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ASSOCIATION OF HEADS OF INDEPENDENT SCHOOLS OF AUSTRALIA

17 October 2016

The Hon. Justice Peter McClellan AM
Chair
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

Emailed to: criminaljustice@childabuseroyalcommission.gov.au

Dear Justice McClellan,

Response to Consultation Paper: Criminal Justice

The Association of Heads of Independent Schools of Australia (AHISA) acknowledges the work of the Royal Commission in preparing the way for improved child protection policies and practices in Australia.

The Royal Commission's Consultation Paper on Criminal Justice is comprehensive. Given that AHISA's CEO, Beth Blackwood, participated in the Royal Commission's Criminal Justice Roundtable on 15 June 2016 and that AHISA's views on a number of issues on reporting are already on record from that Roundtable, AHISA's response focuses on third party offences and in particular on the 'failure to protect' offence.

Our aim is to highlight for the Royal Commission implementation and practice issues for schools and their leaders that may arise in relation to the third party offences. To this end, AHISA draws on results of a survey of its Victorian members in relation to the introduction of section 49C of the *Crimes Act 1958* (Vic) and new Child Safe Standards[1] which came into effect for Victorian schools on 1 August 2016. We also refer to advice commissioned from Russell Kennedy Lawyers on section 49C of the *Crimes Act 1958* (Vic) in relation to the role of the principal. That advice is appended to this submission.

Overview

AHISA agrees that, in addition to redress and civil litigation, criminal justice responses to child sexual abuse in an institutional context serve the interests of victims and survivors as well as the broader community. We acknowledge points made by the Royal Commission in its Criminal Justice Consultation Paper (page 12), such that a criminal justice response to child sexual abuse in an institutional context offers survivors and society the opportunity to:

- punish the offender for their wrongdoing and recognise the harm done to the victim
- identify and condemn the abuse as a crime against the victim and the broader community
- emphasise that abuse is not just a private matter between the perpetrator and the victim

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About AHISA

The primary object of AHISA is to optimise the opportunity for the education and welfare of Australia's young people through the maintenance of collegiality and high standards of professional practice and conduct amongst its members.

AHISA's 410 members lead schools that collectively account for over 11 per cent of total Australian school enrolments and 20 per cent of Year 12 enrolments.

Almost a third of AHISA members lead schools with boarding facilities, collectively providing for over 15,000 boarding students. Some 85 per cent of members' schools have an early learning centre.

AHISA's members lead a collective workforce of some 40,000 teachers (full- and part-time) and 24,000 full- and part-time non-teaching staff.

- increase awareness of the occurrence of child sexual abuse through the reporting of charges, prosecutions and convictions
- deter further child sexual abuse, including through the increased risk of discovery and detection.

At the same time, AHISA is concerned that the interaction of some of the proposed offences with other legal and regulatory obligations on schools could have unintended outcomes on practices in schools if the child protection obligations of schools and their officers are not clearly communicated by regulatory bodies.

It is also AHISA's view that where civil litigation already exists as an avenue for victims and survivors to seek justice and redress from institutions – and even though this option is not without its disadvantages to both complainants and defendants – a focus on the development of criminal offences must not come at the cost of the development and implementation of prevention strategies.

Criminal offences have an important place among society's weapons to combat adult predation on children and can serve the interests of some victims and survivors well; it is prevention of abuse, however, that will better serve the immediate interests of all children. With support, schools are well placed to play a key role in prevention – through child safe organisational practices, as conduits of information to their communities and through educational programs to raise awareness of students.

AHISA commends the Royal Commission's extensive research program to inform and support prevention strategies and, as in our previous submissions, recommends the development of appropriate materials for schools to guide better and best child protection practice.

Our response to the Consultation Paper is set out in three sections:

1. Third party offences
2. Grooming offences
3. Recommendations.

1. THIRD PARTY OFFENCES

AHISA acknowledges that the Royal Commission, in the interests of survivors and the wider community, seeks to deter and establish under criminal law the opportunity to prosecute the organisational and professional failures that have been brought to light in the Royal Commission's hearings, and in other jurisdictional investigations.

AHISA agrees there is a place for third party criminal offences where such failures occur. We would be concerned, however, if criminal offences were not developed in tandem with preventative measures. As we argue throughout this submission, prevention must be a focus of action on the part of governments, organisations and the wider community, for the sake of all children. Further, it is only when adequate preventative measures are in place that criminal offences are more likely to be successfully prosecuted and able to realise justice for victims and survivors.

1.1 Failure to report

The Consultation Paper explores the option of creating an offence specifically targeting institutional child sexual abuse offences and requiring those within institutions with the relevant knowledge or belief to report to police:

> A significant benefit of an offence that targets institutions is that it would allow a lower standard of knowledge or belief than would be reasonable for offences that apply to the community at large. The reporting obligation could apply where there is a 'reasonable suspicion', which is clearly a lower standard than knowledge, belief or a reasonable belief. This means that the obligation to report would apply in a broader range of circumstances and where the reporter has less knowledge or certainty of the abuse. (Page 28)

As noted in Professor Ben Mathews' report for the Royal Commission, *Mandatory reporting laws for child sexual abuse in Australia: A legislative history*, failure to report offences are already linked to mandatory reporting legislation in all states and territories except NSW.

In his report, Professor Mathews discusses why people fail to report and notes that the most prominent reason for failure to report in cases of child sexual abuse 'is likely a lack of certainty about whether the child has been sexually abused or not' (page 31).

