have carried out criminal record checks on an employee within two years of the commencement of the Act (s 7(3)). Under the transition period of three months after the commencement of the Act an employer who takes all reasonable steps to prevent or restrict a prohibited person from having unsupervised contact with children will not be guilty of an offence under section 8 (s 8(2)).

Commission for Children and Young People Act 1998

<p>Key concepts (primary) child-related employment child abuse (mandatory) employment screening</p>
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relevant criminal record relevant disciplinary proceedings

Employment Screening

Part 7 of the *Commission for Children and Young People Act 1998* regulates employment screening for child-related employment administered by the Commission. Section 32 provides that the welfare of children and, in particular, protecting them from child abuse, is to be the paramount consideration in employment screening. Section 37 establishes that *employment screening is mandatory for preferred applicants in primary child-related employment* where the person is not already employed by that employer in child-related employment. The concept of child-related employment draws upon the definition in the *Child Protection (Prohibited Employment) Act 1998* with the definition ‘*employment involving direct contact with children where contact is not directly supervised*’, whilst permitting kinds of employment to be included and excluded by the regulations. Primary child related employment includes paid employment to which the *Child Protection (Prohibited Employment) Act 1998* applies. The legislation imposes a duty on employers in child-related employment to carry out all relevant screening procedures before the employment of a preferred applicant (s37(2)). Section 37(3) provides that the pre-employment screening may be deferred in limited circumstances. Employers are permitted under the legislation to engage the Commission or another body approved by the Minister to carry out employment screening on its behalf (s 37(4)).

Employment screening of *employees and applicants* for child-related employment is defined in section 34 as consisting of the following procedures:

- criminal record check;
- relevant apprehended violence order check;
- relevant disciplinary proceedings check;
- relevant probity check;
- assessment of risk to children;
- disclosure of results of check to employer.

The functions of the Commission in respect of employment screening are outlined in sections 36-38 and include:

- collection and maintenance of employment screening data;
- giving access to information to employers for their employment screening (under memorandum of understanding);
- conducting employment screening on behalf of employers by agreement;
- recommendations to the Minister concerning procedures and standards;
- community education function;
- monitoring and auditing compliance with screening procedures and standards;
- disclosing employment screening information to employers on behalf of whom the Commission has undertaken screening.

Obligations of Employers: Disciplinary Proceedings and Rejected Applicants

Part 7 also imposes obligations on employers with respect to disciplinary proceedings (s 39) and rejection of applications for employment in connection with employment screening (s 40). An employer is under a duty to notify the Commission of the name and particulars of an employee against whom relevant disciplinary proceedings have been completed, irrespective of the outcome. Further, the employer is required to keep records of the matter notified to the Commission. The notification applies to relevant disciplinary proceedings completed within five years of the commencement of Part 7. The expression '*relevant disciplinary proceedings*' is defined in section 33 to mean completed proceedings involving child abuse, sexual misconduct by the employee or acts of violence committed by the employee in the course of employment. The term 'child abuse' has the same definition as that which appears in the *Ombudsman Amendment (Child Protection and Community Service) Act 1998*, which is considered below. There is also a duty to notify the Commission of the name and particulars of any applicant rejected for employment primarily on account of a risk assessment in employment screening (s 40).

The statute provides protection from legal liability for those acting in good faith and with reasonable care in the process of employment screening (s 41). However, unauthorised disclosure of information obtained in connection with employment penalty is an offence and attracts a significant penalty (s 42). The Part also addresses the issue of the application of Freedom of Information legislation to relevant disciplinary proceedings and the operation of other legislation, rights and procedures upon the new scheme (ss43 and 44).

For employers in the non-government school sector, the obligations imposed by the legislation may raise serious practical questions. This is particularly the case in respect of the duty to notify the Commission under section 39 of completed relevant disciplinary proceedings. The contractual nature of non-government school employment is at the heart of the difficulty, and has been referred to earlier in the paper. It may be that the regulations envisaged by the legislation, and the Ministerial Guidelines required by section 35 of the Act will address the issue of the different employment practices in government and non-government sectors.

