

TEACHERS' POLICY-BASED DUTIES TO REPORT CHILD SEXUAL ABUSE: A COMPARATIVE STUDY

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Each year, some 3,500 children in Australia are identified by government child protection authorities to be sexually abused, with the real incidence being even higher. Where a teacher suspects a child has been sexually abused, different types of duty may require the teacher to report his or her suspicion. However, these reporting duties may be found in multiple sources, namely legislation, common law, and school policy. For an individual teacher, the content of those duties may be different. Further, the sources and content of reporting duties differ across government and nongovernment school sectors within States and Territories, and differ between States and Territories. This article reports on a comparative study of policy-based duties to report suspected child sexual abuse in government and nongovernment schools in Queensland, New South Wales, and Western Australia. Key elements of the policy frameworks in these States, in both government and nongovernment schools, are described, and significant differences are identified. Aspects of the policy frameworks are compared to legislative and common law reporting duties, and are assessed for legal soundness, theoretical soundness, and practical workability.

I INTRODUCTION

This article explores the policy-based obligations of teachers to report suspected child sexual abuse. It presents the results of part of a larger study of teacher reporting of child sexual abuse, examining law and policy, and reporting practice of teachers in government and nongovernment schools in three States having different legislation: Queensland, New South Wales, and Western Australia. This part of the study, focusing on policy-based reporting obligations, was necessary to identify one of the key sources of reporting duty of teachers, and to compare these duties to the forms of duty emanating from the legal system.

There are three broad sources of duty which may require a teacher to respond in certain ways when knowing of, or suspecting, that a child in his or her care has been, or is being, or is at risk of being, sexually abused. Two of these three sources of duty are legal: legislation made by Parliament, and common law made by courts. The third source of duty is policy, made and administered by school authorities. In government schools, policy is made at a sector level by a centralised authority such as the education department. In nongovernment school contexts, policy is often made by systemic school authorities such as Catholic dioceses and archdioceses, but may be made by individual schools. In a given jurisdiction, the three types of duty may form a coherent and consistent whole, or alternatively may contain different instructions to teachers, which may be contradictory and/or confusing.

The purpose of this article is to report on a comparison of policy-based reporting duties, and to identify questions and issues which have emerged from that comparison, such as: whether

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policy duties within a State are consistent with legislative and common law duties; whether policy duties promote child protection and adequately safeguard school authorities from potential legal liability in negligence; whether the law and policy contexts differ between jurisdictions, and if so, how; and whether any policy-based duties appear to be problematic, for example by omitting an important element, by containing ambiguous elements, or by having unhelpful features. Before exploring the policy landscape, and to situate policy within its broader context, it is necessary to summarise the legislative and common law bases of reporting duties.

II LEGISLATION

In all Australian States and Territories except Western Australia, legislation has been enacted regarding the context of teachers suspecting child sexual abuse.¹ This legislation is a central plank of governments' efforts to protect children from abuse and neglect (including sexual abuse), by requiring professionals who work regularly with children to report suspected abuse or neglect. The primary goal is to enable early intervention to protect children from harm, provide necessary assistance to children, and, where appropriate, to also assist parents and families. In the case of the reporting of suspected child sexual abuse, an associated goal is to prevent further criminal offending since sexual abuse, unlike many (but not all) manifestations of other types of abuse and neglect, will always constitute criminal offences, and early intervention in such cases prevents not only continued assaults on the child who is the subject of the report, but also protects other potential victims to whom the perpetrator may turn his or her attention if left uninterrupted.

Regarding the reporting of suspected child sexual abuse, apart from the legislative provisions in Queensland, the legislation in each jurisdiction has similar content and effect. A teacher, whether employed in a government school or a nongovernment school, is required to report suspected child sexual abuse where that suspicion arises in the course of his or her employment. In all jurisdictions except the Australian Capital Territory, the teacher has to report suspected past abuse, suspected presently-occurring abuse, and suspected risk of future abuse that may not have happened yet.² In all jurisdictions except Queensland, the legislative provisions draw no distinction regarding the identity of the suspected perpetrator, so that it does not matter if the perpetrator is thought to be a family member, a school staff member, or anyone else: the suspicion must be reported. In contrast, Queensland legislation only requires teachers to report suspected sexual abuse if the suspected perpetrator is a school staff member. An international review of mandatory reporting legislation in all jurisdictions in Australia, the USA and Canada, has shown that this restriction is unique.³ It should be noted that on 19 June 2008, Western Australia passed the *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2007*, which enacts similar provisions to the rest of Australia except Queensland. The key provisions of this legislation have not yet become operational, although they are anticipated to commence in 2009.

III COMMON LAW

In addition to these legislative reporting duties, the common law of negligence may also provide a source of an obligation to report suspected sexual abuse, depending on the circumstances of a particular case. It is a well-established legal principle that teachers have a duty of care regarding their students, which is not a duty to prevent *all* harm, but which, broadly stated, means that they are to take such measures as are reasonable in the circumstances to prevent harm to the student.⁴ In some situations, this duty can extend to taking care to take measures to prevent

harm to a child even where the harm is occurring or likely to occur outside the school grounds.⁵ While under this branch of the law, teachers would not be expected to detect and report all cases of sexual abuse, if a teacher did know of or develop a suspicion that a child in his or her care was being sexually abused, the teacher may well be found to have a duty of care to take appropriate action (for example, by reporting the suspicion) to protect the child from further harm. As well, if a child has been or is being sexually abused, and if it can be found that, even if a teacher did not actually know or suspect it, that teacher *ought* to have known or suspected it, the teacher may be found to have breached his or her duty of care.

