

Dealing with Student-on-Student Sexual Abuse in Schools

Steven Troeth

gadens

Level 25, Bourke Place
600 Bourke Street
Melbourne VIC 3000
Australia

T +61 3 9252 2555
F +61 3 9252 2500

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1 Introduction

Dealing with sexualised behaviours of children in the school environment is a complex and difficult issue. It is an issue that the Royal Commission investigating institutional responses to child sexual abuse is enquiring into.

During the period 20 October to 4 November 2016 the Royal Commission held a public hearing in Sydney to inquire into the responses to children with problematic or harmful sexual behaviours in schools. The scope and purpose of the public hearing was to inquire into:

- the response of three public primary schools in New South Wales to allegations of problematic or harmful sexual behaviours by students at those schools;
- the response of three named faith-based independent schools in New South Wales to allegations of problematic or harmful sexual behaviours by students at those schools;
- the response of a named faith-based independent school to a student who is alleged to have been sexually abused at another school; and
- the systems, policies, procedures and practices for responding to allegations of problematic or harmful sexual behaviours of children within educational institutions promoted and implemented by the Department of Education NSW, the four named schools and the Association of Independent Schools NSW.

Further, recent research found that although educators, as a whole, are usually able to distinguish some elements of typical and problematic sexual behaviours, individual educators lacked comprehensive knowledge, which may lead to incorrect identification of problematic sexual behaviours under reporting or over reporting¹. The researchers, from the University of South Australia, noted that findings from the recent Royal Commission and the South Australian Child Protection Systems Royal Commission highlight two relevant points:

- (a) children and their parents are less disposed to accept sexual harassment as a normal part of growing up and are legally challenging these claims outside of school; and
- (b) there is a need for more education to assist practitioners working with children and young people and their families to deal specifically with issues relating to problematic sexual behaviours.

The researchers also note that mandatory reporting of suspected child abuse drives teacher responsibilities; however, it is important to skill practitioners in appropriate intervention strategies. These factors are all relevant to how schools respond to student-on-student abuse².

¹ Lesley-anne Ey, Elspeth McInnes & Lester Irabinna Rigney (2017): *Educators' understanding of young children's typical and problematic sexual behaviour and their training in this area*, Sex Education, DOI: 10.1080/14681811.2017.1357030.

² The Victorian Government has published *Identifying and Responding to Student Sexual Offending*, 2016.

2 Factors relevant to children

Children are not adults

The complexity of issues arising from this area were adeptly raised by Dr Wendy O'Brien in the evidence she gave before the Royal Commission³. The issues Dr O'Brien raised included:

- what terminology should be used when dealing with problematic or harmful behaviours of children towards other children, and particularly distinguishing it from the terminology that is used to deal with more conventional situations of an adult perpetrator of child sexual abuse
- the need to understand where child sexualised behaviours originate and that they originate from a set of different factors
- the relevance of the chronological age of the child
- the need to deal sensitively with the impact on the child exhibiting the behaviour as well as the impact on the child against whom the behaviour has been directed
- acknowledging that there is a very broad spectrum of behaviours with varying impacts on the child that is subjected to them.

One of the critical tasks for the Royal Commission will be to provide recommendations as to how organisations such as schools are to respond to the broad range of different child sexual behaviours against other children.

Criminal responsibility of minors

In Victoria, it is conclusively presumed that a child under the age of 10 years cannot commit an offence⁴. This means that the presumption cannot be rebutted in any case and the child is referred to as being *doli incapax*.

Doli incapax is a Latin term meaning "incapable of crime." In criminal law, *doli incapax* refers to a rule of English common law applied to children that acted to prevent them from being charged with a criminal offence. The rule is based on the irrefutable presumption that a child under 10 years of age was too immature to understand the nature of right from wrong and therefore could not form the relevant intention to commit a crime⁵.

After attaining the age of 10 years a child then becomes in principle capable of committing a crime. However, until the child reaches the age of 14 it is necessary to show that, as well as possessing the appropriate criminal state of mind for the crime in question, the child must also know that the act was morally wrong. The child's knowledge of moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous⁶.

³ Case Study 45 - responses to children with problematic or harmful sexual behaviours in schools, Transcript (Day 215), 20 October 2016, 21654.

⁴ Section 344, *Children, Youth and Families Act 2005* (Vic).

