

How should schools respond to problematic or harmful sexualised behaviour between children?¹

Why is this important now?

Royal Commission into institutional responses to child sexual abuse

Case study number 45 of the Royal Commission dealt with institutional responses to children with problematic or harmful sexual behaviours in school.² It was held between October 2016 and February 2017. The study examined allegations relating to three government primary schools and three non-government secondary schools. For the 3 primary schools, non-publication orders remain in place³ made so that the identities of the school are not publicly known. This was primarily to protect the identities of individual children involved in the cases, a number of whom are still children and might be able to be identified if their school and other facts were made known.

Despite the non-publication orders, there is useful information to be learnt from generalised expert evidence before the commission.

The case study concluded in February 2017 and the Royal Commission is due to hand down its findings and recommendations by December 2017. So, this remains a topic of probable policy development and reform as school authorities consider and implement reforms arising from this case.

Statistics?

According to one Victorian Government source, between 30 and 60 percent of childhood sexual abuse has its origins from other children and young people.⁴ In evidence before the Royal Commission, Dr Wendy O'Brien said that incident data were not reported in a consistent way across Australia. A recent ABC freedom of information request revealed 1000 incidents Australia wide. She described this as "most certainly an underestimation" because some state reporting rates were dramatically lower than others.⁵

Assuming these assessments are correct, we might expect the average principal to be at a school dealing with these issues several times in their career.

¹ Notes for Presentation by Michael Waterhouse, General Counsel, NSW Department of Education to the ANZELA national conference, Sydney, October 2017. It is an update of a similar paper for school counsellors in March 2017.

² See Royal Commission website: <http://www.childabuseroyalcommission.gov.au/case-study/b487f384-6a1f-48b0-afc7-a2b106df188b/case-study-45,-october-2016,-sydney>, accessed 17 March 2017.

³ This remains the case as at October 2017.

⁴ *Adolescents with sexually abusive behaviours and their families*, Victorian Department of Human Services, 2012, http://www.dhs.vic.gov.au/_data/assets/pdf_file/0005/589721/adolescents-sexually-abusive-behaviours-families-specialist-practice-resource-2012.pdf, accessed 20 March 2017.

⁵ Dr Wendy O'Brien, Evidence for Case Study 45, Child abuse royal commission, <http://www.childabuseroyalcommission.gov.au/exhibits/b487f384-6a1f-48b0-afc7-a2b106df188b/case-study-45,-october-2016,-sydney>, accessed 10 May 2017, p12, referring to an FOI request in 2014.

Why are these cases difficult?

Special considerations because of possibility of child exhibiting harmful behaviour also being a victim.

One of the reasons why this area is difficult, and has perhaps been neglected, may be that our traditional concepts of “victim” and “perpetrator” do not straightforwardly apply. A child may act in a sexually harmful way towards another child because the child himself or herself has been a victim of sexual abuse. (Note: the Commission heard evidence that this is not universally the case).

The NSW Mandatory Reporter Guide⁶, identifies “exhibiting sexualised behaviour that is age-inappropriate and cannot be explained” as one of the reasons why a child’s behaviour may cause significant concern. This alone requires a report to the Child Protection Helpline. However, in cases where this child has acted in a harmful way towards another, both children will need to be considered as in need of protection.

What is the definition of Harmful Sexual Behaviour by Children?

Mandatory reporting guide

Under the NSW Mandatory Reporter Guide, the sexual abuse branch in the decision tree has a category of “Child/Young person problematic Sexual Behaviour toward others.”⁷ The definition here has the following elements:

1. The victim was substantially younger, smaller, weaker, less mature or intellectually or psychologically/physically less capable
2. The initiating child uses pressure, coercion, aggression, bribery, secrecy or other grooming behaviours
3. And the sexual action was abusive with regard to age appropriate sexual behaviour

The guide recognises that there will be the development of sexuality among children and seeks to distinguish a typical interest and development of sexuality from behaviours that are abnormal or unacceptable, based on typical age-related development.

