

The Research Director  
Industry, Education, Training and Industrial Relations Committee  
Parliament House, George Street  
BRISBANE QLD 4000

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Dear Research Director

## **RESPONSE TO THE EDUCATION AND TRAINING LEGISLATION AMENDMENT BILL 2011**

We refer to the letter from the Committee Chair, Mr Kerry Shine MP dated 12 August 2011. Thank you for providing the Queensland Law Society (The Society) with the opportunity to comment on the *Education and Training Legislation Amendment Bill 2011* (the Bill).

Our comments on the Bill are divided into 2 parts:

- Part 1- the *Education (General Provisions) Act 2006* (criminal law issues); and
- Part 2 - the *Education (Queensland College of Teachers) Act 2005* (administrative law issues).

The response to the changes to the *Education (General Provisions) Act 2006* has been compiled with the assistance of the Society's Criminal Law Committee and Children's Law Committee, who have a thorough knowledge of these areas of law and practice.

### **1.0 EDUCATION (GENERAL PROVISIONS) ACT 2006**

The Society notes that the intention of the Bill is to "protect the safety and wellbeing of Queensland students through amendments relating to reporting of sexual abuse and cancellation of teacher registration..."<sup>1</sup>

Under the current notification laws in the *Education (General Provisions) Act 2006*, staff members of State schools and non-State schools are required to report, if they become aware or reasonably suspect, sexual abuse against a student under 18 years by a fellow staff member.<sup>2</sup> The reporter is required to give a written report to the principal, the principal's supervisor or director, depending on who the reporter is. This report must then be given to a police officer or a person nominated by the Chief

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<sup>1</sup> Explanatory notes found at: <http://www.legislation.qld.gov.au/Bills/53PDF/2011/EducTrainLAB11Exp.pdf> .

<sup>2</sup> *Education (General Provisions) Act 2006*; section 365 and section 366.

Executive. There are criminal sanctions for all parties if this is not done, with a maximum fine of 20 penalty units for non-compliance.

The Bill expands these reporting duties to include the following obligations on staff members of both State and non-State schools:

- Staff members must report, if they become aware or reasonably suspect in the course of their employment, sexual abuse of a student under 18 years by any person, not just by another staff member;<sup>3</sup> and
- Staff members must report, if they reasonably suspect, any likely sexual abuse by another person.<sup>4</sup>

These new laws would substantially expand the reporting obligations for school staff.

### **1.1 Inclusion of ‘any person’ as a perpetrator of sexual abuse, and reporting of ‘likely sexual abuse’**

These changes generally bring Queensland in line with legislation in other States such as New South Wales and Victoria. The Society understands that consistency between States is important, however we note that there must also be strong arguments that clearly show the benefits and value of the proposed laws.

The proposed expansions to the mandatory reporting laws would bring a host of new complexities such as:

- A situation where consensual sexual relations occur between students but is mistaken/interpreted as abuse; or
- Assessing the legal interpretation of what constitutes ‘likely’ sexual abuse; or
- Significant expansion of the risk of criminal and civil litigation against school staff and the Department for failure to carry out reporting obligations.

The term “sexual abuse” is not defined in the *Education (General Provisions) Act 2006* or in other pieces of legislation. Under the existing provisions, any sexual contact between a staff member and a student was likely to have been abuse of trust, and there would be little difficulty in applying the provision. The term would be much more difficult to apply with certainty in relation to sexual activity between students and other persons. As mentioned above, sexual contact could be expected between students themselves, some of whom will be over 16, the age of consent for most forms of sexual activity in Queensland. While it is lawful for children 17 years of age to engage in sexual intercourse, it is unlawful to send a sexualised image of a 17 year old child using the internet or a mobile telephone.<sup>5</sup> It would be difficult for teachers to know when such conduct would be regarded as “abuse” that required a report.

In terms of assessing what constitutes ‘likely’ sexual abuse, we highlight section 3(k) of the *Legislative Standards Act 1992* which states that, in determining whether legislation has sufficient regard to the rights and liberties of individuals, a determining factor is whether the legislation is “unambiguous and drafted in a sufficiently clear and precise way.” The Society submits that the legislation is not drafted in a way that provides any guidance to schools and their staff about what ‘likely sexual abuse’ means.

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<sup>3</sup> *Education and Training Legislation Amendment Bill 2011*; clause 8 and clause 10.

<sup>4</sup> *Education and Training Legislation Amendment Bill 2011*; clause 9 and clause 11.

<sup>5</sup> *Criminal Code 1995 (Commonwealth)*, section 474.19

This is a very broad statement and the Society is concerned that school staff will not know how to manage this new obligation.