Therefore, as evidenced by the case of *AB v Victoria*,⁶ a teacher's duty of care to a student may require a teacher to report his or her knowledge or suspicion that a child has been or is being sexually abused. Because the legislative duty in most Australian jurisdictions is broad, this common law duty may, in those jurisdictions, in effect largely duplicate the legislative duty. However, where the legislative duty to report is narrow, as in Queensland (and Western Australia, until its legislation commences), the common law duty will significantly extend the teacher's legal duty to report. In addition, in Victoria, where the legislation technically only requires a teacher to report if the suspected harm to the child is 'significant', this common law duty may also extend the scope of the teacher's reporting duty under law.

IV POLICY FRAMEWORKS AND DIFFERENCES

A Approach and Methodology

To explore the reporting duties imposed on teachers in any given jurisdiction, whether in a government school or a nongovernment school, requires not only an examination of the relevant legislative reporting duty and the common law, but also any applicable policy-based reporting duty imposed by a school authority or an individual school. For our overall study, which involves not only an examination of law and policy, but also a survey of teachers' knowledge, attitudes and reporting practice, we generated a random sample of schools in Queensland, New South Wales and Western Australia. Survey participants were drawn from this sample of schools. In each of these three States, all government schools operate under a centralised policy generated by the government education department. In contrast, nongovernment schools develop their own policy approaches. Within the nongovernment sector, groups of schools sometimes operate under a centralised policy applying to all schools within that group. For example, in Western Australia, all Catholic schools operate under one policy.⁷ Since Catholic schools are the largest nongovernment group of schools, the benefits of such a consistent approach can readily be seen. However, within groups of nongovernment schools, and even within the Catholic sector in some jurisdictions, policy can be more fragmented. For example, in Queensland and New South Wales in the Catholic sector, policy approaches are developed at the diocesan or archdiocesan level. As will be seen, this results in different policy obligations applying to different groups of schools.⁸ Furthermore, in general, independent schools are empowered to formulate their own policy, and it is not known whether all such schools even possess policies about child protection.

Our random sample was generated to represent proportionate numbers of government and nongovernment schools as exist currently in Australian society. Accordingly, government schools formed the majority of the entire sample. In addition, of those nongovernment schools in the sample, Catholic schools formed the vast majority. The policies of nongovernment schools included in the sample, but which were not in the Catholic sector, were not examined due to practical and methodological difficulty. These policies, where they exist, are of far narrower

application, and for the purpose of the study, presented insurmountable methodological challenges to the task of generating reliable, valid, comparable data.

Accordingly, for the policy exploration aspect of our study, we obtained the following policy documents regarding the reporting of child sexual abuse:

- government school policies, from the government education departments in Queensland, New South Wales and Western Australia;⁹
- relevant Catholic (nongovernment) school policy documents from 5 dioceses and archdioceses in Queensland;¹⁰
- relevant Catholic (nongovernment) school policy documents from 11 dioceses and archdioceses in New South Wales;¹¹ and
- relevant Catholic (nongovernment) school policy documents from Western Australia.¹²

Policy documents were then analysed to extract information about the content of the reporting duty, regarding the following seven key elements:

1. The effect, if any, of the identity of the suspected perpetrator (for example, is the reporting duty activated only when the suspected perpetrator is a school employee, or does the reporting duty apply regardless of the identity of the suspected perpetrator?);
2. The extent of knowledge that a teacher must have before the reporting duty is activated (actual knowledge, reasonable suspicion, or some other state of suspicion or belief);
3. The effect, if any, of the extent of harm thought to have been suffered by the child (for example, whether the reporting duty is activated only if the suspected harm is thought to be 'significant', or if it is activated regardless of the extent of harm thought to have occurred or to be likely to occur);
4. The temporal dimension: that is, whether the reporting duty is applied only to cases of suspected past or presently-occurring abuse, or whether it also applies to suspected risk of future abuse that may not have happened yet;
5. To whom the teacher is required to report;
6. The principal's obligation: namely, if a teacher is required to report to the principal, does the principal have to forward the report to the relevant authority even if the principal himself/herself does not suspect the child has been, is being, or is at risk of being sexually abused?; and
7. Whether the policy protects the teacher's identity from disclosure.

Information extracted regarding these seven elements were then tabulated; compared to the policies of their intra-State government or nongovernment counterparts; compared to their State's legislative reporting duty; compared to the common law duty; and compared between States. Areas of omission and ambiguity were also noted, along with any other problematic aspects.

B Key Findings and Discussion

Before proceeding to discuss findings regarding the seven key elements, it is worth noting that each government sector and all but one diocese did have a policy regarding the reporting of suspected child sexual abuse inflicted by persons other than school employees. On one view, this is very encouraging, while at the same time it is of concern that one diocese did not have a reporting policy. This diocese, which did have a policy about the reporting of suspected sexual abuse by school employees, should be urged to develop a sound policy about the reporting of suspected

child sexual abuse inflicted by perpetrators other than school staff. Associated infrastructure (such as reporting forms) should also be designed as quickly as possible, and steps should be taken to train teachers in its schools about the content and purpose of the policy, and how best to implement it. Other findings described below exclude this outlier from the discussion, relating only to the policy documents in government sectors and all other dioceses.

