



Australia and New Zealand Education Law Association

19th Annual Conference

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I would like to acknowledge the traditional owners of the land on which we meet today and pay my respects to elders past and present.

I was a bit worried when I saw the topic of today's conference: The teaching profession: over-regulated? – although I was relieved to see a question mark at the end. The title still seems to suggest that there is too much, and that regulation is a bad thing.

I don't want to labour the point, but I would like to touch on regulation for a minute. Regulation is not a dirty word. We need it. In fact our very ability to have trust in what goes on around us is dependent on it. It was regulation that buffered us from the worst of the global financial crisis. In the United States, the market was relied upon to regulate itself. Look how well that turned out. Effective regulation instils trust, and trust is at the core of all our relationships. We need regulations, we need checks and balances, because without them we are not very trusting. When you think about it our system of government is built around distrust, with the three tiers of government effectively keeping one another honest. We have watchdog bodies, such as my office. We have parliamentary committee that oversee the work of watchdog bodies. At the day to day level, we lock our cars, our houses – all because we don't trust those around us.

In any event, I don't think of my office as a regulator. True, we oversee the way in which some investigations are handled, we receive and deal with complaints regarding government agencies and non-government service providers. We conduct own motion investigations into areas where we believe there may be some form of systemic failing. But we are not regulators in the true sense of the word. We do not enforce laws, apply standards or make binding decisions. We are also not a community advocate. We are fair, independent and we are impartial. We work to achieve the best possible outcome in the public interest, we are an honest broker, a safety net.

But really this is all just semantics. I was asked to speak today about the work of my office – that's what I should do.

I would like to start by recognising that teaching is an incredibly difficult, frequently underappreciated job. Educators have to deal with and live up to very high community expectations.

The community places a great deal of faith and trust in those of you who are educating their kids. They trust you to treat their kids kindly and fairly, they trust you to keep their kids safe while they are at school, they trust you to develop appropriate relationships with their children, and of course they trust you to provide a good, well-rounded education and to provide their children with some of the most important tools they need to build their lives.

Not surprisingly, with this trust comes a heightened level of responsibility and scrutiny.

I spoke several weeks ago in a speech about the importance of trust across the public sector, and particularly about the damage that is done to the relationship with the community when that trust is lost. The actions of just a few can have a negative impact on the way in which entire sections of the public sector are viewed.

This is where offices such as mine come in. We help to provide independent assurance and oversight that helps people maintain trust in the systems and those who provide services to the community.

My office has wide ranging involvement with educators and the education sector. This stretches from early childhood education, through primary and secondary schooling, and on to university.

- We oversee the handling of allegations of inappropriate conduct towards children by employees. This includes both government agencies and non government organisations. This is the area where we probably have the most day to day contact with the education sector.

- We have a broad general jurisdiction over the administrative conduct of government departments, including Education and Training, Universities and linked education services, such as the Board of Studies. We can conduct own motion investigations into areas where we believe there may be some form of systemic failing. For example, several years ago, this saw us look into the systems Education and Training has in place around long suspensions from school.
- Until July this year, we were an avenue of external review under the former Freedom of Information Act. This has seen us looking into issues such as the release of school accident reports to parents, and more recently the refusal by the Board of Studies to release raw HSC marks and other information to a student who had completed his exams. This role has now passed to the newly created Office of the Information Commissioner.
- We have a broad role in relation to the provision of community services, including examining the child protection system. This can include us examining educational issues.
- We are responsible for reviewing the deaths of certain children. This involves looking into the contact government departments and non government service providers had with the child and their family.
- We have been tasked with auditing the implementation of the government's interagency plan to tackle Aboriginal child sexual assault. This work has included us looking at those Aboriginal kids who disengage with the school system.
- We will soon have an expanded role under the Protected Disclosures – soon to be Public Interest Disclosures – Act. A Bill currently being considered by Parliament will task us with promoting public awareness and understanding of public interest disclosures, providing information, advice, assistance and training to public authorities, issuing guidance to the public and agencies, and monitoring and auditing the way agencies are dealing with public interest disclosures. This of course will include Education and Training.

It is interesting to note that, while all these areas involve contact with government agencies involved in education, it is only our employment related child protection work and our community services work that relates to all education providers. It is this work that brings us into play with the private, independent and religious school sector. And it is for this reason that I wish to focus on these two areas of our work and some of the challenges ahead in relation to each of them.

I have been Ombudsman for ten years. In that time, community expectations have changed a great deal. We as an organisation – just like educators – have needed to change and grow to meet these expectations. Generally, much more is expected of our public servants, and we do not start from a position where we trust them to do the right thing. Many of these changes are reflected in the reforms around child protection that followed the Wood Royal Commission in 1997.