The obligation to report likely sexual abuse, proposed in clause 9 of the Bill, is directed at possible future conduct, where no offence has yet been committed. The clause uses the words “is likely to be sexually abused.” Not only does this create uncertainty as to when a report should be made, but it will also often be difficult for the person who receives such a report to take any action upon it.

Furthermore, Queensland has the benefit of research that has been done in other States in Australia that show that mandatory reporting in its various forms is not working to protect children.

For example, a study conducted into the Victorian mandatory reporting system concluded that:

*“Legislation requiring certain professionals to report suspected child abuse has led to increased notification of cases of abuse and neglect nationally. There is, however, no evidence that mandatory reporting legislation in Australia or elsewhere has been effective in protecting children.”<sup>6</sup>*

In Victoria, registered teachers and principals are mandatory reporters under the *Children, Youth and Families Act 2005* (Vic). They must report if they form a belief on reasonable grounds that a child is in need of protection on the grounds that the child has suffered or is likely to suffer:

- Sexual abuse; or
- Physical abuse.<sup>7</sup>

This is very similar to what is proposed for the Queensland framework for sexual abuse concerns. However, the Society is concerned that these changes will be made without due consideration of the experiences found in other States (such as Victoria) which indicate that reporting laws do not enhance the protection of children.

Unless any real benefits of mandatory reporting by school staff can objectively be shown, the Society does not support any expansion to current Queensland laws.

## **1.2 Over-reporting of sexual abuse notifications**

The *Child Protection Act 1999* allows for any person to make notifications about alleged harm or risk of harm to a child.<sup>8</sup> The definition of harm in this legislation explicitly includes sexual abuse.<sup>9</sup> These notifications go to the Department of Child Safety, and can result in the issue of a Child Concern report (when the information does not reach a certain threshold of concern for the Department) or a Child Protection Notification. Education Queensland policy specifically refers to the ability for staff to make

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<sup>6</sup> “Strategies for Gain - the evidence on strategies to improve the health and wellbeing of Victorian children”, University of Wollongong found at: <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1001&context=chsd&sei-redir=1#search=%22Strategies%20Gain%20-%20evidence%20strategies%20improve%20health%20wellbeing%20Victorian%20children.%20Centre%20Health%20Service%20Development%2C%20University%20Wollongong%22>, p ix.

<sup>7</sup> Section 184(1) of the *Children, Youth and Families Act 2005*

<sup>8</sup> Section 22 *Child Protection Act 1999*

<sup>9</sup> Section 9 *Child Protection Act 1999*

reports voluntarily to the Department of Child Safety regarding any concerns they may have.<sup>10</sup> Furthermore, non-state schools in Queensland are required under the provisions of the *Education (Accreditation of Non-State Schools) Act 2001 and Regulations 2001* to have in place policies for the reporting of harm caused to students. These reports are required to be made to the Queensland Police Service or Department of Child Safety.<sup>11</sup>

The Society notes that there are reports of over-reporting of child abuse claims in Queensland by State and non-State school staff. A recent media report showed that school staff made 12,339 reports of child harm made in the year ending 31 March 2010, with 3,090 investigated and 858 cases actually substantiated.<sup>12</sup>

The Society is concerned with the high rates of reporting and submits that teachers are already adequately reporting their concerns, either through the existing provisions in the *Education (General Provisions) Act 2006*, through the *Child Protection Act 1999* as discussed in Education Queensland policy, and through the policies of non-state schools developed in compliance with the *Education (Accreditation of Non-State Schools) Act 2001 and Regulations 2001*. Any further expansions to these laws will result in even greater numbers of reporting (especially given the risk of criminal penalties), which will undoubtedly impact the resources available to enable investigations of genuine sexual abuse cases against children.

The Society submits that expanded mandatory reporting legislation may not substantially increase the wellbeing and safety of children, but may only function to divert resources away from the areas in which children are in most need.

### **1.3 Privacy and potential isolation of alleged perpetrators**

The Society is concerned that the expansion of these laws unduly infringes a person's civil liberties. This is especially the case when notifications are made which are later disproved. Reputations, livelihoods, relationships and mental health are adversely affected by allegations of this nature. Given the high rate of unsubstantiated claims (as highlighted earlier), there is a real risk to the protection of individuals in our school societies if the obligatory reporting rules are expanded further.

A more useful approach would be policy-driven, which focuses on training school staff to recognise the signs of sexual abuse so that they can appropriately note any concerns under existing legislation. Importantly, the *Child Protection Act 1999* explicitly affords the notifier confidentiality (section 186), whilst the *Education (General Provisions) Act 2006* does not. The Society believes that school staff would be safer reporting their concerns under the protection of confidentiality.