⁵ The rule of *doli incapax* continues to apply in many countries around the world although the age up to which it applies varies from country to country.

⁶ *RP v The Queen* [2016] HCA 53 at 3, citing *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38 and *BP v The Queen* [2006] NSWCCA 172 at [27]-[28].

On proving that the child knew that the act was wrong, he or she is referred to as *doli capax* – "capable of crime" – and which refers to the mental capacity of the child to distinguish right from wrong.

A court could permit the prosecution to adduce any evidence to rebut the presumption that a child between the ages of 10 and 14 was incapable of committing the crime with which he or she is charged. However, the evidence must be relevant to the issue of the child's capacity to know good from evil. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she know that it was morally wrong to engage in the conduct⁷.

3 What are the relevant behaviours?

General

The range of inappropriate sexualised behaviours of children that a school may have to deal with is very broad – from behaviour that may amount to a serious crime to behaviour that is much less than a crime and far more ambiguous.

The nature of the behaviour, the age of the students involved and the circumstances in which the behaviour arises are all matters that are relevant when considering how to respond.

Relevant offences

Some behaviour may amount to a serious crime and will generally come within the scope of the offences noted below (which are offences under the Victorian Crimes Act):

Offence	Crimes Act	Summary details of offence
Rape	Section 38	A person commits rape if he or she intentionally sexually penetrates another person without that person's consent and does not reasonably believe that the person consents to the penetration (other than in the course of a procedure carried out in good faith for medical or hygienic purposes). Imprisonment – 25 years maximum
		Sexual penetration includes penetration by a person's penis into the vagina, anus or mouth of another person or of an object or other part of the body into the vagina or anus of another person (other than for a medical procedure).

⁷ *RP v The Queen* [2016] HCA 53. See also *R v B, R v A* [1979] 3 All ER 460 – a decision of the Court of Appeal, Criminal Division in England; *The Queen v M* 16 SASR 589 (1977) – a decision of the Full Bench of the Supreme Court of South Australia; *In Re C (a minor)* [1995] UKHL 15 – a decision of the House of Lords, United Kingdom which traces the history of the common law presumption.

Offence	Crimes Act	Summary details of offence
Sexual assault	Section 40	<p>A person must not intentionally touch another person if the touching is sexual and the other person does not consent to the touching and does not reasonably believe that the other person consents to the touching.</p> <p>It is not a defence that, at the time of the conduct constituting the offence, the offender was under a mistaken but honest and reasonable belief that the touching was not sexual.</p> <p>Imprisonment – 10 years maximum</p>
		<p>Touching may be done:</p> <p>(a) with any part of the body; or</p> <p>(b) with anything else; or</p> <p>(c) through anything, including anything worn by the person doing the touching or by the person touched.</p> <p>Touching may be sexual due to:</p> <p>(a) the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female, the breasts; or</p> <p>(b) the fact that the person doing the touching seeks or gets sexual gratification from the touching; or</p> <p>(c) any other aspect of the touching, including the circumstances in which it is done.</p>
Sexual assault by compelling sexual touching	Section 41	<p>A person must not intentionally cause another person to touch another person, themselves or a third person if the touching is sexual and does not reasonably believe that the other person consented to the touching.</p> <p>It is not a defence that, at the time of the conduct constituting the offence, the offender was under a mistaken but honest and reasonable belief that the touching was not sexual</p> <p>Imprisonment - 10 years maximum</p>

Offence	Crimes Act	Summary details of offence
Assault with intent to commit a sexual offence	Section 42	A person must not intentionally apply force to another person where the other person does not consent to the application of that force and at the time of applying that force the offender intended that the other person take part in a sexual act.
		<p>A person takes part in a sexual act if:</p> <p>(a) the person is sexually penetrated or sexually touched by another person; or</p> <p>(b) the person sexually penetrates or sexually touches another person or themselves.</p> <p>Imprisonment - 15 years maximum</p>
Threat to commit a sexual offence	Section 43	<p>A person must not make to another person a threat to rape or sexually assault that person or a third person where the offender intends that the person threatened will believe, or believes that the person threatened will probably believe, that the offender will carry out the threat.</p> <p>Imprisonment - 5 years</p>
		<p>Words or conduct may constitute a threat if by those words or that conduct an intention to do any of the following is conveyed:</p> <p>(a) to sexually penetrate or sexually touch another person without that person's consent;</p> <p>(b) to cause another person, without their consent, to sexually penetrate or sexually touch the offender or the other person or themselves.</p>
Sexual penetration of child under the age of 12	Section 49A	<p>A person must not intentionally sexually penetrate a child under the age of 12.</p> <p>Imprisonment (25 years)</p>
Sexual penetration of child under the age of 16	Section 49B	<p>A person must not sexually penetrate a child under the age of 16.</p>
		<p>Consent is a defence only if the accused was not more than 2 years older than the child and the child was aged 12 or older and the child consented.</p>

