A Guide for NSW Non-Government Schools on Reporting, Disclosing or Exchanging Personal Information for the purposes of Child Wellbeing

1. INTRODUCTION

1.1 Legislation in New South Wales sets out a regime under which schools may be required or permitted to disclose the personal information of students, their families, employees and volunteers to others. The legislation also sets out circumstances in which a school may request another school (or other prescribed body) to provide them with information relating to the safety, welfare or wellbeing of a student or students including personal information.

1.2 The relevant legislation addressed in this Guide is:

- *Children and Young Persons (Care and Protection) Act 1998 (CYP Act)* see sections 2, 4 and 7;
- *Education Amendment (School Attendance) Act 2009 (Attendance Act)* see section 8;
- *Ombudsman Act 1974 (Ombudsman Act)* see section 5;
- Part 5A of the *Education Act 1990 (Health and Safety risks of schools arising from student behaviour)* (Part 5A) see section 3; and

Some of the legislation refers to a child or young person. This guide refers to 'child' or 'children' to encompass both concepts.

1.3 The Federal *Privacy Act 1988 (Privacy Act)* and the National Privacy Principles (NPPs) contained in the *Privacy Act* put in place various rules governing the collection, use, disclosure and security of personal information. The legislation in New South Wales will generally override the provision of the *Privacy Act*. However, this does not mean that the privacy of students or of other people about whom information relates can be disregarded. Careful consideration needs to be given before disclosing a person’s personal information to ensure it is being provided in circumstances contemplated by the relevant New South Wales law. The various Catholic Diocesan Offices and the Association of Independent Schools of N.S.W. have officers who can assist schools to determine where it is necessary or appropriate to disclose or collect personal information of others.

1.4 This Guide examines each piece of legislation to provide guidance to a school's obligations and rights under New South Wales law. It should be read in the context of these laws providing exceptions to the general provisions relating to privacy which apply to schools and which are set out in some detail in the Privacy Compliance Manual for schools which can be accessed at:


1.5 The legislation covers six situations:

(a) where a school is required to report certain information of students;

(b) where a school is required to report certain information of employees;
where a school may disclose information about students;
(d) where a school may disclose information about employees;
(e) where a school may seek information about students and prospective students; and
(f) where a school may seek information about employees and prospective employees.

1.6 The NPPs place restrictions on the collection, use and disclosure of personal information. These are set out in detail in the Privacy Manual but in summary terms:

- personal information can be collected by a school if it is necessary for one of its functions;
- sensitive information, such as health information, can only be collected with consent;
- personal information can only be used or disclosed for the primary purpose of collection; or
- used or disclosed for a related secondary purpose which is reasonably expected; and
- disclosure is permitted when it is authorised or required under law.

1.7 In each of the situations referred to in paragraph 1.5, a school may be collecting or disclosing personal information which will only be permitted if such disclosure is authorised under the Privacy Act or under other legislation such as the Acts referred to in paragraph 1.2. If there is a conflict with a school's obligations under the Privacy Act, and State legislation, the State legislation will take precedence. If a disclosure is not authorised under the State legislation, care needs to be taken that the requirements set out in the Privacy Act are followed.

1.8 However, it is important to remember that the other provisions of the NPPs will continue to apply and in particular:

(a) the personal information collected must be protected from unauthorised access; and
(b) potentially, the person concerned could obtain access to the information under NPP 6 unless there are grounds set out in NPP 6 which would justify refusing access (see section 12 of Privacy Manual).

2. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT – EXCHANGE OF INFORMATION UNDER CHAPTER 16A

2.1 On 30 October 2009 amendments to the CYP Act inserting a new Chapter 16A, came into operation giving schools greater ability to obtain information which is relevant to the wellbeing of the children in its care.

2.2 The amendments give scope to make inquiries which previously were not possible because of concerns about privacy or which were the subject of confidentiality agreements.

2.3 Under the amendments, schools and other prescribed bodies are permitted to request
information relating to the safety, welfare or well-being of a child or children in order to assist the school or other prescribed body to:

(a) make a decision, assessment or plan; or
(b) initiate or conduct any investigation; or
(c) provide any service relating to the safety, welfare or well-being of a child or children; or
(d) manage any risk to a child or class of children.

A list of prescribed bodies is contained in paragraph 2.26.

2.4 If a school receives a request for information by a prescribed body, it must comply with the request if the school reasonably believes that the information requested may assist the requesting agency to:

(a) make a decision, assessment or plan; or
(b) initiate or conduct any investigation; or
(c) provide any service relating to the safety, welfare or well-being of a child or children;
(d) manage any risk to a child or class of children.