1 Effect of the Identity of the Suspected Perpetrator

All policy documents in each State, and across both government and nongovernment sectors, required teachers to report suspected child sexual abuse regardless of the identity of the suspected perpetrator. This approach is sound, primarily in terms of protecting children, but also in the sense that it accords with the common law duty of care and thus more effectively safeguards the school from potential legal liability for failure to report. It also is consistent with the legislative approach adopted in New South Wales. In Western Australia, which does not yet have a legislative reporting duty, the policy-based duty clearly far exceeds the lacuna created by this lack of Parliamentary action. However, it can be noted that should the new legislation in Western Australia commence as anticipated, the legislative context there will essentially be consistent with that now operating in New South Wales (see especially s 124B). In Queensland, this consistent policy-based approach in this respect also far exceeds its uniquely restricted legislation. Along with other arguments for amending Queensland's legislation, the soundness and harmony of this policy approach constitute another formidable reason for broadening Queensland's legislative provision so that reports of all suspected child sexual abuse are required, without limiting the obligation only to cases of sexual abuse by school staff. This would make Queensland's legislation consistent with legislation in other Australian jurisdictions (and those in the USA and Canada), and with Queensland's general policy approach.

2 Extent of Knowledge a Teacher Must Have Before the Reporting Duty is Activated

In each State, and across both government and nongovernment sectors, all policies required a teacher to have a 'suspicion' or a 'reasonable suspicion' of sexual abuse, rather than actual knowledge of it, to activate the reporting duty. Western Australian policy documents use the term 'concern' rather than 'suspicion' or 'reasonable suspicion', but it is most arguable that this terminology is not materially different in effect from that used in the other two States. This approach is consistent with the legislative provisions in New South Wales and Queensland, and with the legislation in Western Australia that has not yet commenced. It is also consistent with the common law duty of care.

3 Effect of the Extent of Harm Thought to Have Been Suffered by the Child

Analysis regarding this element reveals several issues. First, Western Australian nongovernment school policy was the only policy that clearly required reports of suspected child sexual abuse regardless of the extent of harm suspected. There, the amount of harm thought to have been caused to the child was not a factor to be considered when deciding whether to report or not. This is a sound approach, both from the point of view of child protection (since it is highly arguable that any form of sexual abuse not only causes some type of significant harm, but also because sexual abuse will usually constitute criminal conduct),¹³ and from the perspective of complying with a common law duty of care. It can be noted that the pending Western Australian

legislation also adopts this approach, and that this is the approach adopted in legislation in other jurisdictions in Australia, the USA and Canada.

While Western Australian nongovernment school policy clearly adopted this approach, both New South Wales government and nongovernment policies only required reports when the teacher was ‘concerned for the child’s welfare’. Although seemingly just as all-encompassing, on a close reading this terminology is at least capable of being interpreted as equivocal, in contrast to the Western Australian nongovernment approach. This is because it leaves room for the possibility that a teacher may suspect sexual abuse but not be concerned for the child’s welfare, in which case the teacher would not be required to report. An example of this might be of a young boy who is known to be exposed frequently to violent pornography on the internet by an adult male acquaintance, where the boy shows no clear sign of distress or harm. Another example may be of a young child, under the age of consent, known to be involved in sexual intercourse with a significantly older person, which the child does not complain about and where no obvious signs of harm or distress are evident. Thus, a subjective element regarding the estimate of harm or the damage to the child’s welfare is at least capable of being introduced by this wording. It remains highly likely that in actual practice, teachers in New South Wales in both government and nongovernment sectors are trained to, and actually do, report suspected sexual abuse without engaging in any such subjective exercise. Nevertheless, this wording could be modified to remove both any doubt about the nature of the reporting duty, and to remove any potential for failure to report despite suspecting sexual abuse because of a likely damaging misjudgement about the presence or extent of harm caused to the child.

In contrast, the wording of the policies in Western Australian government school policy, and in Queensland government and nongovernment sectors, indicates that the reporting duty is only activated when the teacher suspects the harm caused or likely to be caused to the child is ‘significant’. While this approach duplicates the legislative approach taken in Queensland regarding the reporting by doctors and nurses of all forms of child abuse and neglect,¹⁴ it is vulnerable to criticism on several grounds. First, as mentioned above, sexual abuse virtually always causes significant harm and adding a layer of subjective assessment to the reporting decision is not warranted. While it may well be warranted for the reporting of some other forms of abuse, such as emotional abuse, such an approach serves no useful purpose in the context of reporting sexual abuse. If observed, it could only produce failure to report a reasonable suspicion that sexual abuse was occurring, or even knowledge that it was occurring. Additionally, sexual abuse — assuming it is a form of conduct which patently is abuse (exposure to nudity may be contrasted, for example) — is a criminal offence. As well, such a restriction on the reporting duty, if resulting in failure to report suspected sexual abuse on the basis that the teacher thinks, for whatever reason, the child is not suffering harm, breaches the common law duty to take steps to prevent injury to the child.