Professor Mathews also examines the few cases where failure to report offences have been prosecuted. Of note is his description of the dismissal of the failure to report case brought against the principal of a Catholic primary school in Toowoomba, Qld (the Royal Commission's Case Study 6). The case represents a professional failure that could not be prosecuted because of complex provisions of the state mandatory reporting laws of the time (page 41).

That is, the effectiveness of failure to report offences to prevent further harm or provide justice for victims can be limited by human uncertainty on the one hand and the interaction of professional failure and regulatory ambiguity on the other.

Most school staff members are mandatory reporters. If the success of mandatory reporting depends on appropriate education to address human uncertainty in identifying behaviour that justifies the formation of a reasonable suspicion or belief, this can be and is already addressed in schools through regular professional

development. Further, as reported by AHISA's CEO at the Royal Commission's Roundtable, AHISA members in NSW affirm the value of NSW's reportable conduct scheme, where schools have access to a 'one stop shop' of expert advice on follow up action or investigation should any suspicion of grooming behaviour or abuse arise. AHISA members in other jurisdictions have expressed interest in a similar scheme operating in their state or territory. In other words, information, education and support are likely to be more successful in promoting early reporting and prevention of abuse than a failure to report offence.

Where professional failure does occur, it is AHISA's view that a failure to report offence of itself – irrespective of whether it requires reporting on reasonable belief or reasonable suspicion – can only be effective when it functions as a penalty to a mandatory reporting law that defines reportable conduct or which is linked to regulations that define such conduct.

1.2 Failure to protect

Given that a 'failure to protect' offence would likely target principals of schools, as does section 49C of the *Crimes Act 1958* (Vic), AHISA canvassed the views of Victorian members on the impact of the Victorian law on their role as principal and also sought legal opinion on Victorian law in relation to the Royal Commission's discussion of this offence in the Criminal Justice Consultation Paper.

Legal opinion

AHISA commissioned legal opinion from Russell Kennedy Lawyers on section 49C of the *Crimes Act 1958* (Vic) in relation to the points raised in the Criminal Justice Consultation Paper, with specific reference to the role of principals in managing independent schools. We have accepted that opinion, which is summarised in the following points. (The full opinion is appended to this submission.)

- Section 49C(2) of the *Crimes Act 1958* (Vic) should not be used as an exact template for any national offence. While the offence requires that three tests be satisfied, which will generally be difficult for a prosecution to achieve except in compelling cases, the requirement that there must be 'substantial risk' is so imprecise that it provides little guidance for principals wishing to avoid engaging in criminal behaviour.
- Given that the Royal Commission has already recommended civil liability for schools that fail to take steps to protect children from the risk of child sexual abuse, there appears to be no specific need for a similar criminal offence to be created that is aimed at schools. Tying civil liability to an institution's accreditation is likely to have a greater deterrent effect than the introduction of a criminal offence.
- If a 'failure to protect' offence is introduced nationally for schools, then any national offence for individuals should be narrower than section 49C(2) of the *Crimes Act 1958* (Vic) and reserved for only the most egregious of decisions by individuals.

The opinion notes that as the Victorian Act does not define 'substantial risk', there may be unintended consequences as the Act intersects with other obligations on schools:

> By failing to provide clarity about what exactly a substantial risk is, principals are being left to guess what they need to do to avoid committing a criminal offence, and this may have significant unintended consequences.
>
> An illustration of this is useful. An obvious way to deal with a risk that a sexual offence will occur is to remove the individual creating that risk from a school. If a sexual abuse allegation is made against a

teacher, it is easy for a school to stand that teacher down for the time being. If the teacher then admits to the allegations, or the allegations are proven in a court of law, the school will then typically have reasonable grounds for terminating the teacher's employment. It may therefore be justifiable for it to be a criminal offence for a principal not to do these obvious things.

However, what happens if allegations are made, the teacher denies those allegations, but there is no determination by a court about whether or not the allegations are substantiated? Many schools will be able to describe a situation in which allegations were raised about a teacher by a student, and the allegations were reported to the police who decided there was insufficient evidence to press charges. Just because the police have decided not to charge the teacher, does not necessarily mean that the allegations are untrue. Is there a substantial risk at that point? What happens if the school then investigates the allegations, but is unable to either discount or substantiate the allegations on the balance of probabilities (which is a typical problem where allegations rest on a child's verbal complaint, and a teacher's verbal denial)? Is there a substantial risk or not?

This uncertainty about whether or not there is a substantial risk could make it difficult for a principal to decide what to do next. Principals and their schools have to take into account a number of considerations when deciding whether to dismiss an employee. The school must consider the terms on which the employee was engaged, including any written contract of employment or enterprise agreement, and whether those terms permit the dismissal. The school must also consider an employee's prospects of making an unfair dismissal claim, which will generally require the employer to prove to the Fair Work Commission that the employee engaged in misconduct warranting dismissal.

By introducing an offence that is predicated on an amorphous concept such as substantial risk, there are likely to be a number of circumstances – particularly where allegations of grooming are involved – where a principal may be unreasonably forced to decide between:

(a) dismissing an employee in potential breach of a school's workplace obligations; or
(b) allowing an employee to continue working at a school, and potentially committing a criminal offence.