Offence	Crimes Act	Summary details of offence
		It is a defence if the accused reasonably believed the person was over the age of 16 (and the person was aged more than 12 at the time).
		<p>Imprisonment – 25 years maximum (if the child was under the age of 12)</p> <p>Imprisonment – 15 years maximum (if the child was aged between 12 and 16 and was under the care, supervision or authority of the offender)</p> <p>Imprisonment – 10 years maximum (for all other cases)</p>
Sexual assault of a child under the age of 16	Section 49D	<p>A person must not touch a child under the age of 16 if the touching is sexual and contrary to community standards of acceptable conduct.</p> <p>Imprisonment – 10 years maximum</p>
		<p>Whether or not touching is contrary to community standards of acceptable conduct depends in the circumstances, including:</p> <ul style="list-style-type: none"> • the purpose of the touching • whether the person gets sexual arousal or gratification from the touching • but consent is not a consideration
		It is a defence if the accused reasonably believed the person was over the age of 16 (and the person was aged more than 12 at the time).
		Consent is a defence only if the accused was not more than 2 years older than the child and the child was aged 12 or older and the child consented.
Sexual activity in the presence of a child under the age of 16	Section 49F	<p>A person must not intentionally engage in an activity that is sexual in the presence of a child under the age of 16 in circumstances where engaging in the activity is contrary to community standards of acceptable conduct.</p> <p>Imprisonment – 10 years maximum</p>

Offence	Crimes Act	Summary details of offence
		<p>An activity may be sexual due to—</p> <p>(a) the area of the body that is involved in the activity, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female or a person who identifies as a female, the breasts; or</p> <p>(b) the fact that the person engaging in the activity seeks or gets sexual arousal or sexual gratification from the activity; or</p> <p>(c) any other aspect of the activity, including the circumstances in which it is engaged in.</p>
		<p>Whether or not the activity in the presence of a child is contrary to community standards of acceptable conduct depends in the circumstances, including:</p> <ul style="list-style-type: none"> • the purpose of the activity • whether the person gets sexual arousal or gratification from the activity • but consent is not a consideration
		<p>Consent is a defence only if the accused was not more than 2 years older than the child and the child was aged 12 or older and the child consented.</p>

Sexually abusive behaviours

One of the grounds pursuant to the *Children, Youth and Families Act 2005* (Vic) upon which child protection intervention may occur is where a child above the age of 10 years and under the age of 15 years is in need of therapeutic treatment because he or she has exhibited sexually abusive behaviour⁸.

The Act does not define *sexually abusive behaviours*. However, the practice definition used by the Therapeutic Treatment Board and therapeutic services is⁹:

A child has exhibited sexually abusive behaviours when they have used their power, authority or status to engage another party in sexual activity that is either unwanted or where, due to the nature of the situation, the other party is not capable of giving consent (for example animals, or children who are younger or who have a cognitive impairment). Physical force or threats are sometimes involved. Sexual activity may include exposure,

⁸ Section 244.

⁹ *Adolescents with sexually abusive behaviours and their families*, R Pratt, R Miller and C Boyd, Victorian Government Department of Human Services, Melbourne, June 2012.

peeping, fondling, masturbation, oral sex, penetration of a vagina or anus using a penis, finger or object, or exposure to pornography. This is not an exhaustive list.

The Act sets out the procedure that is then followed in determining whether or not a child should be receiving therapeutic treatment.