What laws apply to Harmful Sexual Behaviour by Children?

A wide range of laws apply to this behaviour. They include criminal law, child protection law, duty of care (both statutory and at common law), discrimination law and laws affecting the powers of schools.

Criminal law

The *Crimes Act 1900* contains a range of serious offences relating to sexual intercourse with children.⁸ At the most serious end is sexual intercourse with a child under 10, attracting a maximum penalty of 25 years imprisonment. Lesser penalties apply if the victim is older, or if the offence is in the nature of an act of indecency.

⁶ <https://reporter.childstory.nsw.gov.au/s/sexual-abuse>, accessed 17 March, 2017.

⁷ <https://reporter.childstory.nsw.gov.au/s/sexual-abuse>

⁸ Crimes Act 1900, Sections 66A – EA, section 73

Doli incapax

The Latin term “*doli incapax*” means “incapable of evil”. The legal doctrine of *doli incapax* is that below the age of 10, children are legally (and irrebuttably) presumed to be incapable of committing a crime. This doctrine of common law dates back to the 14th century.⁹ It is a “bar to conviction” rather than a defence.¹⁰ Under the NSW *Children (Criminal Proceedings) Act 1987*, it is conclusively presumed that a child under 10 cannot commit an offence.¹¹

Between 10 and 14 there is a rebuttable presumption that the child remains incapable of committing a crime. In such cases, the prosecution has the burden to prove that the child knew that what they were doing was seriously wrong.¹²

In many cases, therefore, where a child has done acts which would be criminal conduct if done by a person of 15 and above, there will be no (or limited) possibility of prosecution.

So, a set of facts in which a person has been subject to significant harm of a sexual nature may be subject to a conclusive presumption that a crime has not occurred because the relevant acts were committed by a child under 10. Similarly, police may cease pursuit of an investigation without proceeding to prosecution on the basis that they cannot rebut the *doli incapax* presumption in relation to a child between 10 -14. These cases do not mean there is nothing further for a school to do. Indeed, in such cases, lack of further involvement in the criminal justice system may be the very circumstance in which the requirement for the school to take further action increases. (See further discussion below under “duty of care”).

It will not be uncommon for a school to continue to have both a victim and a child exhibiting harmful behaviour remaining at the same school. Decisions will be needed about how this can be safely managed.

Criminal conduct by children aged 14 and above

Above the age of 14, there is no presumption that a child is incapable of committing a crime. Offences committed by people above 14 but under 18 will be dealt with by the Children’s Court under the *Children (Criminal proceedings) Act 1987*. Here, they may be subject to a different penalty regime than adult offenders (depending on the seriousness of the crime).

Duty to report crimes

Section 316 of the *Crimes Act 1900* provides:

If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

⁹ See <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/NewcLawRw/2001/16.html?stem=0&synonyms=0&query=doli%20incapax> , page 158. Accessed 17 March 2017.

¹⁰ Ibid.

¹¹ Children (Criminal Proceedings) Act 1987, section 5. All Australian States and Territories, and the Commonwealth have similar provisions

¹² For a discussion of the law of *doli incapax* in Australia, see <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MurUEJL/2003/26.html?stem=0&synonyms=0&query=doli%20incapax>

A serious indictable offence is defined as one that is punishable by imprisonment for life or for a term of 5 years or more.

An offence of sexual assault against a child under 10 attracts a penalty of 25 years. Normally, if a school became aware of facts leading them to believe that this offence had been committed and were able to assist the prosecution of an offender, they would be obliged to report it to the police or other appropriate authority. In my opinion, other appropriate authority would include the child protection help line, which is linked with police in the Joint Investigation Response Teams (JIRT).

However, if the person who would otherwise be considered to have committed the offence is known by the principal to be under the age of 10, the doctrine of *doli incapax* means, in my opinion, that the circumstances cannot lead to prosecution or conviction. As well, this fact would appear to be a reasonable excuse not to report it (a factor that is directly referred to in section 216). That is *not* to say that the offence cannot be reported to police; just that the principal is not compelled to do so under the *Crimes Act*.