The advice received by AHISA notes that the newly introduced Child Safe Standards in Victoria reflect the Royal Commission's interest in the imposition of a non-delegable duty to prevent child sexual abuse on institutions. (This is referred to again in section 1.3 below.) When such a duty is imposed and tied to a school's accreditation, it is the view of Russell Kennedy Lawyers that 'there should be compelling grounds if a criminal offence is to also be introduced for failing to discharge those duties, and such grounds do not presently appear to exist':

> However if an offence for institutions is to be introduced, then for the reasons stated above, we take the view that any 'failure to protect' offence needs to be narrower in scope than section 49C of the *Crimes Act 1958* (Vic), and should provide greater clarity about what specifically must or must not be done to avoid an offence being committed.
>
> We also suggest that if there is to be an offence for institutions, then there is less need for an offence against individuals. If there must also be an offence for individuals, it should be significantly narrower in scope than the offence for institutions, and reserved for the most egregious of behaviour by individuals that warrants criminal prosecution beyond the remedies already available against the institution itself.

AHISA member survey

Section 49C of the *Crimes Act 1958* (Vic) came into effect in 2015; Victoria's Child Safe Standards were announced at the beginning of 2016 and came into effect for Victorian schools on 1 August 2016. Although implementation of these child protection initiatives is therefore of relatively short duration, AHISA surveyed its Victorian members to ascertain what, if any, impact the offence and the Standards have had on the management of independent schools.

a. Managing the risk of committing the 'failure to protect' offence

In response to the question, 'What have you done differently – or scaled up – in your school to manage the risk of committing the "failure to protect" offence?', all principals engaging with the survey reported their school met the Child Safe Standards.

Responses indicate that the 'failure to protect' offence, allied to the introduction of Child Safe Standards which make expectations of schools explicit, has instigated prompt and thorough action in schools to support better practice in child protection. Key areas where schools had taken action to meet or exceed the new Standards include:

- Revision of staff induction programs
- Ensuring that all adults within the school community are aware of their child protection obligations, including reporting obligations
- Provision of professional development for staff
- Provision of support for staff in undertaking their responsibilities in child protection
- Revision of induction programs for relief or temporary staff
- Revision of training programs for volunteers
- Introduction or revision of recordkeeping policies and procedures in relation to child protection.

Nearly half of those surveyed had made reporting on child protection policies and procedures a standard item on school Board meeting agendas, while nearly two-thirds of schools have added child protection to the list of items monitored by the school Board's risk committee. One respondent to the survey noted that their school's Board has instigated a sub-committee with a specific focus on child protection.

Whether as a standard item on Board agendas, or a focus of Board committees, child protection is now clearly a governance – not just a management – issue in independent schools in Victoria. This is an important support for developing and sustaining child safe school cultures.

b. Barriers to knowledge of substantial risk

When asked about barriers to principals having knowledge of substantial risk that an officer, employee, contractor or volunteer at a school will commit a sexual offence against a student, all respondents identified a failure by parents to notify the school if they were leaving their teenager at home alone while the parents were away. More information from families about at home risks would alert schools to changes in the potential vulnerability of students.

Principals noted that while failure of staff to report suspicious behaviour by another adult associated with the school would be a barrier to the principal's knowledge of substantial risk, they expected child protection policies and procedures, including ongoing staff training, and school culture to mitigate this.

Principals reported they were also more likely to be unaware of substantial risk if schools did not have in place adequate recordkeeping practices, such as would alert the principal to a pattern of grooming behaviour.

c. The age of students

Principals agreed that the 'failure to protect' offence should apply to school students up to the age of 18 or for as long as the school has a duty of care for the student.

c. Implementation concerns

When asked whether some child protection obligations could be deemed 'unreasonable' in that they unnecessarily impede the work of schools, principals affirmed that all child protection measures could be deemed 'reasonable' by virtue of the importance of keeping children safe. However, areas of difficulty or concern for schools did emerge in the survey. These include:

- The ability of schools to control risk during students' work experience placements and school-related overseas travel
- The capacity of smaller schools to manage the increasing administrative and compliance burden on schools
- A negative impact on the number of staff members volunteering for extra duties or activities out of fear of exposure to the risk of false allegations.

Responses revealed there is still uncertainty and/or concern among some principals about the level of suspicion that is required before prompting a report to an external authority, and the extent to which schools can investigate a suspicion before reporting. However principals also reported that a number of documents produced by the Victorian Government or its agencies had been helpful in upgrading school policies and procedures on child protection since introduction of the Child Safe Standards. Some larger schools had also sought the help of external consultants.

Implications

AHISA's survey of members affirms the readiness of schools to meet and surpass regulated obligations in regard to child protection. It is clear, however, that human uncertainty over reporting must be addressed, by first making those obligations explicit, followed by ongoing education about how those obligations are to be executed. It is uncertainty about what should be done in specific circumstances – either on the part of staff, or on the part of the principal in managing sometimes competing legal or regulatory obligations – that appears to concern principals most as posing the greatest risk of school officers committing a 'failure to protect' offence.

1.3 Offences by institutions

Several options for institutional offences are discussed in the Criminal Justice Consultation Paper. Here, AHISA raises general concerns.

Expected standards and best practice

In Section 6.5.2 of the Consultation Paper, the Royal Commission notes the potential difficulty in differentiating between an institution's culture and the actions of the institutions' officers. However, it goes on to say 'there may be good reasons of principle why offences targeting institutions should be introduced', and draws on a point made in its commissioned research study, *Sentencing for child sexual abuse in institutional contexts*:

> … focusing primarily, if not exclusively on individuals minimises the collective dimensions of organisational or institutional action, not only in relation to corporate intention or corporate policy but, more relevantly, to the extent of collective negligence, namely a 'failure to meet the standard of care expected of an organisation in the same type of situation' … (Page 249 of the Consultation Paper)

As with other third party offences, AHISA believes unless schools are given explicit notice of what constitutes 'the standard of care expected of an organisation in the same type of situation', they may be left vulnerable to prosecution without good purpose.