2.5 A school must not use information provided to it or disclose information which is not associated with the safety, welfare or well-being of a child or class of children to whom the information relates.

2.6 A school is permitted to provide this information to a prescribed body regardless of whether it has been requested to provide the information. An example may be where a school is aware that a child lives in a household where there are some domestic violence issues that have not met the threshold for reporting to Community Services. The school has a support/care plan in place for the child but the child is removed to another school. In the circumstances, the first school may consider it would assist the wellbeing of the child to pass on this information to the new school regardless of whether it is asked to do so.

2.7 Unlike the reporting provisions contained elsewhere in the CYP Act it is not necessary for a risk of significant harm to a particular child or young person to be identified before the information can be exchanged. However, at a minimum, general issues of safety, welfare or wellbeing of a child or children are required to be determined.

2.8 A flow chart to assist in determining how to deal with a request for information is set out below.
Dealing with Requests under Chapter 16A of the Children and Young Persons (Care and Protection) Act

1. Is the person about whom the information is requested clearly identified
   - No
   - Yes
   —— seek clarification

2. Do the reasons given for the request identify a potential issue relating to the safety, welfare or wellbeing of a child or children
   - No
   - Yes
   —— seek clarification or refuse request

3. Does the school have the information requested
   - No
   - Yes
   —— advise body requesting

4. Is there a reason as set out in the CYP Act (see para 2.11) why the school should not provide the information, such as it may endanger a person's life or physical safety
   - Yes
   - No
   —— advise that cannot provide, and give the reason

PROVIDE INFORMATION

2.9 Templates of letters can be found on the Keep Them Safe website and can be used when requesting information or answering requests. Draft template letters can be accessed at:


Interaction with other legislation

2.10 The CYP Act specifically provides that any other act or law (including the Privacy Act) that prohibits or restricts the disclosure of information does not operate to prevent the provision of information or a duty to provide information under the CYP Act. This means that the duty to provide requested information relating to a child or class of children's safety, welfare or well-being will take precedence over confidentiality
2.11 Schools must comply with a request for information from a prescribed body if the school believes that the information requested may assist the school in the assessment of the child's safety, welfare or well-being of the child or children to whom the information relates, regardless of any agreement to the contrary. However, schools may refuse to provide requested information if the school reasonably believes that the provision of the information would:

(a) prejudice a criminal investigation or coronial inquest;
(b) prejudice care proceedings;
(c) contravene legal professional or client legal privilege;
(d) enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained;
(e) endanger a person's life or physical safety; or
(f) not be in the public interest.

2.12 It is important to remember:

(a) some information about prospective employees will be obtainable through the mandatory background checking screening process (see section 5 below); and

(b) a school has a separate ability to obtain information about students and prospective students under Part 5A of the Education Act (see section 6 below).

2.13 Where an organisation collects personal information about an individual the NPPs require that the organisation must take 'reasonable steps' to ensure that the individual is aware of certain matters, including any laws that require the collection of the information and the fact that the individual can obtain access to the information. The Privacy Commissioner has indicated that there will be occasions when it is 'reasonable' to take no steps to inform the individual of the personal information collected. Standard forms of collection notices contained in the Privacy Manual have been amended to make it clear that the school may collect this type of information. [See the Standard Collection Notice at para 7.10.1 and the Employment Collection Notice at para 7.13.1.]

Application

2.14 Before providing or requesting information under Chapter 16A of the CYP Act, the school must form a reasonable belief that the information requested or provided would be of assistance in relation to the safety, welfare or well-being of a child or class of children to whom the information relates.

2.15 The following scenarios illustrate potential situations where the provision of specific information could assist in protecting the safety, welfare or well-being of a child or children, and hence constitute a valid application of the CYP Act:

(a) A child is expelled from a school for a violent act and appears to have an ungovernable temper. Informing the new school of the child's history would assist the new school to put a plan in place to manage the child and protect other children in the school; [However see also commentary on Part 5A of the Education Act]
below.]

(b) A child is removed from the school by parents and transferred to another school. The school believed that the child was suffering some trauma due to the child's home environment. Informing the new school of this belief would assist the new school to take this into account in looking after the child.

(c) A child who is new to the school is showing signs which may indicate difficulties at home. The school may wish to ask the previous school if they have any information which would assist in providing assistance to the child at the new school. The school may also contact other prescribed bodies to determine if any other agency has concerns or is working with the particular child.