While it was initially established to look at police corruption in NSW, the commission collected a great deal of information relating to widespread paedophilia and its concealment. Its final report highlighted a number of systemic failings relating to child protection. Central among these were a lack of commitment among government agencies to an effective system for protecting children, as well as a lack of coordination of roles. It was not clear who was responsible for dealing with allegations of inappropriate conduct, or how they were to be dealt with. Far too often, this meant nothing was done at all. Put simply, people who should have known and acted better could not be trusted to do the right thing.

These issues were not unique to NSW, and Justice Wood was certainly not the first to raise them. But the Commission's recommendations provided the impetus for wide ranging reform.

Following the commission, a number of major changes were made to the way in which allegations of inappropriate conduct were dealt with by a range of government departments, and non government service providers. This included schools.

These reforms were met with concern and hostility from some sectors, especially education. Some were worried there would be a rash of false and vexatious allegations, that investigations were going to take far too long, and that allegations would unfairly ruin careers.

These concerns were taken seriously when establishing the new systems – safeguards were built in and I believe they have largely been successfully addressed. We have also seen organisations go from resistance and reluctance, through resigned acceptance, to taking ownership of and pride in the development of effective and fair child protection systems.

This evolutionary process has been helped along by the very nature of my office's role. We rarely directly investigate allegations made against employees working with children. Organisations are required to investigate matters themselves, and to follow through on those investigations with appropriate action. We are the safety net. We provide assistance in setting up systems and training staff. We follow the investigative process to make sure it is appropriate. If we feel an organisation is not heading in the right direction, we can provide advice. If this is not heeded, we can step in and investigate the matter ourselves.

But more importantly, the organisations themselves have shown a real commitment to change and improvement. With very few exceptions, we have seen government agencies and non-government organisations continually improve their processes and procedures, as well as ensuring their staff have the training needed to develop their investigative skills. This has been particularly obvious within the various Catholic archdiocese. When we were first given this role, they had no prior dealings with us. It started out as a fairly tense relationship. Over time, however, many archdiocese have become leaders in best practice around dealing with allegations.

These developments and our confidence in agencies' systems has meant we are able to enter into agreements with some organisations so they no longer have to notify us of all allegations. These agreements, known as class or kind agreements, are now in place with Education and Training, the eleven Catholic archdiocese across the State and the Association of Independent Schools to name a few. These agreements have meant the number of matters notified to our office has halved in the past few years. But these agreements do not mean we are no longer involved. While organisations are not required to notify us of all allegations, we can and do audit their records, ensuring they continue to deal with allegations appropriately.

These systems help build trust in the community. But trust has to go both ways. In order for any system to be effective teachers must also be able to trust that they will be treated equitably and afforded procedural fairness when an allegation is made against them.

When we first came into the area of employment related child protection, one of the key concerns of the education sector was undoubtedly the need to ensure that teachers were treated fairly. Importantly, the Ombudsman does not have the power to take any action against an employee.

The Commission for Children and Young People, or CCYP, is responsible for administering the State's 'working with children' program. The working with children background check includes consideration of relevant criminal records, apprehended violence orders and 'employment proceedings'.

At the moment, the Commission classes all finalised employment proceeding matters referred to it as either 'category 1' or 'category 2'. All sustained findings against employees are classed as category 1, regardless of the level of seriousness of 'proven' inappropriate conduct.

If an allegation made against an employee is classed as category 1, they will be subject to a risk assessment whenever they seek future child related employment.

I and others have come to the view that this is a relatively crude category system which is not always fair to employees, and it is a grossly inadequate indicator of risk to children. A comprehensive review of all of the evidence should be considered before a decision is taken as to whether the employee's conduct warrants a full risk assessment. This ensures fairness to the employee, as well as ensuring the information that is collected is a true indicator of future risk.

Alleviating the risk to children and providing fairness to all involved has to be at the heart of any system – if it is to be truly effective.

Some claim that the system of notifications, as well as the other systems in place, impose an unfair burden on teachers – the majority of teachers – those who will never do anything wrong. I recognise that this is a common and not unreasonable feeling, it is a view shared by many others across other areas of our work – police, community service workers and so on. But for any system of oversight to be effective, it must be applied to all. It is particularly true of those areas and professions where the community has placed a great deal of trust.

This is why I believe we need change in the way matters are categorised. If a system is applied to everyone, it has to be fair, it has to be open, and it has to be targeted. If it is not, there is a risk it will unnecessarily tarnish careers and create resentment. But perhaps the most negative outcome is for kids, as it diverts time and resources away from those matters where they are genuinely needed.