As we have argued above, in the first instance, prevention must be prioritised above punishment. Unambiguous obligations on schools and their officers in regard to duty of care, duty to report and duty to protect – supported by educative materials and/or programs or, ideally, reportable conduct schemes that offer advice and support to schools and their officers to meet these obligations – will not only serve the cause of prevention but are also the necessary foundation for a criminal offence if it is to be successfully prosecuted.

We are at a point in Australia where individual schools and school systems are moving rapidly to improve child protection practices and ensure child safe cultures. It is, however, difficult for schools to institute 'expected standards' or 'best practice' if these are not specified by regulatory authorities.

For example, in its recently released commissioned report, *Risk profiles for institutional child sexual abuse: A literature review*, there is discussion of the weaknesses inherent in Working with Children Checks and a number of recommendations are made regarding comprehensive screening processes for institutions (pages 84-5):

- All minors and adults working with children should go through a screening procedure.
- Screening procedures should require candidates to take part in a personal interview, undergo a thorough reference check, and fill out and sign a verified written application to be able to work with children.
- A statement of the organisation's code of ethics, policies and procedures (as relevant to child sexual abuse prevention) should be provided to applicants during the hiring process. An understanding of, and agreement with, these concepts should be demonstrated via a document signed by the applicant.
- Any written applications and personal interviews should include screening aspects involving child sexual abuse. Specifically, questions should determine if an applicant has a fixation on working with children of a certain gender or age group. This inclusion of follow-up questions can help to determine whether an applicant poses a risk to children.
- It is also recommended that interviewees be asked how they would respond to certain hypothetical scenarios.
- The intensity of screening should depend on the level of organisational risk. For instance, a high-risk organisation might be defined as one that served children who had been abused or who had physical or mental disabilities; was staffed by volunteers or paraprofessionals; undertook limited staff

supervision; or offered service primarily in residential-type settings. The intensity of screening should also depend on the level of autonomy of the position that the applicant is applying for, and the age of the applicant, as minors are less likely to have accessible work and criminal histories.

- The use of screening tools may also be combined with screening techniques to provide a more thorough screening process. These tools include the *Abel Assessment for Sexual Interest*, the *Screening Scale for Pedophilic Interests*, the *Boundary Violations Vulnerability Index*, and personality testing such as the Minnesota Multiphasic Personality Inventory-2, Millon® Clinical Multiaxial Inventory-III and SCID II. These tools can be combined with screening techniques such as interviews, background checks and reference checks to contribute to an overall stronger screening process.

Given the need of schools to employ relief and temporary staff, and to host teacher education students for practicum placements, it would be extremely difficult – and costly – for non-systemic schools to implement all of these procedures in all circumstances. Yet, as the *Risk profiles* report has been published in the public domain by the Royal Commission, could the above set of recommendations be considered 'best practice' for screening applicants? What percentage of schools would have to adopt these recommendations before an 'expected standard' could be argued, and therefore place other schools at risk of committing an institutional offence? Would hiring staff from an agency that purported to screen applicants using sophisticated screening tools and techniques rate as meeting an 'expected standard'?

In the absence of any mandate from regulatory authorities on screening practices beyond Working with Children Checks, AHISA is concerned an institutional offence based on an 'expected standard' could leave schools at risk of prosecution because of their screening practices, even though they have met existing regulations. We offer this only as an example to illustrate the principle underlying our concern.

It is AHISA's view that, should an institutional offence be introduced, to be effective it must be linked to a recognised and explicit standard set by a regulatory authority, in the same way that a failure to report offence should be linked to mandatory reporting laws and explicit obligations of what should be reported, when, and to whom.

Onus of proof

The Royal Commission reiterates in the Criminal Justice Consultation Paper its recommendations that all states and territories should impose a non-delegable duty upon institutions and 'introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution', with a reverse onus of proof (pages 252-3). It also restates:

> To our minds it is time that Australian parliaments moved to impose liability on some types of institutions for the deliberate criminal acts of members or employees of the institution as well as for the negligence of those members or employees. (Page 253)

AHISA appreciates that exposure of the failings of institutions and their officers in the Royal Commission's hearings is prompting exploration of all avenues that will assist in minimising risk to children and providing justice when abuse occurs. However, it is our view that caution should be exercised before reversing the onus of proof. The general principle of criminal law in Australia, that the prosecution should always be required to prove a criminal offence beyond reasonable doubt, has served justice well.

It is worth noting that civil litigation already offers an avenue for justice where schools have failed. In his *Mandatory reporting* report, Professor Mathews writes that in the Toowoomba case the school authority had legal liability (page 43):

> As a result of these employees' failure to act appropriately, and in view of the high level of knowledge they possessed about the abuse suffered by the girl who made the initial complaint, these employees breached their common law duty of care to prevent further harm being caused to the first girl, and to other children to whom the teacher had continuing access. Because the school authority employed these individuals, it is vicariously liable in compensatory damages for harm suffered by the teacher's victims as a result of the negligent omissions. Civil proceedings were commenced by some of the victims. In July 2010, the Catholic Church admitted liability in all thirteen cases.