### **1.4 The assessment of 'reasonable suspicion' of sexual abuse or likely sexual abuse by school staff**

The test of reasonably suspecting the occurrence of sexual abuse, or any likely sexual abuse is a difficult one for most people to comprehend. For teachers who are not legally trained, this duty to assess a reasonable suspicion may be a particularly arduous one. In fact, the QUT report quoted in the Explanatory Notes for this Bill specifically states that more than half of Queensland teachers "lacked

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<sup>10</sup> Department of Education and Training Policy on Student Protection found at: <http://education.qld.gov.au/strategic/eppr/students/smspr012/>

<sup>11</sup> Regulation 10, *Education (Accreditation of non-State Schools) Regulation 2001*

<sup>12</sup> 'Queensland schools file 12,000 child harm reports', The Courier Mail, July 23 2010, found at: <http://www.news.com.au/national/queensland-schools-file-12000-child-harm-reports/story-e6frfkvr-1225895831827>

sufficiently familiarity with the legislation to answer questions about it. Training should ensure that all QGS teachers are aware of the key features of the legislative duty”.<sup>13</sup>

It is also noted that while the QUT report focused on the reporting of sexual abuse by teachers, the Bill as it stands refers to the reporting of sexual abuse and likelihood of sexual abuse by school staff. School staff will include cleaners, groundsman, tuckshop convenors and administrative staff employed by schools. While teachers may receive some instruction in their teacher training regarding behaviours displayed by children which may give rise to a suspicion of abuse, staff in the other roles referred to above will not even have this level of training.

The Society encourages the Government to be more proactive in effective training for staff members about their current legislative duties. Without the confidence that school staff are appropriately equipped to handle their current reporting obligations, the Society does not support an expansion of these laws.

The Society is concerned that the proposed changes are too broad. As such, the Society fears that school staff will feel obliged to report any suspicion they might have without having regard to the proper exercise of the test enshrined in the legislation. Staff working under the threat of criminal penalties would form the view that it would be better to report, even if there is no reasonable basis, rather than risk penalties and a criminal conviction if no report is made.

### **1.5 Risk of young people being charged with sexual offences**

The proposed changes may result in young people having their names recorded on statutory databases for life, or being charged with sexual offences. The Society submits that the legislation should not mandate reporting of sexual abuse by ‘another person’, as this will require staff to report concerns that they have about sexual interaction by students which they might feel obliged to interpret as being sexual abuse. For example, a seventeen year old may be in a sexual relationship with a fifteen year old. Under the proposed section, the seventeen year old may be reported by school staff as the 15 year old, a child under 16 years old, is not legally capable of consent to such relations. The 17 year old may then be charged with the offence of carnal knowledge with a child under 16 (section 215 of the *Criminal Code 1899*) and may then be liable for imprisonment of up to 14 years. The charge and/or conviction could have multiple negative consequences for a young person including restrictions on travel and employment.

A consequential effect of the proposed changes may be a loss of trust and confidence between teachers and students. The 15 year old child in the above example may be less willing to seek advice and support from school staff if they cannot do so in the expectation that the information will be treated confidentially, particularly if it leads to their sexual partner being arrested by the police.

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<sup>13</sup> ‘Teachers reporting child sexual abuse: Towards evidence-based reform of law, policy and practice’ found at: [http://eprints.qut.edu.au/33010/1/ARC\\_DP0664847\\_Final\\_Report.pdf](http://eprints.qut.edu.au/33010/1/ARC_DP0664847_Final_Report.pdf), Pg 84

## **2.0 EDUCATION (QUEENSLAND COLLEGE OF TEACHERS) ACT 2005 CHANGES**

The Bill makes significant changes to the registration and professional conduct rules for teachers.

In the following paragraphs we propose a suite of interconnected amendments to the decision-making process proposed in the Bill. We note that the suggested changes should be considered in their entirety as a system of good decision-making. Selective adoption of our following proposals may introduce unintended prejudice to an applicant.

### **2.1 Application for eligibility declaration**

There is a proposal for a new part in the Act to deal with 'eligibility declarations'. These are declarations that the applicant is not an excluded person and is eligible to apply for registration or permission to teach (section 12B).

Section 12E deals with the process for making an application for an eligibility declaration. Section 12E(2) specifies that an applicant cannot make an eligibility application within 2 years after making a previous eligibility application that has been refused, unless the decision to refuse the previous eligibility declaration was based on wrong or incomplete information.