Concerning sexual behaviours

(a) Pre-adolescents

In the Human Services publication – *Adolescents with sexually abusive behaviours and their families*¹⁰ – the following behaviours are listed as *concerning sexual behaviours* for pre-adolescents (8-12 years):

- Attempting to expose others' genitals
- Sexual knowledge too great for their age once the context is considered
- Pre-occupation with masturbation
- Single occurrence of peeping, exposing, obscenities, pornographic interest (sources include the internet, pay TV, videos, DVDs and magazines)
- Simulating foreplay or intercourse with peers with clothes on

The following are listed as *very concerning sexual behaviours* for pre-adolescents:

- Compulsive masturbation, including task interruption to masturbate
- Repeated or chronic peeping, exposing, obscenities
- Chronic pornographic interest
- Degradation/humiliation of self using sexual themes
- Degradation/humiliation of others using sexual themes
- Touching genitals of others without permission
- sexually explicit threats – written or verbal
- forced exposure of others' genitals
- simulating intercourse with peers with clothes off
- penetration of dolls, children or animals.

(b) Adolescents

The authors of *Adolescents with sexually abusive behaviours and their families* also list the following as *concerning sexual behaviours* for adolescents (13-18 years):

- sexual preoccupation or anxiety
- pornographic interest
- promiscuity
- verbally sexually aggressive themes or obscenities
- invasion of others' body space

The following are listed as *very concerning sexual behaviours* for adolescents:

¹⁰ R Pratt, R Miller and C Boyd, Victorian Government Department of Human Services, Melbourne, June 2012 citing Pyan 2000 cited in Barnett, Giaquinto, Hunter and Worth 2007.

- compulsive masturbation (especially chronic or public)
- degradation/humiliation of self using sexual themes
- degradation/humiliation of others using sexual theses
- chronic preoccupation with sexually aggressive pornography
- attempting to expose others' genitals
- touching others' genitals without permission
- sexually explicit threats – verbal or written
- obscene phone calls, exhibitionism, voyeurism, sexual harassment
- sexual contact with significantly younger people
- sexual contact with animals
- forced penetration

(c) Abusive behaviour

The authors of *Adolescents with sexually abusive behaviours and their families* emphasise that sexual development is a normal part of childhood and adolescence and that it is therefore important to recognise that there are distinct differences between abusive sexual behaviour and developmentally appropriate sexual play.

They also say that whether any particular adolescent sexual behaviour is abusive cannot always be assessed on the actual behaviour alone and that a contextual assessment is of critical importance.

Sexual harassment

Sexual harassment is:

- an unwelcome sexual advance;
- an unwelcome request for a sexual favour; or
- other unwelcome conduct of a sexual nature.

Sexual harassment can include making a statement of a sexual nature to or about a person while in their presence. The proliferation of cyber-bullying and electronic harassment (by email, Facebook, Instagram and the like) means that sexual harassment is now a much broader issue, particularly for schools.

Under the Victorian *Equal Opportunity Act* it is unlawful for a student of a school to sexually harass another student at the same school.

Under the Federal *Sex Discrimination Act* sexual harassment perpetrated by a student against another student is only unlawful if the harassing student is an “adult student”, that is, a student who has attained the age of 16 years.

The Federal Act also prohibits an adult student from one school from sexually harassing another student from a different school (regardless of age) if the sexual harassment occurs in connection with the adult student being a student at the first school. This prohibition seeks to prohibit sexual harassment from occurring at, for example, inter-school activities such as

sporting carnivals, debating competitions, joint school theatrical productions, joint school dinners and dances, and at shared or co-located school facilities.

In relation to a school's liability for the sexual harassment of a student, the school cannot be vicariously liable unless it can be established that the student was acting in the capacity of an agent for the school, which usually would not be the case but will depend on the circumstances at the time.

Intimate images and impermissible conduct

(a) Observation or capturing images of a person's genital or anal region

It is an offence for a person to intentionally observe, with the aid of a device, another person's genital or anal region in circumstances in which it would be reasonable for that other person to expect those regions could not be observed¹¹.

A device is a device of any kind capable of being used to observe a person's genital or anal region including a mirror, a tool when used to make an aperture or a ladder.

The offence carries a maximum penalty of 3 months imprisonment.

It is also an offence to intentionally visually capture another person's genital or anal region in circumstances in which it would be reasonable for that other person to expect that those regions could not be visually captured¹².

The reasonable expectation test is an objective one - what would a reasonable person in the position of the person whose genital or anal region is being visually captured have expected.

The offence carries a maximum penalty of 2 years imprisonment.