2. GROOMING OFFENCES

The Royal Commission notes in the Criminal Justice Consultation Paper that 'grooming presents a challenge for the criminal law because – at least in its broader forms – it is particularly difficult to identify if it does not lead to contact offending' (page 196).

The Royal Commission asks (page 205) whether a broader grooming offence has the potential to:

- educate staff and volunteers about the signs and dangers of grooming
- encourage staff and volunteers to comply with the code of conduct
- encourage staff and volunteers to report any noncompliance with the code of conduct.

While AHISA agrees such an offence may have these outcomes, there is also a risk that criminal offences for grooming – whether broader or narrow in scope – will inhibit reporting. We have noted above that human uncertainty is a deterrent to reporting; knowing that reporting a suspicion of grooming behaviour may lead to prosecution can put staff of schools in a position where they feel they are acting as judge and jury and possibly accusing the innocent. It may mean a delay in reporting until suspicions or beliefs can be firmed.

This is not to say that grooming offences should not be pursued; on the contrary. As noted in a report on child grooming prepared for Child Wise[2], there is a 'grave culpability' involved in grooming behaviours (page 36), which can also be directed toward families and organisations as perpetrators target their intended victim or victims. Rather, the possibility of a negative impact from a grooming offence points to the importance of education for staff in schools and other institutions if such offences are to fully realise their intent. As stated in the Child Wise report:

> Ultimately . . . public education is likely to be key to overcoming the difficulties inherent in both interception and proof of grooming offences. […] While police can proactively lay traps as it were to catch would-be online perpetrators, the only way to effectively intervene and disrupt offline grooming where there is usually no tangible physical evidence, is for the people involved to be sufficiently educated to identify the signs of grooming to then provide police with impetus they need to intervene as well as the evidence required to successfully prosecute such matters in Court. (Pages 34-5)

It is AHISA's view that the greatest encouragements to both recognition of grooming behaviours and reporting such behaviours evident in schools include:

- A school-based code of conduct that specifies unacceptable adult-student behaviours, ideally supported by a system such as NSW's reportable conduct scheme
- Regular professional education for staff on the code of conduct and identifying potential grooming behaviours
- A school culture that supports child safe practices
- Best practice in recordkeeping in regard to observations of staff and complaints from students
- Development of educational materials on grooming behaviours suited to school staff and parents
- Age appropriate education for students to help them discern what are appropriate and inappropriate behaviours of adults (and other children).

The Royal Commission's commissioned report, *Our safety counts: Children and young people's perceptions of safety and institutional responses to their safety concerns*, reveals that allowing student voice and listening to student voice on issues that concern students is a perceived weakness in school cultures that needs urgent attention. While most students surveyed in the study were confident in schools' efforts to keep them safe, it is deeply concerning that almost 50 per cent of those surveyed 'felt that adults at their school would only know that a child was unsafe if the child told them' (page 9).

As noted in AHISA's response to the Royal Commission's Consultation Paper on Best Practice Principles in Responding to Complaints of Child Sexual Abuse in Institutional Contexts (April 2016), schools would welcome information developed specifically for teachers on how to encourage students to speak out about behaviour that makes them uncomfortable. There is also a clear need – in addition to professional education for staff on identifying grooming behaviours – for further research into how schools and their staff can best signal to students that they *are* able to identify when a child is unsafe.

3. RECOMMENDATIONS

In the Child Wise report on child grooming mentioned above, it is noted that:

> The introduction of grooming legislation is to be welcomed, but cannot on its own offer the protection our children need. Awareness and action must be combined, and through these efforts, we can build child safe organisations and communities. (Page 39)

As NZ sexual assault prevention and response adviser, Melanie Calvesbert has argued:

> Child sexual abuse requires a multi-agency, comprehensive approach – we cannot simply 'arrest' our way out of it.[3]

These comments reflect the tenor of AHISA's argument in this submission: criminal offence responses are important weapons in the child protection armoury, but equally important are community-based prevention efforts – and particularly prevention education: without adequate education, staff in institutions cannot make the reports and provide the evidence that will lead to the successful prosecution of offences.

With community and institutional awareness of child protection at a peak, AHISA believes it is timely for priority to be given to the prevention of child sexual abuse in institutions. The evidence given at hearings of the Royal Commission and state and territory inquiries has created a groundswell of agreement that 'this should never happen again', and a willingness to act in unity to prevent further abuse in institutions.

AHISA accepts the argument expressed in the *Sentencing* report, that although an institutional criminal offence may be difficult to prosecute it has a 'symbolic role in marking the boundaries of acceptable and unacceptable behaviour' (pages 219-220). Other offences discussed in the Criminal Justice Consultation Paper that may be difficult to prosecute, including grooming offences and failure to report and failure to protect offences, also have a symbolic dimension. However, as we argue throughout this submission, regulation of institutional practice must be a precursor to establishing a criminal offence if these offences are to successfully meet their aims of offering justice to victims and setting community boundaries. Laws that leave a trail of dismissed cases will soon lose their symbolic impact.

The Royal Commission's research program has created a pool of evidence-based knowledge about child sexual abuse in institutions and its prevention, and also exposed knowledge gaps. It is AHISA's recommendation that Australian governments, working through the Council of Australian Governments, move urgently to fill these gaps and – through a 'multi-agency, comprehensive approach' – find ways to translate knowledge into information that schools can use to support child safe organisational practice and culture.

AHISA is keen to contribute to this work. Creating child safe schools is a primary responsibility for principals. It is also incumbent on all schools and principals to help rebuild the community's trust in schools and those who work in them and to make 'this should never happen again' not just an aspiration but a reality.