4 The Temporal Dimension

The question here is whether the reporting duty is applied only to cases of suspected past or presently-occurring abuse, or whether it also applies to suspected risk of future abuse that may not have happened yet. Policies in Queensland and New South Wales, in both government and nongovernment sectors, require teachers to report not only suspicions of past and presently-occurring sexual abuse, but also suspicions of risk of future sexual abuse that may not have happened yet. An example of such a situation may be where a child’s mother is known to have formed a relationship with a new partner, whose behaviour regarding the child has been observed

to be suspicious, even though the teacher does not think the child has yet been abused. This policy approach is sound, and embodies a true child protection approach because the optimal method of child protection is to prevent abuse happening in the first place. The approach also accords with legislation in New South Wales, most other Australian jurisdictions, and most jurisdictions in the USA and Canada.¹⁵ It is worth noting that the pending legislation in Western Australia limits the reporting duty to suspected past and presently-occurring abuse. This legislative approach, while adopted by the Australian Capital Territory and by some overseas jurisdictions, is a less robust embodiment of child protection strategy. Whether this policy approach is in breach of the common law duty is a difficult question to answer. It is likely that in most cases, following this policy approach would not breach the common law duty. It would, however, depend on the facts of the particular case and the extent of knowledge the teacher had about the level of risk posed to the child. To use an example from one end of the spectrum of possible cases: if a teacher knew that a child was going to be taken with her mother to live in a closed community where it is accepted that the male leader of the community would have sexual access to the female children, then failure to report such a situation would almost certainly breach the duty of care. Another example, which may occur more commonly, is where a child is known to have been sexually abused by a particular family member, and that child's younger sibling is thought not to have been abused yet, but is deemed to be at risk of abuse. Another situation is where a child is known to have been sexually abused, the perpetrator has been convicted and imprisoned, and it is known that the perpetrator is soon to be released from prison and intends to have access to the child again.

Policies in Western Australia, in both government and nongovernment sectors, restrict the reporting duty to suspected past or presently-occurring abuse. As exemplified by the jurisdictions where legislation adopts this tactic, there are reasons motivating this approach. One reason is to limit the potential for hypersensitive reporting of as-yet-unknown cases, with accompanying reduction of cost to government authorities and avoidance of unnecessary intrusion into people's privacy. Yet, demonstrated by the fact that many jurisdictions adopt the broader temporal approach, there are strong reasons for requiring reports of suspected future sexual abuse. It is likely that this class of cases is small, and it would be interesting to know how many reports of suspected future sexual abuse are made in those jurisdictions whose legislation and or policy require it. Perhaps the most prudent approach is to extend the reporting duty to situations where the teacher suspects likely future sexual abuse even if it has not happened yet, since the number of these cases is likely to be relatively small, and the goal of child protection would be advanced without incurring undue cost to governments and other stakeholders.

5 To Whom is the Teacher Required to Report?

This element does not affect the conceptual scope of the duty to report, but it is a critical feature of the practical context of reporting, and has the capacity to affect the operational success of the reporting system. Intuitively, it might seem there is only one simple approach to adopt in this respect, which is to require the teacher to report directly to the relevant government department. In fact, this direction typically appears in mandatory reporting legislation both in Australian and overseas jurisdictions. However, we discovered a number of different approaches in the policy documents regarding this question, and while our study is relatively broad, we surveyed only a fraction of the policy frameworks in the country. Thus, it is possible that there are other channels of reporting, of varying degrees of complexity, within this Australian policy labyrinth. We may reasonably postulate that, where the policy is not congruent with the legislative approach in this

respect, it is desirable that the policy be simplified so that it aligns with the legislation (or perhaps with any interagency agreement between, for example, the departments responsible for child protection and education respectively). For reasons which are discussed below, this would assist teachers and principals, help ensure quality of reporting, and promote child protection.

Usually, the policy requires the teacher to report to the school principal, and, as we will see in the next section, this element therefore interacts with the principal's obligations upon receiving a report from a teacher. However, within the sample studied, there were four different approaches concerning whom the teacher is required to report to, with three of these commonly adopted:

- (a) a direct report to the relevant Department, without involving any further step requiring the principal to make a decision or an act (adopted by one diocese in New South Wales);
- (b) a report to the principal, with the principal required to forward the report without questioning the teacher's suspicion (adopted by four dioceses in New South Wales, five in Queensland, and nongovernment schools in Western Australia);
- (c) a report to the principal, with the principal required to make a second judgment about the situation and only to forward the teacher's report if the principal also suspects the child has been, is being, or is at risk of being sexually abused (adopted by New South Wales government schools, Western Australian government schools, and six dioceses in New South Wales); and
- (d) the same situation as (c) but with a report to be forwarded by the teacher, after reporting to the principal and gaining the principal's agreement to report (adopted by Queensland government schools).

These approaches raise different issues which need to be considered.

(a) *Queensland Nongovernment Schools and Western Australia*

In Queensland and Western Australia, the approach is broadly similar, but there are some significant differences. Queensland government school teachers now operate under a more complex approach than under its previous policy, and this will become apparent after first outlining the Western Australian positions and the Queensland nongovernment sector approach.