This may be a moot point, as the question of reporting to FACS will in any case arise. (See next section on mandatory reporting).

Sexual harassment

Sexual harassment is defined under the *Anti-Discrimination Act 1977* as making unwelcome sexual advances in circumstances where a reasonable person would anticipate that the other person would be offended, humiliated or intimidated.¹³ The *Anti-Discrimination Act* indicates that it is unlawful for an “adult student” at a school to sexually harass another student at the school and, interestingly, defines “adult student” to mean a person who has reached the age of 16.

Sexual harassment is part of the spectrum of problematic or harmful behaviours that may be displayed by students. Schools should have policies that prevent sexual harassment between students. They should be aware, and make students aware, that in addition to disciplinary action students over 16 years of age could face direct legal action from other students whom they harass.

Mandatory reporting

Under the *Children and Young Persons (Care and Protection Act) 1998*, mandatory reporters must report to the Child Protection Helpline if they have reasonable grounds to suspect a child is at risk of significant harm.¹⁴ This includes current concerns that a child has been or is at risk of being sexually abused. (The relevant criteria for reporting in the Mandatory Reporter Guide is discussed later in this paper.)

Clearly if a child has been, or other children are at risk of being, abused, there is a need to report to FACS.

The fact that a report has been made to FACS is not a signal to the school that their duty is over. Section 29A makes it clear that the person making a report “is not prevented, ..., from responding to the needs of, or discharging any other obligations in respect of, the child”.

Once a report is made, further decisions are needed for the ongoing management and safety of “both” children at the school.

¹³ *Anti-Discrimination Act 1977*, section 22A.

¹⁴ *Children and Young Persons (Care and Protection) Act 1998* section 27.

Duty of care

Common law

The general common law duty of care that a school authority owes to a student is a duty to take reasonable steps to avoid reasonably foreseeable harm.¹⁵ These concepts are subject to the requirements in sections 5B and 5C of the *Civil Liability Act 2002*, which includes consideration of what a reasonable person in the equivalent position would do. For school authorities this invites comparison with what a reasonable school authority would do. It includes a balance of consideration of the probability and seriousness of harm and the burdens of taking precautions.

A breach of the duty to take reasonable care, if it causes harm, will be compensable by an order of monetary damages intended to put the plaintiff in the position he or she would have been in had the breach not occurred.

Where a school is aware that one of its students has engaged in harmful sexual behaviour towards other children – whether this be at school or in other contexts – *prima facie* it is foreseeable that such harm may occur again. A school must therefore decide what steps are reasonable to prevent that risk. Such steps will include consideration of what schools generally do. This will include implementation of statewide policies designed to address such risks.¹⁶ In future, it may include whether a school system has followed recommendations of the Royal Commission. It will include consideration of measures designed to mitigate the particular circumstances posed by the child such as:

- Cooperation with treatment programs designed to modify behaviour
- Modified supervision arrangements
- Separation of the child from susceptible others

Such measures need to be monitored for their effectiveness, and if they are not working, will need to be modified.

WHS

Duty of care also arises under the *Work Health and Safety Act 2011*. Here, a school must ensure the health and safety of their workers, and “other persons” (including students), is not put at risk from the conduct of the school so far as is reasonably practicable. Clearly this duty is very similar to the common law duty (if perhaps somewhat more onerous). A primary difference is that a breach of this duty by a school can lead to prosecution by WorkCover rather than an award of damages to a victim. The penalty for a prosecution for serious offences under this Act can include a significant monetary fine – up to \$300,000 for an individual or \$1.5million for a body corporate. The court can also order compensation, reinstatement or for a project or general improvement to be undertaken.

The measures to meet this duty referred to under the heading of “common law” above, are also applicable here.