In the case of each of these offences, it is a defence if the observing or capture took place with the express or implied consent of the person being observed or visually captured¹³. Consent in this instances means free agreement, and therefore the age of the person who is observed or visually capture is relevant as are the circumstances under which the observation or visual capturing occurred.

(b) Distribution of genital/anal images

It is also an offence for a person who has visually captured an image of another person's genital or anal region to intentionally distribute that image. The offence is punishable by a maximum of 2 years imprisonment¹⁴.

However, in relation to a child, an offence is not committed if:

- the subject of the image is a child (a person under the age of 18);

¹¹ Section 41A, *Summary Offences Act 1966* (Vic).

¹² Section 41B, *Summary Offences Act*.

¹³ Section 41D(1), *Summary Offences Act*.

¹⁴ Section 41C, *Summary Offences Act*.

- the image was not taken in circumstances in which it would be reasonable for the child to expect that the image could not be visually captured; and
- in the particular circumstances, a reasonable person would regard the distribution of the image as acceptable.

(c) Distribution of an “intimate image”

It is also an offence to intentionally distribute an intimate image of another person to others in circumstances where the distribution is contrary to community standards of acceptable conduct¹⁵. The offence is punishable by a maximum of 2 years imprisonment.

An “intimate image” is defined in the Act to mean a moving or still image that depicts-

- a person engaged in sexual activity; or
- a person in a manner or context that is sexual; or
- the genital or anal region of a person; or
- in the case of a female, the breasts.

There are defences to the offence of distributing an intimate image, such as consent. However, in the case of minors (being under the age of 18), consent by a minor to the distribution of an intimate image of the child can never be a defence.

(d) Summary of offences relating to child abuse material

The following is a summary of some of the offences in Victoria relating to child abuse material (which was previously referred to as "child pornography").

Offence	Crimes Act	Summary details of offence
Involving a child in the production of child abuse material	Section 51B	A person must not intentionally involve a child in the production of child abuse material.
		Imprisonment (10 years maximum)
		Child means a person under the age of 18 years.
		Child abuse material means material that— (a) depicts or describes— (i) a person who is, or who appears or is implied

¹⁵ Section 41DA, *Summary Offences Act*.

Offence	Crimes Act	Summary details of offence
		<p>to be, a child—</p> <p>(A) as a victim of torture, cruelty or physical abuse (whether or not the torture, cruelty or abuse is sexual); or</p> <p>(B) as a victim of sexual abuse; or</p> <p>(C) engaged in, or apparently engaging in, a sexual pose or sexual activity (whether or not in the presence of another person); or</p> <p>(D) in the presence of another person who is engaged in, or apparently engaged in, a sexual pose or sexual activity; or</p> <p>(ii) the genital or anal region of a person who is, or who appears or is implied to be, a child; or</p> <p>(iii) the breast area of a person who is, or who appears or is implied to be, a female child; and</p> <p>(b) reasonable persons would regard as being, in the circumstances, offensive;</p>
Producing child abuse material	Section 51C	A person must not intentionally produce child abuse material.
		Imprisonment (10 years maximum)
Distributing child abuse material	Section 51D	A person must not intentionally distribute child abuse material.
		Imprisonment (10 years maximum)
Possession of child abuse material	Section 51G	A person must not knowingly possess child abuse material.
		Imprisonment (10 years maximum)
	Section 51M(1) – exceptions for children	An offence is not committed if the person in possession of the child abuse material is a child and the image depicts the child alone.
	Section 51M(2)	An offence is not committed if the person in possession of the child abuse material is a child and

Offence	Crimes Act	Summary details of offence
		the image depicts the child as a victim of a criminal offence punishable by imprisonment.
	Section 51N – defence applying to children	An offence is not committed if the person in possession of the child abuse material is a child and the image depicts one or more persons (which may include the child) not involved in a criminal offence and where the youngest person depicted is not less than 2 years younger than the child in possession of the material.
	Section 51O – image of self	An offence is not committed by a person if the image depicts that person as a child (not committing a criminal offence) and the person does not distribute the image to others.
	Section 51T – Unsolicited possession	If it is not an offence to possess child abuse material if the person did not intentionally come into possession of the material and on becoming aware, as soon as practicable took all reasonable steps to cease possessing the material.