In Western Australia, both government and nongovernment school teachers report to either the principal or the district director, or the principal or the principal's supervisor respectively. Similarly, nongovernment school teachers in Queensland are required to report to the principal or a director of the school's governing body. In general, these approaches might appear sound enough, provided they combine appropriately with the principal's reporting obligation when that obligation is to forward the teacher's report immediately, which is dealt with shortly. However, this approach not only adds workload pressure to principals, but leaves the potential for delayed, misplaced and unforwarded reports, which will be discussed below. Because the policy requirements in these two States so far exceed the legislative provisions, there is no need to analyse them further to examine consistency between policy and legislation. It should be noted however that the pending legislation in Western Australia requires reports to be made directly to the Chief Executive Officer of the relevant government department. We propose that this approach is the most commendable method.

The ability to report directly to the relevant government department, by completing and faxing or emailing a form, or by making a telephone call, is arguably the superior policy approach. Such a strategy reduces principals' large administrative workload, and avoids the risk that the principal will, for whatever reason, fail to forward the report at all, or will not forward the report

with sufficient haste. If either of these consequences arose, and especially if the report was not forwarded at all, the protection of the child would be compromised, which in some cases could lead to horrific results. Such an omission or delay could also breach the common law duty of care. Principals are notoriously busy, with multiple competing demands on their time, and there may well be instances where a report is not forwarded, not out of malice or even carelessness, but simply because the principal was occupied with other duties and unable to give the reporting procedure its necessary attention. Reporting forms may also be misplaced amongst a sea of other school-related papers. Apart from possibly screening out hypersensitive reports, there is no compelling reason to require reports to be made first to the principal. Certainly, before the report is made, the principal should be made aware of the teacher's intention to report, to avoid the submission of duplicate reports. As well, the principal should be informed of the pending report so that he or she can ensure that steps are taken to ensure the child's safety at school and that the child is treated appropriately by teachers and other staff. In addition, it would enable the principal to take appropriate action if the child has siblings who may also be at risk. Hypersensitive reporting behaviour could and should be avoided through appropriate training of teachers concerning their reporting duties, and it can also be minimised by requiring the teacher to notify the principal of their intention to make a report, but without requiring the teacher to make the report through the principal. Hypersensitive or 'clearly unnecessary' reporting can also be dealt with by the intake and assessment branch of the relevant government child protection department.

So, at the very least in those policy contexts where the principal is required to automatically forward the teacher's report, there is a strong case for a policy amendment requiring the teacher to report directly to the Department, while wherever possible first informing the principal of their intention to report. This would hasten the process, ensure reports did not get lost in the intervening step, and take pressure off principals.

(b) New South Wales

In New South Wales, the situation is different, at least on the face of the policy. According to the policy for government school teachers, reports are required to be made to the school principal or executive officer. Similarly, for most nongovernment school teachers in our sample, reports are to be made to the school principal or executive officer. However, the legislation in New South Wales requires reports to be made directly to the Department of Community Services (DoCS), so there appears to be a clear inconsistency between legislation and policy. However, principals in New South Wales government and nongovernment schools are generally required by policy to forward teachers' reports automatically to DoCS, and this creates a constructive satisfaction of the teacher's requirement to report to the Department, as confirmed by the *Memorandum of Understanding*.¹⁶ Yet, this situation is not entirely satisfactory for several reasons. The first is the same reason discussed above regarding the context in Queensland and Western Australia: that is, the potential for delayed reporting, and negligent or accidental nonreporting. Second, among our sample, the policy in one diocese in New South Wales expressly requires teachers to report *directly* to DoCS (which, as we have argued, is actually the better approach). Third, as will be seen shortly, and like the situation now existing in Queensland government schools, a number of dioceses' policies do *not* require principals to automatically forward teachers' reports to DoCS, but instead add another layer of decision making by the principal.

(c) Queensland Government Schools

The policy requirements for government school teachers in Queensland adopt a unique approach. Teachers are required to report initially to the school principal or the Executive Director

of Schools, who assesses the teacher's suspicion in the circumstances, and decides whether to endorse the teacher's suspicion. That is, if the principal agrees with the teacher, and thus himself or herself has a reasonable suspicion that the child has been sexually abused or is at risk of being sexually abused, the principal signs the teacher's reporting form, and then the teacher is required to forward the signed reporting form to both the relevant government department and the police. If, on the other hand, the principal does not share the teacher's suspicion, the principal will not sign the form but will have an obligation to 'risk manage the student's situation' which may include advising the teacher to monitor the child's situation and report any further concerns to the principal.

It is true that in such a situation where the principal does not share the teacher's suspicion and the form is not forwarded with the principal's endorsement, the teacher may choose to make a voluntary report to the Department. However, this extra layer of bureaucracy is vulnerable to criticism. It is the individual teacher who is best placed to develop the suspicion (assuming adequate training about this), and in some cases the child will have made a disclosure of the abuse to the teacher, so why should the teacher be compelled to seek the principal's endorsement? Another difficulty is that much will depend on individual principals' capacities and inclinations in this area. Realistically, some principals will be more informed and prudent than others regarding child sexual abuse and the reporting of it. To give principals such power over the making of teachers' reports seems unnecessary and unhelpful. If this aspect of the policy was motivated by a desire to reduce the making of hypersensitive or 'clearly unnecessary' reports, then such a goal could be promoted by encouraging teachers, where necessary, to discuss their suspicion with the principal or another informed individual (such as a school counsellor, another well-informed teacher, or an officer at the Department of Child Safety). In fact, the policy does encourage teachers to contact the Education Queensland district child safety contact if they require guidance or advice about a child protection matter. In any event, there is no evidence that the overreporting by teachers of suspected sexual abuse is a severe problem. While it is hoped that the following situation would not arise, this aspect of the policy is also vulnerable to abuse in a situation where an idiosyncratic principal may have inappropriate attitudes towards child sexual abuse, or is misinformed about it. In such a situation, a school could develop a culture of not responding appropriately to child sexual abuse. Events in Queensland government schools in 2008 demonstrate the danger of this approach. At a number of different schools, children were allegedly the victims of sexual assaults at school by other children. Reporting procedures were not followed by school principals, and statements attributed to principals displayed misinformed and dangerous attitudes about child sexual abuse and its nature and consequences.¹⁷