¹⁵ *Geyer v Downs* [1977] HCA64; *Cox v State of NSW* [2007] NSWSC471; *Oyston v St Patrick’s College* [2011] NSWSC 269; *Prince Alfred College Incorporated v ADC* [2016] HCA 37.

¹⁶ Such policies from the NSW Department of Education are likely to be updated in the reasonably near future.

Officers' duties under the WHS Act

Generally speaking, "officers" are those person who have participate in making decisions affecting the whole or a substantial part of the business of the organisation.¹⁷ Depending on the legal structure of the school, it is conceivable that principals in some non-government school principals will be officers. In any case, there will undoubtedly by "officers" at the head of all school authorities.

Officers of a business or undertaking have a duty of exercising due diligence to ensure that the organisation is meeting its obligations under the WHS Act. This (in short) includes taking reasonable steps to:

- Keep up to date with health and safety matters
- Understand the risks faced by their business
- Ensure their employees have resources and processes to minimise safety risks
- Ensure employees receive information about risks and appropriate processes of notification, training and consultation.
- Check that the above systems and processes are working.¹⁸

Duty to coordinate to protect children – Chapter 16A Children and Young Persons (Care and Protection) Act 1998

Chapter 16A of the *Children and Young Persons (Care and protection) Act 1998* requires agencies with responsibilities relating to the safety welfare and wellbeing of children and young people to exchange certain information and coordinate the provision of services to those children. The section applies to "prescribed bodies", a term which includes all government and non-government schools, other public sector agencies such as police, health and FACS, and other non-government agencies providing health and safety services to children (including private psychologists and doctors).

Provision of services

Prescribed bodies are required to take reasonable steps to coordinate decision-making and delivery of services. When it comes to services for children who may be behaving in a sexually harmful manner towards others this means, for example, that schools, psychologists and health practitioners are required to take reasonable steps to work together to effectively help such a child to acceptably modify their behaviour. Research suggests that treatment of young people is very successful, with the rate of recidivism being far lower than for adult offenders and most young people not going on to become adult offenders.¹⁹ In my opinion, this makes it especially important that prescribed bodies take the required steps to coordinate access to services, and consistency in support in different areas of young persons' lives.

Information exchange

Prescribed bodies are also empowered to proactively provide other such bodies relevant information, and are required to provide information if requested from another such body.²⁰

Provision of information under Chapter 16A is not prevented by other laws restricting information

¹⁷– *WHS Act, section 4.*

¹⁸ *WHS Act, section 27 (5).*

¹⁹ *Adolescents with sexually abusive behaviours and their families*, Victorian Department of Human Services, 2012, http://www.dhs.vic.gov.au/_data/assets/pdf_file/0005/589721/adolescents-sexually-abusive-behaviours-families-specialist-practice-resource-2012.pdf, accessed 20 March 2017. Page 14

²⁰ Provided the exceptions in section 245D(4) do not apply.

disclosure.²¹ (There are however circumstances with Chapter 16A in which a prescribed body is not required to provide information. These include potential prejudice of other legal proceedings and related matters.)²²

Similarly, part 5A of the *Education Act 1990* gives schools the power to obtain information about a student's history of violence from relevant agencies for the purpose of risk management.

This means, for example, if a prescribed body is aware of a potential risk to children and young people posed by a child or young person with harmful sexualised behaviour, they are able to provide other prescribed bodies with information that would help them manage that risk. Given that it is apparent that in many cases these risks can be effectively managed over the medium term, provision of such information for effective planning of new placements of such students seems particularly important, not just for potential victims, but for the future well-being of students who are potentially behaving harmfully.

How is Harmful Sexual Behaviour by Children detected and who makes the judgment?

Harmful sexual behaviour by students may come to a school's attention in a range of ways. It may be directly observed to occur at school. It may be reported to teachers by victims or witnesses. It may be indirectly, euphemistically or potentially unknowingly referred to by children. It may arise from third party provision of information about events that have occurred away from the school.