The Society is uncertain why the period of 2 years was chosen as the time period, and submits that a more effective measurement would be a test based on:

- a substantial change of circumstance of the applicant; or
- where an applicant has had their most recent previous application subject to deemed refusal;  
or
- where the previous eligibility declaration was based on wrong or incomplete information.

A test based on a flawed decision-making process or a substantive change in the applicant's circumstances is likely to be more appropriate than an arbitrary time period.

### **2.2 Construction of the test for granting an application of an eligibility declaration**

Section 12F(1) describes that "*the college must refuse to grant the eligibility application unless the college is satisfied is it an exceptional case in which it would not harm the best interests of children to issue the eligibility declaration*".

The Society submits that the way this test is formulated reflects an unfair institutional bias that will influence the decision-making framework for these applications. The implication of the test as it currently stands is that generally declarations will not be made. An applicant must therefore not only show positive grounds to support the making of a favourable decision but must also overcome the negative bias inherent in the decision-making framework. This is contrary to the principle that each application should be treated equitably and looked at on its individual circumstances, and decided based on its merits.

We submit that to promote good decision-making the test should be positively worded with the best interests of children as the key factor for consideration, such as:

"The college may grant the eligibility declaration provided the college is satisfied that it is in the best interests of children to issue the declaration."

The detailed provisions set out in the section related to an 'exceptional case' should be relevant considerations for the key test of determining whether the college is satisfied that it is in the best interests of children to issue the declaration.

### **2.3 No right of review or appeal for eligibility declarations**

Decisions about eligibility declarations are not subject to appeal or review under the Act or through QCAT. The Society believes that this is contrary to procedural fairness and the principles of natural justice.

The *Education (Queensland College of Teachers) Act 2005* already prohibits a person from appealing or reviewing a decision to cancel registration or permission to teach after the commencement of the section for a disqualifying offence (section 56).

The Society is opposed to any legislation which denies a person their right to seek a review of decisions made, especially as this will potentially affect the livelihood and reputation of the applicant. In particular, section 4(3)(a) of the *Legislative Standards Act 1992* states that legislation should make "rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review." Additionally, section 4(3)(b) of the *Legislative Standards Act 1992* states that legislation should be "consistent with the principles of natural justice". We believe the proposals in the Bill breach fundamental legislative principles without reasonable justification.

In the case of an eligibility declaration, section 12D describes that the applicant is a person who is not an excluded person and is not given an imprisonment order for committing a serious offence. The College is mandated in section 12F to consider a range of different factors in deciding the application for declaration, including issues such as:

- The criminal history of the applicant including the time, nature and penalties of offences or alleged offences (section 12F(2)-(4))
- If the applicant has been refused registration in another jurisdiction or has had their registration in another jurisdiction suspended or cancelled, the reasons for this and the way in which this relates to the applicant's suitability to teach (section 12F(5)(b))
- If the applicant's employment had been terminated by an employing authority for a school for a reason relating to the applicant's suitability to teach, the reason for termination (section 12F(5)(c)).

Section 12G states that a notice with reasons must be given to the eligibility applicant if the application is refused. The Society is opposed to a system where an applicant would be given reasons, after a thorough examination of all relevant factors under section 12F, and then not be allowed to a review of those reasons. We strongly consider that there should be an avenue in which the applicant can review the validity of the decision and its stated reasons flexibly within the framework of the Act. While we accept that an applicant may have a right of review to the Supreme Court under the *Judicial Review Act 1991*, we submit the interests of good administration and transparent decision-making are furthered by there being accessible review processes close to the original decision-maker.

As a matter of principle it is inappropriate for any decision-maker to be provided with an unreviewable discretion as this promotes poor internal processes, poor decision-making practices and also provides fertile ground for inappropriate conduct of officials.

The Society supports the inclusion of a new section which specifies a legislative avenue of appeal of the decision, internally at the college, if appropriate, and then externally to QCAT to confirm or substitute the decision. This will bring the section in line with other reviews of decisions that are allowed under the *Education (Queensland College of Teachers) Act 2005* (section 209).

#### **2.4 No specified time periods for deciding the eligibility declaration (section 12G)**

There is no time period for the college to make its decision to grant or refuse an application. For the process to be fair and efficient, a time period by which the college must issue the eligibility declaration (section 12G(1)) or give the notice with reasons for refusal (section 12G(2)) should be stated in this section.

There should be a mechanism by which the college can, by notice, extend the time period up to a statutory maximum. This will ensure that the college has enough time to consider the decision, and that the applicant is dealt with in a timely manner.