4 Responses

Child Safe Standards

The *Education and Training Reform Amendment (Child Safe Schools) Act 2015* (Vic) introduced new minimum standards for registration that require schools to develop policies, procedures, measures and practices in accordance with a Ministerial Order for managing the risk of child abuse including-

- the implementation of minimum standards for a child safe environment; and
- responding to allegations of child abuse committed against a child enrolled at the school or committed by an employee or a student, contractor or volunteer of the school or other person connected with the school.

On 22 December 2015 the Minister for Education made *Ministerial Order No. 870* for managing the risk of child abuse in schools. Schools must now be compliant with this Ministerial Order.

Standard 1 dictates the overall strategy to embed a culture of *child safety* in a school. The Ministerial Order defines “child safety” very broadly to be:

child safety encompasses matters related to protecting all children from child abuse, managing the risk of child abuse, providing support to a child at risk of child abuse, and responding to incidents or allegations of child abuse.

The Ministerial Order also defines “child abuse” quite broadly:

child abuse includes-

- (a) *Any act committed against a child involving-*
 - (i) *a sexual offence; or*
 - (ii) *grooming; and*
- (b) *the infliction, on a child, of-*
 - (i) *physical violence; or*
 - (ii) *serious emotional or psychological harm; and*
- (c) *serious neglect of a child.*

Standard 5 requires a school to have a clear procedure or set of procedures for responding to allegations of suspected child abuse in accordance with the Standard and other legal obligations. In particular, the Standard requires the procedure to:

apply to allegations or disclosures of child abuse made by or in relation to a child, school staff, visitors, or other persons while connected to a school environment

The Standard also requires the procedure to:

clearly describe the actions the school will take to respond to an allegation of child abuse, including actions to:

- (i) *inform appropriate authorities about the allegations (including but not limited to mandatory reporting);*
- (ii) *protect any child connected to the alleged child abuse until the allegation is resolved; and*
- (iii) *make, secure and retain records of the allegation of child abuse and the school’s response to it.*

While the focus on the Child Safe Standards has tended to be towards the risk of child abuse at the hands of adults, a school’s procedures for responding to and reporting allegations of suspected *child abuse* should also take into account abuse inflicted on a student by another student. It can be expected that the outcome of the Royal Commission will be to recommend an entirely different approach to abuse by children than currently applies in relation to abuse by adults.

The manner in which a school might respond to student on student abuse is very complex and can call for a broad range of responses depending on the circumstances of the “abuse”.

Children in need of therapeutic treatment – “sexually abusive behaviours”

The *Children, Youth and Families Act 2005* (Vic) provides that any person who believes on reasonable grounds that a child who is 10 years of age or over but under 15 years of age is in need of therapeutic treatment then they may report their belief to DHHS¹⁶.

The grounds for belief required to be reported to DHHS are matters of which the person has become aware and any opinions based on those matters¹⁷.

Upon receiving a report DHHS may refer the matter to the Therapeutic Treatment Board for advice. The role of the Board is to provide advice to DHHS as to whether it is appropriate to seek a therapeutic treatment order in respect of the child. If DHHS is then satisfied on reasonable grounds that the child is in need of therapeutic treatment, it may make application to the Children’s Court for a therapeutic treatment order.

A therapeutic treatment order must require the child to participate in an appropriate therapeutic treatment program if the Court is satisfied-

- that the child has exhibited sexually abusive behaviours; and
- the order is necessary to ensure the child’s access to, or attendance at, an appropriate therapeutic treatment program.

Further, if a child appears as an accused in a criminal proceeding and the Court considers that there is *prima facie* evidence that grounds exist for the making of an application for a therapeutic treatment order in respect of the child, the Court may refer the matter to DHHS for investigation as to whether it should make an application for a therapeutic treatment order.

If the Court then makes a therapeutic treatment order, the Court is required to adjourn the criminal proceedings to permit the child to undertake the therapeutic treatment in accordance with the Court’s order. If the Court is subsequently satisfied that the child has attended and participated in the therapeutic treatment program it must then discharge the child from the criminal charges without any further hearing.

The intention of the legislation is to offer young people who allegedly engage in sexually abusive behaviours an opportunity to engage in treatment as a way of assisting them and, at the same time, protecting the community. The process allows a child to avoid the stigma and difficulties that may attach to processing through the Criminal Division of the Court¹⁸.

¹⁶ Section 185.

¹⁷ Section 186.

¹⁸ Judge Paul Grant, Children’s Court of Victoria in *Victoria Police v HW* [2010] VChC 1 at [14].