Based on the Mandatory reporter guide, relevant conduct includes sexual behaviour involving:

For children aged 0-5

- Obsessive preoccupation with sexual behaviour
- Re-enactment of adult sexual activity
- Injury to others or self
- Coercion, threats, secrecy, violence, aggression or developmentally inappropriate acts

For children aged 6-10:

- Sexual penetration
- Genital kissing
- Oral copulation
- Simulated intercourse
- Coercion, threats, secrecy, violence, aggression or developmentally inappropriate acts

For children aged 11-12

- Sexual play with younger children
- Coercion, bribery, aggression or secrecy or involves a substantial peer or age difference

For children aged 13-17

- Masturbation causing physical harm or distress to self and others
- Public masturbation
- Unwanted kissing
- Voyeurism, stalking, sadism
- Non-consensual groping or touching

²¹ Section 245H (1).

²² Section 245D(4)

- Coercive sexual intercourse
- Coercive oral sex
- Behaviour

Victims of domestic violence and sexual abuse

On evidence before the Royal Commission, exposure to domestic violence, is a key trauma recognised by the literature as contributing to problematic behaviour.²³ This is closely followed by experiencing sexual abuse.²⁴ These may appear in combination.

Children with disabilities

In some cases students who behave in a sexually harmful manner may do so because of a disability. Some disabilities will manifest themselves in uncontrolled and violent behaviour. Violent behaviour may be directed towards another child's genital area even if it is not understood to be sexual in nature by the child exhibiting the behaviour. Intent of the child exhibiting the behaviour will be irrelevant to whether the child who is the target of the behaviour needs support. "Research suggests that the impact is as severe with child-on-child behaviour as it is with adult perpetrators" according to evidence before the Royal Commission.²⁵

Children who feel 'entitled'

The Royal commission heard evidence that a small proportion of boys who are seen as charismatic sporting or leadership figures who grow up in a very privileged environment may develop a sense of entitlement to engage in harmful behaviours.²⁶

Availability of pornography

Some experts giving evidence before the Royal Commission have expressed the view that the availability to school aged children of sexually explicit material on mobile devices may lead to students engaging in such behaviour. In some cases students have done so very shortly after viewing such material.²⁷

When should you report?

Sexually harmful behaviour towards a child should be reported to the Child Protection Helpline if a teacher or other mandatory reporter considers a child is at risk of significant harm based on use of the Mandatory Reporting guide. If a sexual assault is alleged to have occurred by a child over 10, it should also be reported to the police.

Should you investigate?

Suppose a student comes to you for a counselling session and is upset. You ask what is wrong and the student says "Jason's been playing with me". What do you do?

²³ Evidence of Dale Tolliday, Royal Commission day 224, page 22819.
[http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=83213c75-c585-4279-91ce-e52152a7112e&type=transcriptpdf&filename=Transcript-\(Day-224\)&fileextension=pdf](http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=83213c75-c585-4279-91ce-e52152a7112e&type=transcriptpdf&filename=Transcript-(Day-224)&fileextension=pdf)

²⁴ Ibid.

²⁵ Wendy O'brien evidence, 20 10 2016, day 215, p 21657,
[http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=5385d815-3a00-4928-ac4b-20944e731bea&type=transcriptpdf&filename=Transcript-\(Day-215\)&fileextension=pdf](http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=5385d815-3a00-4928-ac4b-20944e731bea&type=transcriptpdf&filename=Transcript-(Day-215)&fileextension=pdf)

²⁶ Evidence of Dale Tolliday, Royal Commission day 224, page 22820.
[http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=83213c75-c585-4279-91ce-e52152a7112e&type=transcriptpdf&filename=Transcript-\(Day-224\)&fileextension=pdf](http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=83213c75-c585-4279-91ce-e52152a7112e&type=transcriptpdf&filename=Transcript-(Day-224)&fileextension=pdf)

²⁷ Ibid, 22819

Is this enough to raise a suspicion that the child has been sexually harmed?