6 *Principals' Obligations*

There are four different approaches to this element. It would be highly desirable that this unsatisfactory situation be resolved by harmonising the policy approach. In our view, for the reasons discussed above, the most justifiable approach is to require the teacher to report directly to the Department. Arguably, making this policy change would constitute a significant advance to the policy context and to the actual practice of reporting and child protection. It would also safeguard the legal interests of school authorities.

The first approach, as we have just seen, is evident in Queensland's government school policy. Here, it is the *employee* (not the principal) who has the onus to forward the report, but the employee will only have the duty to report if the principal also reasonably suspects the child has been harmed or is at risk of harm, and the principal must sign the reporting form. So, principals in

Queensland government schools do not themselves forward the reports of other schoolteachers, but in effect assess the teacher's suspicion and determine whether a report is formally made under the policy.

The second approach is similar in that it confers discretion on the principal. Here, the principal does not have to forward the report unless sharing the teacher's suspicion or accepting that the teacher's suspicion is sufficiently sound to warrant making the report. This is the situation in four of the 11 dioceses in NSW, and in all five Queensland nongovernment dioceses in the sample. The difference from the first approach is that if the principal shares the teacher's suspicion, here the principal is required to forward the report, not the teacher. It should be noted that this approach in New South Wales is inconsistent with the approach recommended by the *Memorandum of Understanding*, which requires principals to forward the report automatically without exercising further discretion.¹⁸

In contrast, the third approach, adopted in New South Wales and Western Australian government schools, and in six of the 11 NSW nongovernment dioceses in our sample, compels the principal to forward the teacher's report immediately to the Department, without questioning the soundness of the teacher's suspicion and even if the principal himself or herself does not share the teacher's suspicion or concern. In New South Wales, the *Memorandum of Understanding* also adopts this approach.¹⁹ In Western Australian nongovernment schools this also appears to be the position, although different statements in the policy present an ambiguous situation which needs to be resolved. There are statements clearly directing the principal to forward the report immediately, but subsequent directions suggest the principal has discretion about whether to forward the report or not.²⁰

The fourth approach is to exclude the principal from the process. Here, the teacher reports directly to the Department. This is the situation in one of the 11 NSW nongovernment dioceses in our sample.

This element is clearly one of the most fragmented features of the policy context. In New South Wales, the preferred approach of 'centralised reporting' to the principal and then to DoCS claims to offer superior benefits to individual teacher reporting ('direct reporting'). The *Memorandum of Understanding* reflects an agreement by the government and nongovernment parties that reporting to the principal first, with an obligation then imposed on the principal to forward the report, is the preferred approach.²¹ This is said to provide benefits to the child (ensuring education personnel fully consider the child's circumstances when reporting, and enabling better support of the child); to the school (reducing duplicate reports and improving monitoring of students' welfare); and to DoCS (reducing duplicate reports and adding value to reports made).²² However, in our view this approach incurs avoidable risk and costs, and it is unclear whether the claimed benefits accrue in practice. A fruitful subject of further research would be to seek the views of principals and teachers about the optimal approach.

7 Does the Policy Protect the Teacher's Identity From Disclosure?

Protection of the reporter's identity is an important element of both policy and legislation because it helps to assure reporters that they will not personally be vulnerable to reprisals in the event that they make a report. This protection is known to encourage reporters to make reports in practice, whereas the absence of such protection is known to effectively deter reporters from complying with their reporting duty.²³ It is therefore an important characteristic of both legislation and policy to promote the practical success of the reporting system.

Clear, unambiguous protection of the disclosure of the reporter's identity was apparent only in the policies of New South Wales (both government and nongovernment) and Western Australian nongovernment policy. The Western Australian government school policy did not include an explicit statement regarding the protection of the reporter's identity, and nor did policies in Queensland at both government and nongovernment levels. There remains a strong argument that in Queensland that there is an intention in the government policy to protect the identity of reporters' names from disclosure (via associated policy and operational documents, namely the Records Management policy, and Legal Action policy). However, if this intention exists, it should simply be made explicit in the *Student Protection* policy so that teachers accessing that policy are left in no doubt about the protection afforded them.

The legislation in New South Wales, as in virtually all jurisdictions having mandatory reporting legislation,²⁴ expressly protects the reporter's identity from disclosure. The pending legislation in Western Australia also expressly protects the reporter's identity from disclosure.²⁵ Queensland's legislation applying to teachers does not have such a provision expressly applying to its restricted scope of reporting, and this should be remedied. At a broader level, Queensland's reporting legislation applied to doctors and nurses expressly protects the identity of reporters,²⁶ and the *Child Protection Act 1999* (Qld) s 22, which enables but does not compel reports by any person, combines with s 186 to protect the disclosure of such reporters' identities. These *Child Protection Act 1999* provisions should apply to protect the disclosure of the identity of teachers who report, but this is not readily apparent to any teacher wondering whether or not to make a report.