***Ombudsman Amendment (Child Protection and Community Service) Act 1998*²⁴**

Key concepts

Designated government authority (s 25A)

Non-designated government authority (s 25A)

Child abuse (s 25A)

Notification (S 25C)

Disclosure (s 25D)

Scrutiny, monitoring and investigation by Ombudsman (s 25B, 25 E, 25G)

This statute introduces a new part 3A to the *Ombudsman Act 1974* (NSW), and thereby extends the jurisdiction of the Ombudsman in respect of child protection matters. The amendment is of particular significance in that it extends the jurisdiction to the private sector, which is largely a new territory for the Ombudsman, although the office has had experience in respect of private certifiers and the private gaol at Junee. A diagrammatic representation of the potential operation of Part 3A in respect of schools can be found in **Appendix B** below. The legislation introduces a number of significant concepts which regulate the operation of the section. These include in section 25A the notion of *designated government agency*, which includes the Department of Education and Training (including a government school), *designated non-government agency* which includes a non-government school within the meaning of the *Education Act 1990*, and *child abuse*, which is defined as meaning assault (including sexual assault), or ill-treatment or neglect of a child, or exposing or subjecting a child to behaviour that is psychologically harmful.

Jurisdiction of the Ombudsman: Scrutiny, Monitoring and Investigation

The Ombudsman is required to keep under scrutiny the systems for preventing child abuse and for handling and responding to allegations of child abuse (S 25B). The Ombudsman is permitted to disclose information about child abuse allegations to the police, relevant investigative agencies (which might include, for example, the Department of Community Services) or the Commission for Children and Young People (s 25D(2)).

Section 25E provides that the Ombudsman is permitted to monitor the progress of internal investigations of child abuse allegations against an employee within a school or within the Education Department if it is in the public interest to do so. This provision addresses the conflict of interest problems which were exposed at the Wood Royal Commission, and is not incompatible with the notion that an agency must ‘own’ the problem of unprofessional behaviour. The monitoring function includes the granting of observer status to the Ombudsman at any interviews during an internal investigation.

The investigative powers of the Ombudsman in respect of child abuse allegations and convictions are outlined in section 25G. These include power to conduct investigations into inappropriate handling of internal investigations, and may exercise any conciliation or other powers as conferred by the Act. Significantly, internal investigations of allegations must be deferred if the Ombudsman notifies the head of a school of an intention to investigate. After investigation by the Ombudsman, the recommendations for action are forwarded to the head of a school.

Requirements of the Head of a School: Notification and Disclosure

Within thirty days of the head of a school becoming aware of any allegations of child abuse, or child abuse conviction against an employee she or he is required by the statute to notify the Ombudsman. Further, notification must be given of whether the school proposes to take any disciplinary or other action and the reasons for such action (s 25C). The notification concerning disciplinary or other action may be complicated in the case of employees in non-government schools where the primary legal relationship between employer and employee is contractual. In circumstances in which an employer dismisses an employee summarily upon becoming aware of

child abuse within the meaning of the Act, the dismissal is not easily characterised as a ‘disciplinary action’, in the sense in which this term might be used in public sector employment. This does raise the issue of whether an internal investigation mechanism is possible or desirable with non-government schools, and whether such processes might be included in codes of professional ethics or contractual terms of employment. The head of a school is also obliged to establish within the school a mechanism for the notification of allegations of child abuse by staff (s 25C). The head of a school or staff member may disclose to the Ombudsman any information which gives him or her reason to believe that child abuse by an employee has occurred.

A head of school may be required to supply documentation to the Ombudsman, whilst that office is carrying out its monitoring functions under the Act in respect of internal investigations (s 25E(3)). As soon as practicable after the completion of an internal investigation, the head of a school is required to report to the Ombudsman on the progress, outcome and consequent action of the investigation. This may require the production of documentation and commentary upon the process (s 25 F). Section 25H provides a necessary and practical safeguard for those required to disclose information under Part 3A in that it protects them from liability for defamation or civil suit.

This legislation may provide the stimulus for the establishment of internal mechanisms for grievance management in respect of child sexual abuse for staff, students and the school community. It models an open and accountable process for the handling and resolution of allegations against teaching staff, and by inference calls upon educational professionals to address issues of professional practice and ethical responsibilities in the area of child sexual abuse.

Implications for the Profession: The Changing Face of Teaching and Professional Ethics

There are sound arguments to suggest that the ‘face’ of teaching is changing for educational professionals. It is fair to suggest that this process is not primarily a consequence of changing physiognomy amongst teachers, but can rather be ascribed to the process of overlaying upon the faces of teachers, masks fashioned by others. The legislation, which has been outlined in this paper has specific objectives, and effects. The legislation creates new ‘masks’. The consequences of the legislation for the teaching profession are profound at every level in the obligations imposed upon employers and employees, in terms of notification, screening, disclosure and monitoring. However, the legislation also reveals significant omissions. It does not address those issues which are at the heart of educational professionalism, the ethical issues of care, concern and collective responsibility. It is significant that in the explication of government policy in the Second Reading Speeches in Parliament for the new legislation, both the Minister for Community Services and the Attorney-General touched upon issues of professional ethics for the profession. The Minister for Community Services referred to ‘the high expectations placed on those who are in the privileged position of working with children and young people’,²⁵ whilst the Attorney-General foreshadowed ‘the establishment of professional standards of behaviour through codes of conduct and development of appropriate work practices’²⁶.