(d) A child who is new to the school has visible bruises and abrasions. The school seeks clarification from the child as to how the injuries were caused. The child asserts the injuries were caused by an accident. If the school suspects the child may be at risk, they may wish to contact the child's previous school or other prescribed body to determine if the child is at risk of significant harm.

(e) Principal of X School has interviewed a prospective employee Y. Y is the preferred candidate. When the Principal X rings Y's current principal (Z), they are told that there has been an issue of concern about Y but due to privacy concerns, they can't say any more. Principal X is really keen to employ Y because they have been trying to get a teacher for this faculty for many months. The CCYP screening has not raised any concerns. Principal X has grounds to seek information from Principal Z because Y may be a risk to children. Principal Z may only refuse to provide the requested information for the reasons set out in 2.11.

(f) Employee A has been at HUGS School since the beginning of 2009. A's current Principal B meets his former Principal C at a function. B says to C, 'I have A at my school. I believe you would know him.' C says to B, "I wish I didn't. He was never supposed to be in a school again.' C refuses to say anything else. Principal B may seek information from Principal C because Principal B now has possible grounds to suspect A may be a risk to children and needs to conduct a risk assessment. Principal C may only refuse to provide the requested information for the reasons set out in 2.11.

**Employees**

2.16 Under the new amendments, a school may also provide information about former employees, or request information relating to employment applicants if there is an existing concern that there may be a risk to the safety, welfare or wellbeing of a child, or request information relating to a current employee where the school is required to conduct an investigation or risk assessment.

2.17 If a school dismisses an employee, or an employee resigns, and the school reasonably believes that the former employee may present a risk to the safety, welfare or well-being of a child or class of children, any confidentiality agreement the school and the former employee entered into prohibiting the disclosure of the circumstances of that employee's termination will not have effect, to prevent the disclosure of that information if it is requested by another school or prescribed body. This is regardless of whether the agreement was entered into before or after the commencement of Chapter 16A of the *CYP Act*. It also includes an obligation to provide information to a new employer.
2.18 The situation may also arise where a school is employing a casual or part time teacher who works with children at other institutions and a serious issue arises. In this case, the school may wish to advise those other institutions and/or seek information from them.

2.19 A school may also request information relating to an employee or potential employee from another school or other prescribed body if it believes that this will assist it provide for the safety, welfare or wellbeing of its student. This should not be a routine inquiry but should only be made where there is a basis for concern.

2.20 An example would be:

A school has employed a new teacher who appeared to be grooming a student. The school may wish to ask the school at which the teacher previously taught for any information which would assist the school to form a view about the conduct of the teacher and the risk to its pupils.

2.21 In fact, if an employee's employment in New South Wales had been terminated (or the employee had resigned) in circumstances where the previous school had found evidence that 'reportable conduct' had occurred then this should have been notified to the Commission for Children and Young People, and been factored into the risk assessment when a working with children check was conducted (see Mandatory Reporting section 6 below).

**Requesting information**

2.22 The information requested could include information held on:

(a) a child or young person's history or circumstances;

(b) a parent or other family member;

(c) people having a significant or relevant relationship with a child or young person or a group of children or young persons, such as a teacher; counsellor or bus driver, or

(d) the other agency's dealings with the child or young person, including past support or service arrangements, or with a teacher or other staff member that it previously employed.

2.23 The detailed guidance\(^1\) provided by the NSW Government suggests that when requesting information from a prescribed body, a school should:

(a) explain how the request for information relates to the safety, welfare and well-being of the child or class of children;

(b) explain why the information is needed to make a decision about service provision or to manage any risk to the child or class of children;

(c) identify the subject of the information request and (if it is not the child or young person) identify the subject's relationship to the child or class of children;

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(d) make sure that the person who is the subject of the request is clearly identified so that there can be no mistake as to identity;

(e) provide a background to the request, including whether or not consent has been requested and where it has not, why the agency should not inform a child, young person, parent or employee that the information has been requested (for example, safety concerns); and

(f) advise of the time frame for providing the information, giving the agency a realistic time frame within which to notify, unless the information is required for court proceedings where a more limited time frame may be required.

2.24 It is also suggested in the Guidelines that 'consent should be sought where possible, however, it is not essential to obtain this consent where it is likely to further jeopardise the child or young person's safety, welfare or wellbeing.'

There will be other occasions where it would not be appropriate to gain consent, such as where it is felt it would damage relations with parents or some other person. The CYP Act does not require that consent be sought.

Protection

2.25 Where a school provides information in good faith under Chapter 16A of the CYP Act, it cannot be liable for any civil or criminal action, or be held to be in breach of any code of conduct or professional ethics.