AHISA would welcome further inquiry on this submission.

Yours sincerely,

(Mrs) Karen Spiller

AHISA National Chair 2015-17
Principal of St Aidan's Anglican Girls' School, Qld

Further inquiries may be addressed to Ms Beth Blackwood, AHISA CEO, at AHISA's National Office, telephone 02 6247 7300, email Beth.Blackwood@ahisa.edu.au.

NOTES

[1] Further information about the standards is available on the Victorian Registration & Qualifications Authority (VRQA) website at http://www.vrqa.vic.gov.au/childsafe/Pages/standards.html.

[2] Randhawa T & Jacobs S (2013) *Child grooming: Exploring the call for law reform*. A report prepared for Child Wise, Melbourne, Australia.

[3] Calvesbert, M (2015) *Creating a holistic approach to child sexual abuse prevention*. Powerpoint presentation, available at http://aic.gov.au/media_library/conferences/2015-accan/accan_2015_presentations/wednesday_1_april/Melanie_Calvesbert_Creating_a_Holistic.pdf.

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3 October 2016

BY EMAIL beth.blackwood@ahisa.edu.au

Beth Blackwood
Association of Heads of Independent Schools of Australia

Dear Beth

Royal Commission into Institutional Responses to Child Sexual Abuse

1 Thank you for your instructions to assist AHISA with preparing submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse.

2 We have considered the Royal Commission's possible recommendation that States and Territories introduce 'failure to protect' offences for Principals and Schools modelled on section 49C of the *Crimes Act 1958* (Vic). We set out our views on this possible recommendation below.

3 Summary

3.1 Section 49C(2) of the *Crimes Act 1958* (Vic) effectively makes it a criminal offence for a Victorian Principal to negligently fail to remove a substantial risk that an adult associated with a School (such as an officer, employee, contractor or volunteer) will commit a sexual offence against a child. The prosecution will bear the burden of proof in establishing any such offence.

3.2 The offence was created on 1 July 2015. Our research indicates that no one has yet been charged with or convicted of the offence. We therefore have no case law to provide guidance on the scope of the offence.

3.3 However, in our view section 49C(2) of the *Crimes Act 1958* (Vic) should not be used as an exact template for any national offence. While the offence requires that three tests be satisfied, which will generally be difficult for a prosecution to achieve except in compelling cases, the requirement that there must be substantial risk is so imprecise that it provides little guidance for Principals wishing to avoid engaging in criminal behaviour.

3.4 Given that the Royal Commission has already recommended civil liability for Schools that fail to take steps to protect children from the risk of child sexual abuse, there appears to be no specific need for a similar criminal offence to be created that is aimed at Schools. In our view, tying civil liability to an institution's accreditation is likely to have a greater deterrent effect than the introduction of a criminal offence.

3.5 However, we consider that if a 'failure to protect' offence is introduced nationally for Schools, then any national offence for individuals should be narrower than section 49C(2) of the *Crimes Act 1958* (Vic) and reserved for only the most egregious of decisions by individuals.

3.6 We expand below on our reasons for the above view.

4 Section 49C(2) of the *Crimes Act 1958* (Vic)

4.1 We understand that the Royal Commission is considering a recommendation that an offence be introduced in each State and Territory similar to section 49C(2) of the *Crimes Act 1958* (Vic).

4.2 Section 49C(2) of the *Crimes Act 1958* (Vic) is as follows:

> *(2) A person who-*
>
> *(a) by reason of the position he or she occupies within a relevant organisation, has the power or responsibility to reduce or remove a substantial risk that a relevant child will become the victim of a sexual offence committed by a person of or over the age of 18 years who is associated with the relevant organisation; and*
>
> *(b) knows that there is a substantial risk that that person will commit a sexual offence against a relevant child-*
>
> *must not negligently fail to reduce or remove that risk.*

4.3 A Principal would clearly be a person with the requisite "power or responsibility to reduce or remove a substantial risk" within a School environment. A Board member would likely also fall within that classification.

4.4 A high-level analysis suggests that compelling circumstances will be required before a Court will determine that a Principal has committed an offence under section 49C(2) of the *Crimes Act 1958* (Vic). This is because an offence can only be made out if three key tests are satisfied:

(a) There must be a substantial risk that a particular adult associated with a School (such as an officer, employee, contractor or volunteer) will commit a sexual offence against a child (the **Substantial Risk Test**).

(b) The Principal must know that there is such a substantial risk (the **Knowledge Test**).

(c) The Principal must have negligently failed to reduce or remove that substantial risk (the **Negligence Test**).

4.5 It is likely these tests would be satisfied in circumstances where a Principal knew that a teacher would commit a sexual offence in the future, but then failed to do anything to stop that from happening. It is also likely that these tests could be satisfied if a Principal knew that a teacher had previously committed a sexual offence against a child, meaning that there was at least a real risk that the teacher will commit an offence again in the future, but then allowed the teacher to continue teaching at the School (or at a related School). It is clear that the offence was created specifically with these types of scenarios in mind.

4.6 However, these tests arguably apply to a much wider range of scenarios, without providing any clarity about what precisely must or must not be done by a Principal to protect children at a School, as we discuss below.

4.7 The Substantial Risk Test

(a) In a School environment, there necessarily must always be a risk that an adult associated with the School will commit a sexual offence. This was acknowledged by the Royal Commission in its Criminal Justice Consultation Paper.