V CONCLUSION

It is not surprising that the policy frameworks across sectors and between States should differ in important respects. Significant differences in States' legislation about the reporting of child sexual abuse have existed for decades, both contributing to and exemplifying the difficulty of gaining a consensus about what should be reported, by whom, and how. Yet, the fact that this situation of disharmony is traditional should not distract us from its inadequacy. Our study, which, while extensive, covers three States only, and not all nongovernment schools within those States, has revealed some inconsistencies in policy frameworks, some omissions and problems within those frameworks, and one case of an absence of a policy. It is known that teachers are an extremely valuable source of reports of cases of child sexual abuse, and the teaching profession deserve to operate within as sound a policy framework as possible in observing this most important task. It is also in the interests of school authorities to devise, implement, and monitor sound policy in this context, to protect themselves from potential legal liability for failure to report. Moreover, children who suffer sexual abuse deserve the best possible chance of their experience being able to be reported by a teacher, who may be their best or indeed only hope of assistance.

In sum, this comparative study yielded significant findings including the following:

- it is encouraging that nearly all school groups in the sample had a reporting policy;
- any school group not yet having a policy should immediately develop one;
- the strong policy situation in Queensland requiring reports of all suspected sexual abuse regardless of the identity of the suspected perpetrator adds further weight to arguments for the amending of Queensland's restricted reporting legislation;
- policies should require the teacher to report all suspected sexual abuse without limiting the reporting requirement to cases of 'significant' harm to the child;

- policies should require reports of suspected likely future abuse even if it has not happened yet;
- teachers should be required to report directly to the relevant Department, and to notify the principal of their report; but failing this, if a requirement remains that the teacher should report to the principal, the principal should be bound to forward the report immediately; and
- policies should expressly inform the teacher that the identity of any teacher who makes a report is protected from disclosure to the broadest degree possible.

Keywords: Child sexual abuse; teachers; school policies and teachers' obligations to report; New South Wales; Queensland; Western Australia; government and nongovernment schools.

ENDNOTES

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1. *Children and Young People Act 1999* (ACT) s 159; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27; *Community Welfare Act* (NT) s 14; *Education (General Provisions) Act 2006* (Qld) ss 365, 366; *Children's Protection Act 1993* (SA) s 11; *Children, Young Persons and Their Families Act 1997* (Tas) s 14; *Children, Youth and Families Act 2005* (Vic) ss 162, 182, 184. For detailed treatment, see B Mathews and K Walsh, 'Issues in mandatory reporting of child sexual abuse by Australian teachers' (2004) 9(2) *Australia & New Zealand Journal of Law & Education* 3-17. It should be noted that on 19 June 2008, Western Australia passed the *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2007*, which enacts similar provisions to the rest of Australia except Queensland. The key provisions of this legislation have not yet become operational, although they are anticipated to commence in 2009.
2. Although in South Australia and Tasmania, this requirement to report suspected likely future abuse is limited to circumstances where the suspected perpetrator lives with the child.
3. B Mathews and M Kenny, 'Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features, differences and issues' (2008) 13 *Child Maltreatment* 50-63. For fuller discussion of Queensland's legislation, see B Mathews and K Walsh, 'Queensland Teachers' New Legal Obligation to Report Child Sexual Abuse' (2004) 9(1) *Australia & New Zealand Journal of Law & Education* 25-40.
4. *Richards v Victoria* [1969] VR 136; *Victoria v Bryar* (1970) 44 ALJR 174.
5. See for example *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Torts Reports 81-399.
6. Unreported, Supreme Court of Victoria, Gillard J, 15 June 2000. For further discussion of this case, see B Mathews and K Walsh, 'Issues in mandatory reporting of child sexual abuse by Australian teachers' (2004) 9(2) *Australia & New Zealand Journal of Law & Education* 3-17.
7. Catholic Education Commission of Western Australia (2002) 'Procedures For The Identification And Notification Of Child Abuse And Neglect', copy on file with author.
8. This occurs even though the New South Wales government has published a comprehensive set of guidelines regarding good practice, aimed at increasing effective practice across sectors: Department of Community Services, *New South Wales Interagency Guidelines for Child Protection Intervention, 2006*, <http://www.community.nsw.gov.au/DOCSWR/_assets/main/documents/interagency_guidelines.pdf>. These *Interagency Guidelines* declare their purpose is 'to assist professionals and agencies in their work with children and families where there are child protection concerns' (p 7). They state that practitioners from government and non-government agencies 'should familiarise themselves with the child protection policies and procedures of their own agency' and 'understand that the *Interagency Guidelines* convey good practice for participating agencies, and recognise that they do not replace agency-specific policies or procedures or replace professional judgment, but rather that they build on these'.

In addition, the document entitled *Protecting And Supporting Children And Young People – Guidelines For Catholic School Personnel* (New South Wales Catholic Education Commission, 2005, http://www.cecsw.catholic.edu.au/CEC_CP_Guidelines_FINAL_Nov_05.pdf) presents ‘a general guide for school personnel’ regarding their legislative reporting duties. However, these comprehensive *Guidelines For Catholic School Personnel* are a guide rather than a prescription, with separate dioceses still required to develop their own policy. They are declared to be intended to ‘provide Diocesan Advisers and School Principals with a synopsis of the relevant principles...and general strategies to be considered in relation to child protection in Catholic Schools; an outline of the procedures to be followed when School personnel...develop concerns about suspected risk of harm...and an explanation of the procedures to be followed when reporting such concerns’ (12).