Other prescribed bodies

2.26 Schools may request information, or receive requests for information, from other prescribed bodies in New South Wales for the purposes of Chapter 16A of the CYP Act, including:

(a) the NSW Police Service;

(b) a government school or non registered government school;

(c) a State government department or a public authority;

(d) a TAFE establishment;

(e) a State public health organisation;

(f) a private hospital in New South Wales;

(g) a private fostering agency or adoption agency;

(h) a body that conducts a residential child care centre or child care service;

(i) any other organisations that have direct responsibility for, or supervision of, the provision of healthcare, welfare, education, children's services, residential services or law enforcement, to children;

(j) an organisation that arranges provision of out-of-home care; and

(k) Community Services.
For any additional information and updates on the list of prescribed bodies, go to the Keep Them Safe website and link to the Keep Them Safe Facts Sheet Information Exchange at:


3. PART 5A OF EDUCATION ACT – HEALTH AND SAFETY RISKS ARISING FROM STUDENT BEHAVIOUR

3.1 Part 5A of the Education Act provides that a school can request a relevant agency to provide it with information about a student or prospective student to:

(a) assess whether the enrolment of the student is likely to constitute a risk (because of the behaviour of the student to the health or safety of any person (including the student); and

(b) to develop strategies to eliminate or minimise such risk.

3.2 A school may seek this information from other schools, the Department of Education and Training, school system authorities and certain other named bodies. A school may also disclose this information from other schools, the Department of Education and Training, school system authorities and certain other name bodies. A school may also disclose this information to another school without the need for a request.

3.3 Where a request is made to a school, it must supply this information if it is within the school's possession or control except where precluded by guidelines made under the Education Act or in some other limited circumstances.

3.4 If the information is provided in good faith, a school will not incur liability, for defamation or other civil proceedings nor will it be a breach of professional etiquette or ethics.

3.5 The Minister may make guidelines under the Education Act in relation to general principles to be followed when exercising a function under the Education Act, of what may constitute a risk to the health or safety of any person and certain other matters which must be followed.

3.6 The purpose of the provisions is to identify students with a propensity to violent behaviour and, if a risk is identified, to engage in strategies to minimise that risk. The guidelines indicate that violent behaviour can include any behaviour that seriously interferes with the physical or psychological health, safety and wellbeing of staff and students.

3.7 The Guidelines are available at:


4. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT - DIRECTIONS TO SHARE INFORMATION WITH COMMUNITY SERVICES UNDER SECTION 248

4.1 Schools may also be required to disclose information to Community Services in accordance with section 248 of the CYP Act, in relation to the safety, welfare and wellbeing of a particular child or young person or class of children or young persons.
4.2 Section 248 of the CYP Act also allows Community Services to disclose personal information to Schools.

4.3 Where a School is given a direction under section 248 by Community Services, it is required to promptly comply with that direction. This provision will override any privacy laws or requirements not to disclose personal information without consent.

5. MANDATORY REPORTING – OMBUDSMAN ACT

5.1 Part 3A of the Ombudsman Act requires the heads of certain agencies, including non-government schools in New South Wales, to notify the New South Wales Ombudsman of all allegations of 'reportable conduct' by an employee and the outcome of the school's investigation of these allegations. The Ombudsman may monitor or review the school's investigation or in certain circumstances may decide to investigate a matter directly.

5.2 Reportable conduct is defined as:

(a) any sexual offence or sexual misconduct committed against, with or in the presence of a child - including a child pornography offence;

(b) any assault, ill-treatment or neglect of a child; and

(c) any behaviour that causes psychological harm to a child, whether or not the child consented to the behaviour.

5.3 Reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or

(b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or

(c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

5.4 Heads of non-government schools must:

(a) set up systems within their organisation to ensure that they are advised of any allegations of reportable conduct against their employees; and

(b) notify the Ombudsman as soon as possible and no later than thirty days after being made aware of an allegation.

5.5 The school must provide the Ombudsman with (among other things):

(a) details of the allegations;

(b) details of the investigation (including risk assessments, notes of interviews, statements, correspondence with employee and any other documentation relied upon);
(c) the findings of the investigation;
(d) any action that is to be taken, or has been taken, as a result of the investigation;
(e) any written submissions made by the employee; and
(f) details of whether the Commission for Children and Young People has been notified.

5.6 The information provided under these provisions cannot be accessed by other people, including new employers, but the individual may be able to access their own records.