The establishment of codes of ethics for the profession is an issue with which educators in North America,²⁷ the United Kingdom,²⁸ and Australia²⁹ have been grappling for some time,

particularly in the last decade, and without easy resolution. In the complex, ‘interdependent’ society³⁰ in which we live, the public articulation of professional ethical commitments is imperative.³¹ In this article the response of the law to abuse of power and betrayal of trust in education and in other areas has been examined. The legal response is constrained, limited and incomplete without the complementary perspective of professional ethics. It has been stated quite clearly that in an ethical context, ‘you cannot mandate what matters’.³² The mere presence of law, which provides mechanisms for notification, processes for screening, offences and penalties, cannot heal what ails a profession which is addressing fundamental and systemic breaches of trust and abuses of power. The profession itself must own what ails it and attempt to heal itself. A code of professional ethics in itself will not provide an instant cure. It should not be used as a band-aid. What it can do is to contribute to the establishment of a healthy professional atmosphere in which professional ethics and collective responsibility become the norm. It can contribute to an environment in which individual professionals can internalise sound ethical standards.³³ It can function as a yardstick against which unprofessional conduct can be measured, and together with law, be remedied.³⁴ The most serious implication of the new legislation for the teaching profession lies not in the present, but the stimulus it provides for new modes of professionalism in the future. Educators must refuse to have masks made for them. Changing the face of the teaching profession is the responsibility of teaching professionals themselves.

Postscript

The Employment Relationship in the Non-Government School Sector³⁵

The Contract of Employment

The primary legal relationship between an employer and employee in the non-government school arises out of the contract of employment (see **Appendix D**). The contract which has been negotiated between the educational/school employer and the employee regulates the relationship between the parties. A contract of employment may contain both express and implied terms. The terms of the contract will most often be written, but oral terms may be included if it is established that this was the intention of the parties to the contractual relationship. A range of terms may be implied in the contract by force of law or established custom. For example, it is an implied term of a contract of employment that an employer will pay wages where the employee is prepared to perform all obligations imposed by the contract. In respect of an employee, terms are implied that the employee will act honestly and exercise care and skill in the performance of the required work. Where an employee breaches fundamental terms of a contract, for example, by reason of incompetence or engaging in serious misconduct, the employer may end the contractual relationship by means of summary dismissal of the employee. Dismissal, either by way of notice, or summarily, has been described as the ‘main disciplinary tool which can be used against non-government teachers’.³⁶

Industrial Awards

The contractual relationship may be supplemented by the terms of an industrial award. An industrial award is an order made by an industrial tribunal under statutory authority to resolve an industrial dispute³⁷ in an industry.³⁸ The High Court of Australia discussed the relationship

between a contract of employment and award provisions in 1995 in the case of *Byrne and Frew v Australian Airlines Ltd* (1995) 131 ALR 422. That authority suggested that a contract of employment will not automatically include the terms of an industrial award, but that the two elements are in a sense ‘symbiotic’:

As a contract of employment may provide additional benefits but cannot derogate from the terms and conditions imposed by an award, (and) as an award operated with statutory force to secure those terms and conditions, there is no need to convert those statutory rights and obligations into contractual rights and obligations.

Current award provisions which apply to non-government school employment³⁹ contain some significant provisions which may affect contractual rights and the operation of the legislative package considered in this article. The clauses which address the issue of terms of engagement indicate that an employer must specify in a letter of employment the classification, rate of salary, normal teaching load and superannuation benefits.⁴⁰ These matters might also form express terms of a contract negotiated between an employer and employee. The awards also deal with the issue of termination of employment by notice, and the period of notice required for termination of a teaching contract.⁴¹ Significantly, the award expressly affirms by restatement the (contractual) right of an employer to dismiss an employee summarily for incompetence, misrepresentation, neglect of duty or other misconduct.⁴² The expression ‘other misconduct’ is not defined, but could potentially include the sexual, emotional or physical abuse of children under a teacher’s care. The awards also provide for a suspension procedure of up to four weeks in circumstances in which an employer is ‘considering’ any matter which could lead to summary dismissal.⁴³ The consideration might include the investigation of an allegation of sexual misconduct by a teacher.