Appended to the *Guidelines For Catholic School Personnel* is a *Memorandum of Understanding between the Department of Community Services, the Department of Education and Training (DET), the Catholic Education Commission (CEC), and the Association of Independent Schools (AIS)*, on ‘Mandatory Reporting for the Education Sector’. This *Memorandum of Understanding* is probably the most important document in this context in New South Wales because it not only endorses centralised reporting (reporting by the teacher to the principal, who then reports to DoCS; rather than the teacher reporting directly to DoCS), but states that the role of the DET, the CEC, and the AIS is to ensure that employees understand their responsibility as mandated reporters, and to ‘ensure that relevant education settings have documented procedures in relation to centralised reporting’ (paragraph 4.2.2, p 86). In sum, there are a number of government and nongovernment-authored sets of guidelines, promoting a consistent method of reporting, but within the Catholic sector individual dioceses and archdioceses are still authorised and are in fact required to develop their own policy. It can be observed that it might be more effective and simple to adopt a centralised approach in the nongovernment sector.

9. Queensland Department of Education, Training and the Arts (2008) *SMS-PR-102: Student Protection*, <<http://education.qld.gov.au/strategic/eppr/students/smspr012/>>; New South Wales Department of Education and Training (2004) PD/2002/0072/V001: *Protecting and Supporting Children and Young People*, <<http://www.det.nsw.gov.au/policies>>; Western Australia Department of Education and Training (2005) *Child Protection*, <http://policies.det.wa.edu.au/our_policies/>.
10. The situation in Queensland within the Catholic sector is not as fragmented as that in New South Wales. There are two basic policies, adopted by different dioceses: the policy of the Archdiocese of Brisbane (*Student Protection – Reporting Processes 2004*, copy on file with author); and the policy of the Queensland Catholic Education Commission (*Manual – Student Protection: Creating Student Safety in Communities of Care*, copy on file with author).
11. To protect confidentiality, these will not be identified; copies are on file with author.
12. Catholic Education Commission of Western Australia, above n 7.
13. However, even here there may be grey areas, depending on what is classed as ‘sexual abuse’: for example, can exposure to adult nudity constitute sexual abuse?
14. *Public Health Act 2005* (Qld) ss 191 (reporting duty), 158 (definition of ‘harm’).
15. Mathews and Kenny, above n 3.
16. *Memorandum of Understanding between the Department of Community Services, the Department of Education and Training (DET), the Catholic Education Commission (CEC), and the Association of Independent Schools*, above n 8, paragraph 4.1.3, p 86.
17. D Houghton, ‘Rampant abuse includes “sex club” for six year olds’, *The Courier Mail*, 13 September 2008, <http://news.com.au/story/0,23599,24336761-1248,00.html>; D Houghton, ‘Education Department “powerless” against sex attackers’, *The Courier Mail*, 16 September 2008, <http://news.com.au/couriermail/story/0,23739,24351649-3102,00.html>.
18. *Memorandum of Understanding between the Department of Community Services, the Department of Education and Training (DET), the Catholic Education Commission (CEC), and the Association of Independent Schools*, above n 8, paragraph 4.1.4, p 86.
19. *Memorandum of Understanding between the Department of Community Services, the Department of Education and Training (DET), the Catholic Education Commission (CEC), and the Association of Independent Schools*, above n 8, paragraph 4.1.4, p 86.

20. Catholic Education Commission of Western Australia, *Procedures For The Identification And Notification Of Child Abuse And Neglect*, above n 7. On page 8, the policy states that 'Where there is a disclosure of child abuse or strong concerns about the well-being of a child, the teacher or staff members involved must report the matter to the Principal. On receipt of this report, the Principal must: inform the Coordinator, Employee and Community Relations, at the Catholic Education Office; [and] report the matter to Family and Children's Services'. However, on page 10, the policy states: 'In the situation where a teacher suspects a student is being abused/neglected the teacher should discuss their suspicions with the Principal who will then discuss the matter with the school social worker/psychologist or the Coordinator, Employee and Community Relations, at the Catholic Education Office *prior to making the choice of reporting the matter or not*' (emphasis added by authors). Yet, these later instructions are placed in the general context of duty of care principles, so may be of less weight than the previous instructions.
21. *Memorandum of Understanding between the Department of Community Services, the Department of Education and Training (DET), the Catholic Education Commission (CEC), and the Association of Independent Schools*, above n 8, paragraph 4.1.4, p 86.
22. *Memorandum of Understanding between the Department of Community Services, the Department of Education and Training (DET), the Catholic Education Commission (CEC), and the Association of Independent Schools*, above n 8, p 83.
23. N Abrahams, K Casey and D Daro, 'Teachers' Knowledge, Attitudes and Beliefs About Child Abuse and Its Prevention' (1992) 16(2) *Child Abuse & Neglect* 229-238.
24. Mathews and Kenny, above n 3.
25. *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2007* (WA) s 124F.
26. *Public Health Act 2005* (Qld) s 196.