We are focussed on working with all involved to make sure the best possible system is in place. One that accommodates the best interests of children, educators and the community as a whole. I have made submissions along these lines to the review of the CCYP legislation.

As I noted earlier, we have a very broad range of contact with schools. As well as employment related child protection, we also interact with schools through our community services work.

Teachers are a vital link in the chain of child protection, as they often have the most contact with children outside of the family.

If everything goes as it should, they should be seeing healthy and hopefully happy kids five days a week.

This regular contact means they are best placed to recognise changes in behaviour, whether small or large; changes in appearance, such as dirty or ripped clothes, poor hygiene or bruising; as well as extended unexplained absences. When they see these signs, they should be able to act appropriately, and where necessary provide that information to other government agencies quickly and efficiently.

Sadly, our work, particularly around reviewable child deaths, has shown us that this has not always been the case. Information collected in schools has not always made its way to other related agencies, or it has moved far too slowly. In other cases, the information has been provided, but has not been acted upon. This disconnect has meant that vital information, and ultimately the child to whom it relates, slips through the cracks.

In 2007, the government established a special commission to look into the child protection system in NSW. The catalyst for the creation of the commission was community outrage following a number of high profile child deaths. One was the tragic death of a child known as Ebony. She died at the age of six, emaciated and alone, locked in a filthy boarded room in the family home. When conducting our review of her death, we looked at the contact various government departments had with her and her family in the months and years leading up to her death including Education and Training. This was a particularly harrowing matter, and I do not want to go over it in detail. It does, however, demonstrate some of the warning signs we have seen time and again in our work, and what can happen when no one views the whole picture.

Between 1998 and 2007, various schools interacted with Ebony's family. They made repeated risk of harm reports in relation to Ebony's siblings, and wrote to and met with the father on a great many occasions to discuss the children's absenteeism. Time and again, teachers passed on their concerns around the children's failure to attend, as well as the behaviour of their father, and nothing of any substance resulted. Every time the children changed schools, the process began again.

This case demonstrated the pressing need for more effective interagency communication. Critical information needs to pass quickly between agencies, and this communication has to be ongoing. Things can change, and those changes can make a real difference to the situation of kids at risk – and in some cases, potentially prevent their death.

This tragic matter is also an example of what we have long viewed as one of the key child protection warning signs; repeated school non-attendance. In our submissions to the Wood special commission, we recommended that habitual school non-attendance be included as a specific ground for a risk of harm report. The commission agreed, and the necessary amendment has been made.

This is not the only legislative change around non-attendance. The Education Amendment (School Attendance) Bill, introduced last year, was clearly aimed at placing a greater responsibility on parents to ensure their children attend school. This included compulsory schooling undertakings, entered into by the Director General and parents, the ability to direct parents to attend meetings regarding their child's attendance, and the ability of the Director General to apply to the Children's Court for a compulsory schooling order. As I said, these are important changes. However, they do not come without challenges for the schools sector.

But legislation in its own is not enough.

For example, absenteeism amongst Aboriginal children is especially high. Our work in Western NSW has allowed us to see some of the fantastic programs and initiatives aimed at getting kids to school. These include the Street Beat program, regular door knocks by principals and education directors at the homes of kids who repeatedly miss school, and targeted visits by the region's Attendance Team, made up of Home School Liaison Officers and Aboriginal Student Liaison Officers. The principal of Walgett High School recently told us what a difference police school liaison officers were making in working with families they had real trouble reaching in the past.

These are great initiatives, developed alongside communities, and they are making a real difference.

As I am sure many of you would know, the special commission also made sweeping recommendations for change to child protection in NSW. The government responded to these with a new child protection strategy, known as *Keep them Safe*.

I am pleased to say that we are seeing a positive response from the education sector and other key players around a range of the changes following *Keep them Safe*.

One of the cornerstones of Wood's recommendations and the new system was the notion of child protection being a shared responsibility. This saw the threshold for risk of harm reports to DoCS raised from a risk of harm to a risk of significant harm. This shifting of the bar is accompanied by a greater level of responsibility for all human service agencies, including the schools sector. They are now expected to consider and deal with matters that do not reach the new threshold.

So where do the matters that would have been reported to DoCS go now? In the public school system, there is the additional support of a wellbeing unit to provide advice on matters that do not, or may not meet the higher reporting threshold. However, non government schools do not have access to wellbeing units. They could access family referral services, but only if they are in one of the three areas where referral services are being trialled. If the trial is successful, they may be rolled out to the rest of the state in 2014.

What are small organisations, with little or no child protection experience or training, no Child Wellbeing Unit, and no access to referral services, meant to do to meet their increased obligations under the new system?