The awards provide for procedures to be followed in the event of industrial disputation. The procedures are broadly based upon principles of consultation, co-operation, and negotiation. When disputed matters arise, which conceivably could include an allegation of sexual misconduct by a teacher, the award provides that discussion should occur between the teacher and the principal of the school or his or her nominee. There is provision for the involvement of union representatives. If the matter remains unresolved after consultation amongst the relevant parties to the disputation, the matter may be referred to the Industrial Relations Commission.⁴⁴ There is some variation in the dispute procedures in the *Teachers (Independent Schools) (State) Consolidated Award*. However, the general principles of consultation and negotiation are maintained.

Keywords

Education; Child Abuse; Child Protection; New South Wales (Australia).

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Endnotes

- 1 The original version of this paper was presented as a keynote address at the Changing Face of Teaching Conference organised by ACT/NSW Independent Education Union, Sydney 15 March 1999. The assistance of Glynis Jones (IEU), Steven Murray (NSW Ombudsman's Office) and Paula Sciacca (Faculty of Law, The University of Newcastle) is gratefully acknowledged.
- 2 Premier's Foreword in NSW Child Protection Council Interagency Guidelines for Child Protection Intervention, 2nd edition, Sydney: NSW Child Protection Council, 1997.
- 3 See Thompson, M. (1997) *Professional Ethics and the Teacher: Towards a General Teaching Council*, Oakhill: Trentham Books. p. 34.
- 4 For the purposes of assessing undue influence, the law classifies the relationship between a teacher and a pupil as one of trust and confidence. See: Cheshire and Fifoot (1992) *Law of Contract*, 6th Australian edition, Sydney: Butterworths. p. 412.
- 5 Suggestions of the development of a climate of fear in the educational community as a result of the practices involved in the investigation of allegations of sexual misconduct of New South Wales teachers, have already emerged in the press. For example, see A Phelan 'Teachers live in terror over sex inquiry', 19 January 1999, *The Sydney Morning Herald*; P Adams 'In Pursuit of Power Abusers' 13-14 February 1999, *The Weekend Australian (Review)*, 32. See also New South Wales Parliamentary Debates (Legislative Council), 17 November 1998, 9935, per The Hon. Jan Burnswoods: '...There is certainly a real concern in those professions that teachers may find themselves fearing to touch a child, to comfort a child, because of a risk of an allegation'.
- 6 Royal Commission into the New South Wales Police Service: Final Report (WRC FR), August 1997, Volume IV, 949.
- 7 WRC FR, Volume IV, 958.
- 8 WRC FR, Volume IV, 958-975.
- 9 WRC FR, Volume IV, 975-980.

- 10 These failures were summarised during Parliamentary Debates on the new child protection legislation by The Hon Patricia Forsythe, as follows: ‘...the royal commissioner noted that each agency generally entertained a disbelieving and disparaging attitude towards complainants, particularly those in vulnerable positions; a disinclination to accept that any of its officers would engage in wrongful conduct; a concern as to the possible scandal arising from the police or an external agency being brought in to investigate the matter; a belief that it was better to fix the problem from within; and on occasions a readiness to penalise an officer or employee who reported possible misconduct by a fellow worker’. (New South Wales Parliamentary Debates (Legislative Council), 12 November 1998, 9771).
- 11 WRC FR, Volume IV, 981-983.
- 12 WRC FR, Volume IV, 981.
- 13 *ibid.*
- 14 WRC FR Vol IV, 987-988.
- 15 Sincere thanks are owed to Ms Paula Sciacca of the Faculty of Law, at the University of Newcastle for the preparation of the Appendices to this paper.
- 16 New South Wales Parliamentary Debates (Legislative Assembly), 11 November 1998, 9761.
- 17 New South Wales Parliamentary Debates (Legislative Assembly), 11 November 1998, 9759.
- 18 *ibid.*
- 19 New South Wales Parliamentary Debates (Legislative Council), 12 November 1998, 9768.
- 20 New South Wales Parliamentary Debates (Legislative Council), 12 November 1998, 9770.
- 21 *ibid.*
- 22 WRC FR, Vol V, 1334.
- 23 New South Wales Parliamentary Debates (Legislative Council), 12 November 1998, 9770
- 24 I express my thanks to Mr Steven Murray of the NSW Ombudsman’s Office who kindly discussed the jurisdiction under the 1998 statute with me.
- 25 See above, n 17.
- 26 See above, n 20.
- 27 For example, Sockett, H. (1993) *The Moral Base of Teacher Professionalism*, New York: Teachers College Press; Strike, K.A. & Soltis, J.F. (1992) *The Ethics of Teaching*, (2nd ed), New York: Teachers College Press; Darling-Hammond, L. Wise, A.E. & Klein, S.P. (1995) *A License to Teach: Building a Profession for 21st Century Schools*, Boulder: Westview Press.
- 28 For example, Thompson, M. (1997) *Professional Ethics and The Teacher: Towards a general Teaching Council*, Oakhill: Trentham Books.
- 29 For example, Haynes, F. (1998) *The Ethical School*, London: Routledge. Ministerial Advisory Council on the Quality of Teachers and Teaching Report Raising the Standing of Teaching and Teachers (August 1997), 20-23.
- 30 This expression is used in M Thompson, *op cit*, 4.
- 31 See Coady, M.M. (1996) ‘The Moral Domain of Professionals’ in M. Coady and S. Bloch (eds) *Codes of Ethics and the Professions*, Melbourne: Melbourne University Press, p.49.
- 32 See M Thompson, *op cit*, 16.
- 33 See Freckleton, I. ‘The Enforcement of Ethics’ in M. Coady and S. Bloch (eds), *op cit*, 144.
- 34 See Skene, L. ‘A Legal Perspective on Codes of Ethics’ in M. Coady and S. Bloch (eds), *op cit*, 111-114.