(b) However, the Substantial Risk Test requires that there be a substantial risk, which must necessarily require there to be a greater likelihood that an offence will occur, and that risk must relate to a particular person associated with a School.

(c) Clearly, there are a number of factors that can increase the likelihood that a person will commit a sexual offence, and therefore the resulting risk. The Department of Justice in Victoria has noted a number of these factors in its *Betrayal of Trust Fact Sheet* relating to the capacity or history of a particular individual committing a sexual offence, and a particular child's vulnerability to being a victim of an offence. There will also be a number of environmental factors to consider in a School context, such as the extent to which School employees are able to be alone with students or interact with students outside of ordinary School hours.

(d) However, none of these factors demonstrate the point at which a risk, namely that a person will commit a sexual offence, suddenly becomes a substantial risk that can result in a criminal offence if a Principal negligently fails to reduce or remove that risk.

(e) Indeed, the Act makes no attempt to define substantial risk, and it appears the concept was not given much attention during the deliberative process that led to the offence being created. This is disappointing because Australian courts have failed to settle on a clear meaning of the concept, perhaps for fear of confining it too narrowly, which has resulted in substantial risk being described at times as:

(1) a strong possibility;[1]

(2) "knowledge that there is a good chance that an event may happen", as distinct from knowledge (or foresight) that an event will happen (which is classified as an expectation that something will happen);[2]

(3) a 'probable consequence' or an 'incident that was a likelihood'[3]; and

(4) a real and not remote chance regardless of whether it is more or less than 50%".[4]

[1] In the USA, a substantial risk has been taken to mean a strong possibility, as contrasted with a remote or even a significant possibility, that a certain result may occur or that a certain circumstance may exist. It is risk of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation, *see* Miller v. Fisher, 2010 U.S. App. LEXIS 12932 (7th Cir. Ill. June 23, 2010) -A substantial risk of serious harm means that the risk was so great that it was almost certain to materialize if nothing was done; and [Brown v. Budz, 398 F.3d 904 (7th Cir. Ill. 2005)] - In the context of prisoner cases, risks attributable to detainees with known 'propensities' of violence toward a particular individual or class of individuals; to 'highly probable' attacks; and to particular detainees who pose a 'heightened risk of assault to the plaintiff' are themselves sufficient to establish a 'substantial risk.'" [Brown v. Budz, 398 F.3d 904 (7th Cir. Ill. 2005)]

[2] *Boughey v R* (1986) 65 ALR 609, 633 (Brennan J).

[3] Charles Cato, 'Foresight of Murder and Complicity in Unlawful Joint Enterprises Where Death Results' (1990) 2 *Bond Law Review* 182, 201.

[4] *Boral Resources (Qld) Pty Ltd v Bundaberg Regional Council* [2014] QPELR 589, [18]; *R v Hung* [2013] 2 Qd R 64, [18].

(f) This lack of definition is important. In a general sense, the requirement that there must be a substantial risk that a particular persona associated with a School will commit a sexual offence against a child creates a strong barrier to a Principal being prosecuted for the offence. However, it is the existence of a substantial risk that effectively triggers an obligation on a Principal to take steps to reduce or remove that risk. Negligently failing to reduce or remove that risk will then result in a Principal committing a criminal offence.

(g) By failing to provide clarity about what exactly a substantial risk is, Principals are being left to guess what they need to do to avoid committing a criminal offence, and this may have significant unintended consequences.

(h) An illustration of this is useful. An obvious way to deal with a risk that a sexual offence will occur is to remove the individual creating that risk from a School. If a sexual abuse allegation is made against a teacher, it is easy for a School to stand that teacher down for the time being. If the teacher then admits to the allegations, or the allegations are proven in a court of law, the School will then typically have reasonable grounds for terminating the teacher's employment. It may therefore be justifiable for it to be a criminal offence for a Principal not to do these obvious things.

(i) However, what happens if allegations are made, the teacher denies those allegations, but there is no determination by a court about whether or not the allegations are substantiated? Many Schools will be able to describe a situation in which allegations were raised about a teacher by a student, and the allegations were reported to the police who decided there was insufficient evidence to press charges. Just because the police have decided not to charge the teacher, does not necessarily mean that the allegations are untrue. Is there a substantial risk at that point? What happens if the School then investigates the allegations, but is unable to either discount or substantiate the allegations on the balance of probabilities (which is a typical problem where allegations rest on a child's verbal complaint, and a teacher's verbal denial)? Is there a substantial risk or not?

(j) This uncertainty about whether or not there is a substantial risk could make it difficult for a Principal to decide what to do next. As you will appreciate, Principals and their Schools have to take into account a number of considerations when deciding whether to dismiss an employee. The School must consider the terms on which the employee was engaged, including any written contract of employment or enterprise agreement, and whether those terms permit the dismissal. The School must also consider an employee's prospects of making an unfair dismissal claim, which will generally require the employer to prove to the Fair Work Commission that the employee engaged in misconduct warranting dismissal.

(k) By introducing an offence that is predicated on an amorphous concept such as substantial risk, there are likely to be a number of circumstances – particularly where allegations of grooming are involved - where a Principal may be unreasonably forced to decide between:

(1) dismissing an employee in potential breach of a School's workplace obligations; or

(2) allowing an employee to continue working at a School, and potentially committing a criminal offence.

(l) We therefore consider that the Substantial Risk Test creates an unreasonable level of uncertainty for Principals faced with the risk of committing an offence for something they have failed to do (rather than actually done).