Reporting matters to the Police or DHHS

(a) Child FIRST and Child Protection

Schools have a range of options in reporting concerns about children or young people, including making a report or referring a concern to either Child Protection or Child FIRST.

The nature of the concern and the relevant circumstances and factors peculiar to each situation will need to be considered in whether a report is made to Child FIRST, Child Protection, the Police or none of these.

DHHS suggests that a referral to Child FIRST may be the best way of connecting with children, young people and their families to the services they need, in circumstances where families exhibit any of the following factors¹⁹:

- significant parenting problems that may be affecting the child's development
- family conflict, including family breakdown
- families under pressure due to a family member's physical or mental illness, substance abuse, disability or bereavement
- young, isolated or unsupported families
- significant social or economic disadvantage that may adversely impact on a child's care or development.

DHHS also suggests that a report to Child Protection should be made where the school believes the child may be in need of protection from significant harm or damage to their health or development in connection with:

- physical abuse, non-accidental or unexplained injury (mandatory reporters must report)
- sexual abuse (mandatory reporters must report)
- emotional abuse or ill treatment
- persistent neglect, poor care or lack of appropriate supervision
- persistent family violence, parental substance misuse or psychiatric illness, or intellectual disability
- a child's actions or behaviour which places them at risk.

DHHS suggests that a report to Child Protection would be appropriate, after consideration of all the available information, a school is on balance more inclined to the view that the concerns have a significant adverse impact on the child's safety or development, or are likely to significantly harm the child or damage their development.

¹⁹ Reporting concerns about children or young people: a guide for professionals, Department of Human Services, October 2014.

(b) Victoria Police

In relation to matters that should be reported to the Police, it is accepted that any adult in Victoria must report to Police any reasonable belief that a sexual offence has been committed by an adult against a child under the age of 16. It is an offence not to do so unless a reasonable excuse exists.

In relation to reporting the behaviour of a child to the Police, consideration must be given to such factors as:

- the nature of the conduct and whether it might amount to an offence
- the age of the child
- the impact on the child in reporting the matter to the Police
- the impact on the child who was the subject of the conduct
- the wishes of the parents of the child

There should be no hesitation in referring instances of serious criminal conduct to the Police for investigation that involve the potential criminal conduct of a child. When this occurs, it would be usual for the Police to request that the School not undertake any investigation of its own or to put on hold any investigation it had commenced.

The protocol between DHHS - Child Protection and Victoria Police notes the following²⁰:

- Where Child Protection receives a mandatory report regarding a child in need of protection due to sexual abuse, physical abuse or serious neglect, Child Protection must notify Victoria Police at the point of intake
- Victoria Police and Child Protection will then jointly plan an appropriate response and conduct joint interviews
- Victoria Police must be informed prior to Child Protection visiting any parties or directly commencing their investigation
- Victoria Police is responsible for determining an appropriate response to an alleged criminal offence.

The Sexual Offences and Child Abuse Investigation Team (SOCIT) is trained to investigate sexual offences and child abuse. In relation to children, it will primarily investigate sexual assault and child abuse offences including:

- rapes of children
- indecent acts (including penetrations) of children
- all allegations of child abuse in family environments
- joint investigations with Child Protection and other stakeholders in relation to child abuse.

²⁰ *Protecting Children – Protocol between Department of Human Services – Child Protection and Victoria Police, 2012. See also Protecting the safety and wellbeing of children and young people – A joint protocol of the Department of Human Services Child Protection, Department of Education and Early Childhood Development, Licensed Children’s Services and Victorian Schools, May 2010; Guidelines – Criminal Abuse of Children and Vulnerable People in Organisations: Reporting to Victoria Police, 7 March 2016.*

SOCIT is also extremely responsive to enquiries from schools and in responding to queries or concerns about how a school should proceed in a particular situation. In appropriate cases, SOCIT can investigate an incident quite quickly and be able to inform the school and the parents of the child whether charges will be laid against a child, whether there will be a warning or caution or whether it will take no further action.

DISCLAIMER

The author of this work is Steven Troeth, Gadens Melbourne – steven.troeth@gadens.com. It represents a brief summary of the law in Victoria applicable as at October 2017 and should not be relied on as a definitive or complete statement of the relevant laws. You should seek specific legal advice in relation to your own circumstances.