Effective child protection is a bit like a jigsaw puzzle. One incident, one observation may not seem particularly important when viewed on its own. But when you look at it alongside information from other agencies and non government service providers, it can demonstrate a pattern of behaviour, and can suggest a need for action and you often can't see the full picture until all the pieces of the jigsaw are put together. This is why effective, two-way, exchanges of information are so important. We raised this issue time and again through our community services work, and it was encouraging to see the Wood special commission recognise its importance.

Legislative amendments were made to make information exchange easier and more effective. These changes give a range of organisations, including schools, the ability to obtain information, as well as provide information in circumstances where it is going to ensure the safety of a child. As our child death work has consistently shown, failing to see the need to either obtain or exchange information can have very serious, occasionally life threatening, consequences.

This is a vital change in approach, but it also raises the stakes in terms of what is expected of the school sector. They will now be expected to not only forward relevant information to other organisations, but also to seek out information. This will be particularly important when dealing with those matters that do not reach the reporting threshold.

We have spoken with representatives from some of the smaller, non government organisations, and they are worried.

They are worried about the workload that will come from these additional responsibilities. They are concerned they will not have the requisite skills to act as case managers for child protection issues. They are not sure how they will manage those matters that do not meet the risk of significant harm threshold. These new responsibilities will require them to collect, store and where appropriate exchange information they have never dealt with in the past. This new role also brings with it concerns around privacy, as well as knowing when and how to share information.

The fundamental question is this: What do we want teachers to do? Community expectations around the role of teachers have changed a great deal over the years, but this is an even greater shift. If we want them to perform this additional role, we have to ensure they and their organisations have the appropriate training, guidance and support to provide a broader child protection role. They have to be alert to the signs child protection workers know well, and they have to know how to react to those signs.

We cannot expect them to share the responsibility if they are unsure what they will be responsible for, or how they should perform their new role.

I note that Rod will be touching on many of these issues in his session later today. I acknowledge the hard work done by Community Services to make the new system work effectively, but we have to continue to be critical in our assessment of the system, because it is vital that it works.

Before I finish up, I really don't feel I can miss an opportunity such as this. It is not often I get to speak to a group containing so many lawyers. Chief Justice French recently began a speech to the Victorian bar association with a poem by the American poet Carl Sandburg:

*The work of a bricklayer goes to the blue
The knack of a mason outlasts the moon
The hands of a plasterer hold a room together,
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers – tell me why a hearse horse snickers
Hauling a lawyer's bones.*

I am a lawyer, and I'd like to think that I leave something more than a laughing horse behind me when I go. I guess it really comes down to what you try to achieve – and the way you go about achieving it.

In relation to education, we deal with lawyers working in a number of guises, here are just a few:

- those working for the Crown Solicitor, providing advice to government departments
- those working directly for government departments, whether as in-house counsel or through a panel law firm, and
- those representing people accused of alleged misconduct

In each case, I am sure they are looking to achieve the best possible outcome for their client. But what if the best interests of their client run counter to the best interests of children involved, or counter to the public interest? I ask this particularly in relation to lawyers acting for government departments.

I know from my own experience, the involvement of lawyers can add much to our work. That is why I am frustrated when, from time to time, we are met with an adversarial or even hostile response, either from the lawyers themselves or from the government department spurred on by legal advice. I find such an approach very difficult to understand and counter-productive. As I noted earlier, we are not a community advocate. We are acting in the public interest, and as such I would expect government departments and their legal counsel at all times to try to work constructively with us to achieve a quick, informal and appropriate outcome.

Conclusion

While I started out by distancing my office from the title of the conference and contemplating its terms, perhaps I can give an answer to the question posed. In relation to the two areas I have touched on today, I do not believe that teachers are over regulated. The controls I have discussed are designed to ensure the community can have faith in the education system and those working in it to treat their children properly, and to ensure they are protected from harm while they are at school. In addition to being alert and responsive to obvious signs of welfare risks and problems.

The systems for protecting kids need to be focussed on serious risks. Justice Wood recognised this, and stressed the need for a more targeted approach and I support this.

My ten years as Ombudsman has shown me time and again that the best outcomes are achieved when we work constructively alongside agencies, with clarity of purpose and a common goal. The challenges posed in the two areas I have raised today are no different. Let me conclude by quoting the words of a mother and Aboriginal elder from Western NSW who spoke at one of our forums. When talking about the changes following *Keep them Safe*, she said:

... child protection might be everybody's business but it doesn't seem to be anybody's responsibility.

Regulation and oversight are important, particularly in areas where the community places trust, and there is no greater trust than caring for children. But we can all do more, teachers, administrators, oversight bodies, and yes even lawyers, to make sure the system is as good as it can and has to be. Only then will we be able to meet the challenge laid down by this mother who is simply voicing the concerns of us all.

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