4.8 The Knowledge Test

(a) In a School environment, Principals must necessarily always be aware that there is a risk that officers, employees, contractors or volunteers will commit a sexual offence. The Knowledge Test offers protection by requiring that Principals know there is a substantial risk, rather than simply requiring that they ought to have known that there was a risk. An individual is generally taken to know that there is a risk if the individual is aware that the risk exists, or that it will exist in an ordinary course of events. This requires a higher level of awareness than merely holding a tentative belief or suspicion.[5]

(b) Further, the knowledge must be based on those matters personally known to the Principal. It is unlikely that a Principal can commit an offence if knowledge that there is a substantial risk depends on information not known to the Principal. This is particularly important in the context of a criminal offence, where a defendant cannot be compelled to give evidence.

(c) We therefore consider the Knowledge Test to be reasonable.

4.9 The Negligence Test

(a) When there is an incident of sexual assault at a School, or attempted sexual assault, it will always be easy to identify a number of things which – with the benefit of significant hindsight – a Principal or School could have done differently to avoid that incident.

(b) However, an offence is not committed merely because something, which could have been done, was not done. The Negligence Test require that a Principal negligently fail to reduce or remove a substantial risk that a sexual offence will be committed against a child. Making this out in a prosecution against a Principal is unlikely to be easy except in the compelling cases.

(c) Subsection 49C(3) of the Act reinforces the high burden on the prosecution of establishing criminal negligence, by stating that a person negligently fails to reduce or remove a risk if that failure involves a "*great falling short of the standard of care that a reasonable person would exercise in the circumstances*"[6].

(d) The report[7] that led to the introduction of the Victorian offence also indicates that:

(1) for a Principal to be found guilty, the State must prove that the Principal understood that a particular act (or a particular failure to act) posed a great risk of harm, yet they disregarded the risk and continued to act (or fail to act); and

(2) it would not be necessary to prove that the Principal intended to cause the resulting harm, however they must have intended to perform the act in question, and again they must have understood the risks associated with their conduct.

[5] Victoria, *Betrayal of Trust Fact Sheet*.
[6] This borrows from the common law concept of criminal negligence discussed in *Nydam v The Queen* [1977] VR 430 at 446.
[7] Family and Community Development Committee, Parliament of Victoria, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) 502-503.

(e) In our view, the Negligence Test creates a reasonable threshold for elevating a particular failure by a Principal to a criminal offence.

5 The introduction of a 'failure to protect' offence for Schools

5.1 We also note that the Royal Commission's *Criminal Justice Consultation Paper*[8] invites submissions on 'failure to protect' offences being introduced for institutions such as Schools.

5.2 We note that the Royal Commission's *Redress and civil litigation report* recommended that a non-delegable duty be imposed on Schools to prevent child sexual abuse, and that the burden be placed on institutions to demonstrate compliance with that duty. Such a duty can be seen in Victoria through the introduction of the *Child Safe Standards*, which require every School to adopt and publish specific procedures to eliminate or otherwise minimise the risks of child abuse within the School.

5.3 These duties, particularly when tied to a School's accreditation as an educational institution, can provide a strong deterrent for institutional child abuse. We therefore consider that there should be compelling grounds if a criminal offence is to also be introduced for failing to discharge those duties, and such grounds do not presently appear to exist. For example, adequate time has not been allowed to see if the creation of these new non-delegable duties for institutions adequately addresses community concerns about institutional child abuse.

5.4 In the circumstances, it would seem premature to us for the Royal Commission to determine that a criminal offence for institutions is necessary.

5.5 However if an offence for institutions is to be introduced, then for the reasons stated above, we take the view that any 'failure to protect' offence needs to be narrower in scope than section 49C of the *Crimes Act 1958* (Vic), and should provide greater clarity about what specifically must or must not be done to avoid an offence being committed.

5.6 We also suggest that if there is to be an offence for institutions, then there is less need for an offence against individuals. If there must also be an offence for individuals, it should be significantly narrower in scope than the offence for institutions, and reserved for the most egregious of behaviour by individuals that warrants criminal prosecution beyond the remedies already available against the institution itself.

5.7 It will also be important that an individual's right against self-incrimination is carefully considered before an offence against institutions is created. Institutions do not have a similar right, and individuals should not be forced to incriminate themselves, and potentially expose themselves to criminal prosecution personally, in the course of defending their institutional employer from an offence. Any criminal offence created for institutions should therefore be subject to a limitation that evidence in a prosecution of that offence is not admissible in proceedings against an individual for a similar offence.[9] Similar safeguards should be introduced in relation to individuals giving evidence in defence of an institution accused or failing the non-delegable duty of care recommended by the *Royal Commission* in its *Redress and civil litigation report*.

5.8 It is for similar reasons that any institutional offence should not impose a reverse burden of proof, or a similar evidentiary burden, which would effectively require an individual to give evidence in defence of an institution that could then expose that individual to criminal

[8] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Consultation Paper* (2016), 246.
[9] Similar to the approach taken in uniform work health and safety laws: see, for example, section 226 of the *Work Health and Safety Act 2011*.

prosecution personally. In any event, as a matter of general principle the prosecution should always be required to prove a criminal offence beyond reasonable doubt.

6 Next steps

6.1 Please do not hesitate to contact us if you would like to discuss any of these observations, but we otherwise look forward to reviewing your draft submissions to the Royal Commission when they are ready.

Yours faithfully
RUSSELL KENNEDY

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