Should the college neither make the declaration nor provide the applicant with the required notice within the required time period (either initial or extended period), then on the expiration of the relevant time period the application should be deemed to be refused and the applicant given their right of statutory review discussed above.

#### **2.5 Automatic revocation of eligibility declaration**

Section 12M of the Bill provides for the automatic revocation of an eligibility declaration if, after it is issued to an applicant, the applicant:

- is charged with a serious offence; or
- becomes an excluded person.

The Society believes that an automatic revocation of a declaration on the basis of a charge is unduly unfair on the applicant and goes against the presumption of innocence. There have been no decisions on the facts of any allegations being made at this stage, and an automatic revocation will adversely affect the applicant, especially if charges are later dropped or the applicant is not convicted.

The Society recommends that this provision be changed so that an automatic revocation occurs when an applicant is convicted of a serious offence or becomes an excluded person.

Given the gravity of a charge of a serious offence, however, we propose that any current eligibility declaration held by an eligibility applicant should be suspended (not revoked) pending the outcome of the charge.

Additionally, there is no ability for an applicant to have the revocation set aside. Section 12M does not deal with a declaration that has been revoked on the basis of wrong or incomplete information, which would include a situation where there is no conviction on the charge.

#### **2.6 Deemed withdrawal of an eligibility application**

Section 12I deals with deemed withdrawal of an application if the identity of the applicant is not established. The college can give the applicant a notice requesting information within a stated time that the college reasonably needs to establish the applicant's identity. If the applicant does not comply with



this notice within the stated time and the college cannot establish with certainty the applicant's identity, the application is deemed to be withdrawn.

Section 12J allows the college to also deem a withdrawal of the application if a notice requesting "stated information" is sent to the applicant and the applicant does not respond within the stated time.

The Society submits that these sections should result in **deemed refusals** and not deemed withdrawals. The inability of the applicant to meet the requests of the college within their nominated timeframes should not be taken to mean a withdrawal from the application. There may be many valid justifications to explain the non-compliance. As we have recommended that the original test for when a person can make an eligibility application (section 12E) should be changed, this would allow an applicant to re-start the process (only if the deemed refusal was the most recent previous application).

The Society also submits that there should be a mechanism which allows the applicant to seek review of:

- whether the request for information was, in fact, a reasonable request; or
- whether the time permitted to respond was a reasonable amount of time in the circumstances.

As the college has a wide range of matters that they are able to look at when deciding these applications, there should be a process in place which considers whether the information request was appropriate in the circumstance, or was not relevant to the matters being decided.

There will be situations where the time stated in the notice was not sufficient to be able to appropriately respond and provide the information needed. If this is the case and the decision becomes a deemed refusal, the applicant needs a mechanism which will allow him/her to seek review about whether extra time should be granted in order to adequately address the inquiries of the college.

We reiterate our position that is inappropriate for any decision-maker to be provided with an unreviewable discretion as this promotes poor internal processes, poor decision-making practices and provides fertile ground for inappropriate conduct of officials.

The Bill also proposes that if an applicant is charged with a serious offence or becomes an excluded person, the eligibility application is taken to be withdrawn (section 12K). As outlined in the section dealing with the automatic revocation of the declaration, the Society opposes a section which discriminates against an applicant on the basis of being charged with an offence. We propose that:

- deemed refusal of an application follows if the applicant is 'convicted' of a serious offence; and
- where an eligibility applicant is charged with a serious offence prior to a decision being made by the college with respect to an eligibility application, time should be suspended pending the outcome of the charge.

## **2.7 Cancellation of registration or permission to teach for conviction of serious offence (section 58A)**

The proposed legislation provides for circumstances in which the registration or permission to teach is cancelled for conviction of a serious offence, and then there is a successful appeal of the conviction (section 58B).

Section 58B(3) provides that the person will “*no longer be an excluded person in relation to the cancellation if:-*

- (a) *The conviction is overturned on appeal; or*
- (b) *The decision or order-*
  - (i) *Is overturned on appeal; and*
  - (ii) *Was not made in relation to a conviction for a serious offence.”*

The provisions do not state whether the effect of the appeal will be to make the cancellation void or will simply overturn the cancellation from the date of the appeal. The Society believes that the Act should state that the decision to cancel will be made void, so that it is clearly absolves the person of all wrongdoing and negative consequences of the cancellation decision.

We thank you for considering our comments in relation this Bill. If you have any questions regarding the contents of this letter, please do not hesitate to contact Ms Binny De Saram, Senior Policy Solicitor with our office on (07) 3842 5885 or [b.desaram@qls.com.au](mailto:b.desaram@qls.com.au).

Yours faithfully

Bruce Doyle  
**President**