In my view, from those words alone, the answer is no. A wide range of children's actions count as playing. The child could be upset because she doesn't like Jason joining in a game in an aggressive manner. On the other hand, it is possible that "playing with" is a euphemism for "sexually molesting" because the child doesn't have the vocabulary, or feels embarrassed about explaining what happened more explicitly.

In such cases you need to know more about why the child is upset. It may also require some clarification about whether it is alleged that problematic or harmful sexualised behaviour has occurred. Such collection of clarifying information should only extend to the point where there is sufficient indication that such behaviour *may* have occurred.

It is not the role of the school to undertake a detailed investigation of the kind that might be undertaken by a JIRT team. There is a risk otherwise of contaminating information or of increasing a child's trauma arising from repeated recounts of the experience. If sexual abuse is revealed, students should not be asked for detailed information. This, however, does not prevent staff from doing what is practicable to provide immediate support and comfort to any students affected by the behaviours and to the student who has exhibited the behaviours. This includes providing words of comfort and acknowledgment.

What are some of the wrong responses?

Wendy O'Brien in evidence before the Royal Commission says that criminological research shows that applying labels to a child such as "perpetrator, sex offender or paedophile" is likely to impede attempts to achieve behaviour change by those children. She advises identifying the behaviour rather than labelling the child. In particular, such behaviour may develop from a range of background characteristics including child sexual abuse, neglect, caretaker substance abuse and disabilities. It is considered quite different from sexual abuse of children by adults.²⁸

Nevertheless, she advocates disclosure and sees turning a blind eye to the issue, or expressing the view that "boys will be boys", as inappropriately minimising harmful behaviour. This may be a failure to intervene early in a situation that later becomes more harmful. She indicates that penetrative offences rarely if ever appear as the first sign of problematic sexualised behaviour. It is important, therefore, not to ignore, disbelieve, discourage, or dismiss such signs.

Similarly, a negative over-reaction - such as "anger, fear, disgust" or "shaming, isolating or punishing" a child with sexualised behaviour - can be counterproductive.²⁹

How is the Department of Education dealing with the issue?

Checklist and toolkit

At the time of writing (August 2017) the NSW Department of Education is working with other agencies (in particular NSW police, Health, Families and Community Services) to develop resources to help schools to deal with these issues.

²⁸ Wendy O'Brien evidence, 20 10 2016, day 215, p 21654,
[http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=5385d815-3a00-4928-ac4b-20944e731bea&type=transcriptpdf&filename=Transcript-\(Day-215\)&fileextension=pdf](http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=5385d815-3a00-4928-ac4b-20944e731bea&type=transcriptpdf&filename=Transcript-(Day-215)&fileextension=pdf)

²⁹ Wendy O'Brien evidence, 20 10 2016, day 215, p 21654,
[http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=5385d815-3a00-4928-ac4b-20944e731bea&type=transcriptpdf&filename=Transcript-\(Day-215\)&fileextension=pdf](http://www.childabuseroyalcommission.gov.au/downloadfile.ashx?guid=5385d815-3a00-4928-ac4b-20944e731bea&type=transcriptpdf&filename=Transcript-(Day-215)&fileextension=pdf)

These are intended to include:

- Guidelines providing advice on identifying relevant behaviour
- Suggested roles and responsibilities
- check lists of appropriate actions to consider when investigating and reporting such behaviour
- Advice on how to continue to support children who have been abused by others, and children exhibiting harmful behaviours (including consideration of powers under the *Education Act* affecting enrolments)
- template letters for appropriate communication with the school community
- Links to appropriate external organisations for advice and referral

This Kit is likely to become available in prototype form, so if such issues emerge in the near future, schools will be able to trial it's use and help improve it. It is currently intended that this prototype will be available in term 4 2017.

Within the Department of Education resources that can provide support for government schools include:

- Incident Response Unit
- Child Wellbeing Unit
- Legal Services
- School Counselling service
- Directors of Public Schools