- 35 For all fuller treatment of this subject, see Ramsay, I.M. and Shorten, A.R. (1996) *Education and the Law*, Sydney: Butterworths. (Ramsay and Shorten), Chapter 9; Edwards, J., Knott, A. and Riley, D. (1997) (Eds) *Australian Schools and the Law*, Sydney: LBC Information Services, Chapter 3.
- 36 See Ramsay and Shorten, 284.
- 37 The High Court of Australia addressed the issue of the meaning of the expression ‘industrial dispute’ in *R v Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297. In that case, the Court held that an industrial dispute ‘includes disputes between employees and employers about the terms of employment and conditions of work...’ ((1983) 153 CLR 297, 312.
- 38 The High Court resolved the issue of whether teaching involved work in an ‘industry’ in *Re Lee, ex parte Harper* (1986) 160 CLR 430.
- 39 The relevant awards include Teachers (Catholic Independent Schools) (State) Consolidated Award 1998; Teachers (Independent Schools) (State) Consolidated Award 1997; Teachers (Archdiocese of Sydney and Diocese of Broken Bay and Parramatta) Award 1997, and Teachers (Systemic Schools) (State) Consolidated Award (Diocese of Maitland-Newcastle and Wollongong).
- 40 Cl 15 Teachers (Catholic Independent Schools) (State) Consolidated Award 1998; cl 14 Teachers (Independent Schools) (State) Consolidated Award 1997; cl 15 Teachers (Archdiocese of Sydney and Diocese of Broken Bay and Parramatta) Award 1997, and cl 15 Teachers (Systemic Schools) (State) Consolidated Award.
- 41 Cl 15 Teachers (Catholic Independent Schools) (State) Consolidated Award 1998; cl 14 Teachers (Independent Schools) (State) Consolidated Award 1997; cl 15 Teachers (Archdiocese of Sydney and Diocese of Broken Bay and Parramatta) Award 1997, and cl 15 Teachers (Systemic Schools) (State) Consolidated Award
- 42 Cl 15 Teachers (Catholic Independent Schools) (State) Consolidated Award 1998; cl 14 Teachers (Independent Schools) (State) Consolidated Award 1997; cl 15 Teachers (Archdiocese of Sydney and Diocese of Broken Bay and Parramatta) Award 1997, and cl 15 Teachers (Systemic Schools) (State) Consolidated Award.
- 43 Cl 17 Teachers (Catholic Independent Schools) (State) Consolidated Award 1998; cl 19 Teachers (Independent Schools) (State) Consolidated Award 1997; cl 17 Teachers (Archdiocese of Sydney and Diocese of Broken Bay and Parramatta) Award 1997, and cl 17 Teachers (Systemic Schools) (State) Consolidated Award
- 44 Cl 18 Teachers (Catholic Independent Schools) (State) Consolidated Award 1998; cl 20 and Attachment A (Agreement between AIS and IEU) Teachers (Independent Schools) (State) Consolidated Award 1997; cl 18 Teachers (Archdiocese of Sydney and Diocese of Broken Bay and Parramatta) Award 1997, and cl 18 Teachers (Systemic Schools) (State) Consolidated Award.

Appendix A

Appendix B

Appendix C

Appendix D