6. **MANDATORY REPORTING – ** **COMMISSION FOR CHILDREN AND YOUNG PEOPLE ACT**

6.1 Section 39 of the *Commission for Children and Young People Act* requires a school to notify the Commission for Children and Young People of relevant employment proceedings. Relevant employment proceedings is a completed disciplinary proceeding where a school has found some evidence that 'reportable conduct' occurred, or an act of violence was committed by an employee in the course of employment and in the presence of a child.

6.2 Broadly, reportable conduct includes:

- any sexual offence, or sexual misconduct, committed against, with, or in the presence of, a child; or
- any child pornography offence or misconduct involving child pornography; or
- any child-related personal violence offence; or
- any assault, ill-treatment or neglect of a child; or
- any behaviour that causes psychological harm to a child, whether or not the child consents.

6.3 Reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
(b) conduct that is exempted from notification by a class or kind agreement under the 'Working With Children Employer Guidelines'; or
(c) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures.

6.4 Schools are required to:

(a) ask all preferred applicants to declare they are not a 'prohibited person' (as defined); and
(b) conduct a working with children background check of preferred applicants for
employment in schools which may reveal if a person had been found to have engaged in reportable conduct.

7. MANDATORY REPORTING - SECTION 27 OF THE CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT

7.1 Under the CYP Act, mandatory reporting where current concerns exist for children at risk of significant harm applies to persons who:

(a) in the course of their employment, deliver services including health care; welfare, education, children's services and residential services, to children; or

(b) hold a management position in an organisation, the duties of which include direct responsibility for, or direct supervision of, the provision of services including health care, welfare, education, children's services, and residential services, to children.

7.2 Such persons must, where they have reasonable grounds to suspect that a child is at a risk of significant harm, report to Community Services as soon as practicable, the name, or a description, of the child and the grounds for suspecting that the child is at risk of significant harm.

7.3 The threshold for the requirement to report was raised on 24 January 2010 from 'risk of harm' to 'risk of significant harm', meaning that there will be far fewer occasions when it is necessary to make a report. The New South Wales Mandatory Reporter Guide states:

'A child or young person is at risk of significant harm if the circumstances that are causing concern for the safety, welfare or well-being of the child or young person are present to a significant extent.

What is meant by 'significant' in the phrase 'to a significant extent' is that which is sufficiently serious to warrant a response by a statutory authority irrespective of a family's consent.

What is significant is not minor or trivial, and may reasonably be expected to produce a substantial and demonstrably adverse impact on the child or young person's safety, welfare or well-being.

In the case of an unborn child, what is significant is not minor or trivial, and may reasonably be expected to produce a substantial and demonstrably adverse impact on the child after the child's birth.

The significance can result from a single act or omission or an accumulation of these.'

7.4 Two new grounds for mandatory reporting that a child may be at risk of significant harm came into effect on 24 January 2010. These requirements are especially pertinent to schools as they must report instances of:

(a) educational neglect. Parents of carers have not made proper arrangements and are unable or unwilling for their child to receive an education; and

(b) cumulative impact. A series of acts or omissions incidents, when viewed together, may establish a pattern of risk of significant harm.
7.5 In addition, the *CYP Act* was amended to remove the penalties for non-compliance.

7.6 The information provided under these provisions cannot be accessed by other people, including other schools. An exception to this is where the disclosure of reporter information can be made to law enforcement agencies (such as Police) investigating a serious offence against a child.

8. **MANDATORY REPORTING – EDUCATION AMENDMENT (SCHOOL ATTENDANCE) ACT**

8.1 The Attendance Act inserts into the *Education Act* new provisions relating to a child's school attendance.

8.2 The *Education Act* now provides that a school may provide information to the Department of Education and Training solely for the purpose of assisting the Director-General of the Department of Education and Training to ascertain:

(a) the age, identity or whereabouts of a child who is not receiving compulsory schooling (or an alternative to compulsory schooling); and

(b) the reason why they are not receiving compulsory schooling.

8.3 The *Education Act* also provides that a school must provide this information if it is requested by the Director-General of the Department of Education and Training.

8.4 If the information is provided in good faith, a school will not incur liability, for defamation or other civil proceedings nor will it be a breach of professional etiquette or ethics.

8.5 The information provided under these provisions cannot be accessed by other people including other schools.

9. **FURTHER INFORMATION**

9.1 Further information about reporting or exchanging personal information, including reporting templates, reporting guidelines and updated information about prescribed bodies can be accessed at the NSW Government's website *Keep Them Safe: A Shared Approach to Child Wellbeing*: