

30 August 2015

## **Royal Commission into Institutional Responses to Child Sexual Abuse**

### **Submission**

Issues Paper 9

### **ADDRESSING THE RISK OF CHILD SEXUAL ABUSE IN PRIMARY AND SECONDARY SCHOOLS**

The comments and views expressed in this submission do not apply to all non-government schools or principals. The vast majority of non-government schools and principals act ethically, professionally and in the best interests of students and their families, but there is a small and increasingly influential group of principals, along with employer organisations, whose priority is the financial and reputational interests of their school, sometimes at the expense of student wellbeing and safety.

#### ***Issues Paper 9:***

***“Around 30 percent of the individuals who have spoken to the Royal Commission were sexually abused as children in a school environment, with non-government schools in particular accounting for a disproportionately high number of reports.”***

School counsellors in non-government schools have for some time been concerned about issues in their schools that relate to the work of the Royal Commission. The issues involve a range of policies and practices in schools, some of which result from the actions of individuals. Of greater concern are those that appear to be systemic failings, often influenced by the policies and practices of employer organisations such as the Association of Independent Schools NSW (AIS NSW). Of particular concern are the differences in policies and practices between government and non-government schools in New South Wales.

The issues of greatest concern to school counsellors relate to two documents, the “School Counsellors Kit” produced and distributed by the Association of Independent Schools NSW, and the “Privacy Compliance Manual” produced by the National Catholic Education Commission and the National Council of Independent Schools’ Association.

Both of these documents contain recommendations and policies that create barriers for students who may wish to report their concerns to a school counsellor. It is likely that both documents have been written by employer organisations with the intention of protecting the financial and reputational interests of non-government schools, at the expense of the rights, wellbeing and safety of students.

The sections of concern in the documents above can be interpreted in a historical context of the way non-government schools have operated over decades. The Royal Commission has brought to light actions of non-government schools which are not in keeping with modern day child protection procedures. The sections of the documents mentioned seem to be an attempt to legitimise anachronistic power structures that some non-government schools seek to maintain, in the face of increasing scrutiny and regulation by external authorities.

Details are outlined below with reference to specific Topics identified in Issues Paper 9

## **Topic A: General questions**

### **1 “How effective are the policies, procedures and/or practices schools have adopted to minimise or prevent, report and respond to risks and instances of child sexual abuse?”**

On 8 August 2013 Justice Sean Ryan, Chair of the Commission to Inquire into Child Abuse in the Republic of Ireland, spoke at a seminar organised by the Association of Independent Schools NSW. At the conclusion of his presentation Justice Ryan was asked for some of his findings which would be fundamental to protecting children from sexual abuse, or disclosing or reporting sexual abuse. Justice Ryan responded by recommending that schools needed to “create an avenue for children to talk...giving children a voice and ways to raise concerns.” It is ironic that one of the greatest concerns of school counsellors in non-government schools involves the rights of students to talk to school counsellors with confidence and safety. Fundamental to those concerns are policies of the AIS NSW.

School counsellors are concerned that policies and practices of the NSW AIS do not encourage children to report their concerns, and in fact some policies and practices create barriers which discourage children from reporting their concerns, the details of which are outlined below.

In line with Justice Ryan’s comments above, an important part of disclosure and reporting is giving children the opportunity and the confidence to disclose abuse and grooming, and inappropriate behaviour in general.

An example of barriers to disclosure and reporting are the policy and templates provided to non-government schools on pages 89 and 106 respectively in the “Privacy Compliance Manual’ referring to the work of school counsellors.

#### Section 26.4.1

“the School Principal is able to call for those records (School Counsellor’s) which directly pertain to a pupil of the school in the same way as he or she may call for the records made by any other School employee which relate to school matters.”

#### Annexure 4

“... if a student is not prepared to use the counselling services on the basis set out above the student will need to obtain counselling services from outside the school.”

The statements above have been widely interpreted as meaning that principals in non-government schools have the right to access, use and distribute, in any way they choose, sensitive information provided by students to a school counsellor, and that students will not be provided with support from a school counsellor if they do not agree with that right of the principal.

These documents also recommend that students must sign a disclosure form before the school counsellor discusses anything with them. One non-government school, based on AIS NSW policies, has written Guidelines for School Counsellors which prevents counselling taking place if a student even “raises concerns about the limits on confidentiality”.

“If a student raises concerns about the limits on confidentiality or says that they don’t want to have a discussion on that basis, the counsellor **must not** commence counselling services. Instead, the student is to be referred to counselling services that may be available external to the school.”

This process of consent and disclosure is unprecedented in the health and welfare sector.

School counsellors working in non-government schools acknowledge that confidentiality and disclosure need to be explained transparently and in an age appropriate and timely way. School counsellors are also very mindful of their responsibilities as mandatory reporters and employees, and are fully committed to do all they can to ensure the safety and wellbeing of students. Whilst it would be unethical and unlawful to mislead students, it is also of great concern that students will be discouraged from seeing a school counsellor because the principal insists that all information and files are available to them for use as the principal sees fit, supposedly to enable the school to fulfil its duty of care to the student. One is entitled to be sceptical and consider that the principal, on advice from the NSW AIS, actually requires the information to protect the financial and reputational interests of the school.

The policies and documents mentioned above also fail to recognise the value of having disclosures and reports being made directly to school based staff, rather than to “external counselling services”.

The NSW Ombudsman requires that **all allegations** of Reportable Conduct made to employees, including grooming, are reported to the Head of Agency (Principal) for investigation. This is a much lower threshold than outside of the education system where mandatory reporters must have **reasonable grounds to suspect significant harm** prior to notifying the police or Community Services. In other words, non-government schools, because of their legalistic and self-interested policies, could be forsaking disclosures from students that might prevent or disclose sexual abuse. By creating barriers that compel students to seek support external to the school, a non-government school may in fact create a greater, long-term litigious burden for itself. Complainants and litigants may do well to consider the barriers to help seeking that non-government schools have created in the past, and which are now formalised in current policies by the AIS NSW.

Finally, in relation to this Topic, an accepted dynamic of disclosing sexual abuse is for a child to test the level of trust they have in adults. If students are required to follow the procedures demanded by the AIS NSW, students will be hesitant to trust adults, seek help and disclose important information.

**3 “What are the particular strengths, protective factors, risks or vulnerabilities and challenges faced by schools within different education systems in preventing, identifying, reporting and responding to child sexual abuse? Is there any rationale for having different legislative obligations and policy requirements relating to child protection for government and non-government schools?”**

There are clear differences in the way non-government schools and government schools deal with interactions between students and school counsellors. The NSW Department of Education and Communities (DEC) produced “Legal Issues Bulletin 51” (attached) which is recognised by school counsellors, the Australian Psychological Society (APS attached) and the National Children’s and Youth Law Centre as being ethical, lawful and conducive to a student seeking help and support from a school counsellor.

In contrast, relevant sections relating to the work of school counsellors in the School Counsellors Kit and the Privacy Compliance Manual are regularly challenged by a range of professionals and organisations which interpret the documents as protecting the interests of non-government schools rather than encouraging help seeking by students.

The Australian Psychological Society has undertaken extensive and detailed consultation regarding the policies and procedures of the AIS NSW, and the APS position is clearly at odds with the AIS NSW. The APS document referred to above, in the opinion of school counsellors, is balanced and advocates strongly that school counsellors/psychologists must act lawfully, ethically and in the best interest of students. There are very few, if any discrepancies, between the policies of the APS and the NSW DEC. The differences between policies of the APS and the NSW AIS are significant and of great concern.

Other important differences between government and non-government schools relate to qualifications of school counsellors, systemic support and professional standards required by external bodies.

School counsellors in government schools are required to be registered psychologists or working towards registration. This is not the case for non-government schools where there are a wide range of qualifications.

The Department of Education and Communities expects and requires that school counsellors comply with the registration and ethical requirements of the Australian Health Practitioner Regulation Agency (AHPRA). Government schools see those qualifications and external reporting responsibilities as protective of students and the government school system as a whole.

In contrast, a representative group of non-government school principals, through the AIS NSW, has threatened to no longer employ psychologists as school counsellors if principals have any conditions place on access to, and use of, all information given to a school counsellor by a student or parents.

Finally, an important difference between school counselling services in government schools and non-government schools is the level of expertise and support provided by the NSW Department of Education and Communities offices. The Department provides extensive and structured support for school counsellors from qualified and experienced senior psychologists. In contrast, amongst its many employees, the Association of Independent Schools NSW does not employ or consult with any school counsellors/psychologists regarding the work of school counsellors. When principals from a non-government school seek advice from the AIS NSW regarding the work of a school counsellor, the principal will be advised by employment relations staff or lawyers. Needless to say the advice given is from that perspective, rather from a student well-being perspective.

**4 “Do the nine elements of the 2009 National Safe Schools Framework effectively make schools safer for students? Are there any additional elements schools should adopt?”**

The Safe Schools Framework (Updated 2013) will not be discussed in detail in this submission. Attention is drawn to Element 3, Policies and Procedures, and specifically 3.2 “Clear procedures that enable staff, parents, carers and students to confidentially report any incidents or situations of child mistreatment, harassments, aggression, violence, bullying or misuse of technology.”

School counsellors in non-government schools question whether the policies of the NSW AIS support this Element, and more importantly that the policies of the AIS may be contrary to “enable .... Students to confidentially report incidents or situations...”.

**Topic B: Governance and leadership**

**1 “How could school governance arrangements be strengthened to provide better protection for children? What should be the role of: students, staff, principals, school councils or boards, governing bodies and education departments in reviewing child safety within individual schools?”**

The question above does not mention the role of employer organisations in protecting children but it would seem important to include those organisations because of their involvement in policy development and operational advice. In NSW the role of the AIS NSW is fundamental to the management of child protection matters in many non-government schools. The role of the AIS NSW is problematic in child protection matters. The AIS is first and foremost an employer organisation which rightly acts in the best interests of its respective fee paying members. The AIS also purports to provide consultancy services for education, training and professional development, and in some cases gives specific and detailed advice about the management of child protection matters.

School counsellors in non-government schools hope that the Royal Commission will examine the possible conflict of interest that exists for the AIS NSW in its role as employer advocate, and on the other hand, advisor on child protection matters. The current regime of internal investigations of Reportable Conduct, as required by the NSW Ombudsman, may need to be examined in the light of evidence presented to the Royal Commission. Although the figures have improved recently, the Ombudsman has noted for a number of years, the disproportionately low number of child protection notifications received from non-government schools.

It is also of concern that the AIS NSW is involved in the professional development of principals and aspiring leaders in the non-government school sector. School counsellors and the APS are concerned that the questionable policies mentioned in this submission are provided to principals as “best practice” in student care when they are being criticised so widely and so consistently.

This submission deals with a very small part of the work of the Royal Commission, and school counsellors appreciate that they are but one of many groups and individuals who have an interest in the safety and welfare of students in schools. This paper has been provided to highlight policies and systemic issues that may play a part in creating barriers to care and prevent help seeking, which for some students and their families are crucial to preventing sexual abuse, and disclosing sexual abuse.

Bravehearts Australia summarise the concerns of school counsellors well, and advocate that:

“...organisations, businesses and individuals change the way they deal with child sexual assault such that the best interests and safety of children become the first priority.”

I would be happy to be contacted to discuss the contents of this submission.

Yours sincerely

John Hensley

# Managing Student Confidentiality in the School Setting: Guidance for Principals and School Psychologists

APS Professional Practice



# Managing Student Confidentiality in the School Setting:

## Guidance for Principals and School Psychologists

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# 1. Introduction

The Australian Psychological Society (APS) has been working for some time to negotiate and establish useful procedures that its members can follow in both public and independent schools with regard to the management of school psychologist/counsellor files. <sup>1</sup>Fundamental to this process is respect for the privacy of the individual student and their family with regard to their discussions with the school psychologist/counsellor as set out in the health records and privacy legislation in each state/territory. To provide the best care and support for students in schools, there must be a clear balance between informing Principals and staff in the schools about critical duty of care issues and the well-established rights of the students and their families to the protection of their privacy.

In every day practice within the school setting that balanced consideration centres on the following questions:

- To whom does the school psychologist/counsellor file belong and who may access the contents of that file?
- Under what circumstances should the school psychologist/counsellor share the information in that file?
- What processes and procedures are established within the school to ensure that the Principal (or delegated staff) are kept informed of matters crucial to the management of student (and/or school community) wellbeing?

## 2. Legislative and legal guidance

To seek authoritative guidance on record management in the school setting, the APS wrote to both the Psychology Board of Australia and the Office of the Australian Information Commissioner. The Society also sought independent legal counsel and advice. Some of the responses from these agencies are quoted below. The management of psychology records has also been addressed by the Education Department of NSW in their Legal Issues Bulletin, *School Counsellors, Confidentiality and the Law* (No 51, May 2012). This Bulletin clearly sets out the fundamental principles that should guide the management of privacy in the school. The consistent conclusions from all these sources are as follows:

- 2.1 The school psychologist/counsellor is obligated to protect the rights to confidentiality and privacy of the student under privacy, health records and the health professions registration legislation. The APS Code of Ethics has been adopted by the Psychology Registration Board of Australia (PsyBA) and therefore applies to all registered psychologists. The PsyBA has stated that the national law under which it performs its functions specifies that the Code is admissible in proceedings under national law or law of co-regulatory jurisdictions, e.g. states and territories. It goes on to further say that “employers of psychologists need to be aware of psychologists’ obligations as a registered professional”. Specifically, the PsyBA states that “a psychologist’s obligations as an employee of an organisation do not exempt them from the responsibility to practice in accordance with the provisions of the Code or from disciplinary action being taken”. The Code thus provides a significant protection for the school in that it presents ways of holding its school psychologists/counsellors to high professional standards.

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<sup>1</sup> The use of the term ‘psychologist/counsellor’ recognises the practice in some jurisdictions of referring to school psychologists as ‘counsellors’. This document is addressed to registered psychologists in schools whatever their official title.

- 2.2 Many of the relevant documents make clear that there are exceptions to the primacy of the protection of confidentiality. The Legal Issues Bulletin, for example, states that the “confidential information obtained in the course of their provision of psychological services” are disclosed only with the consent of the client (or legal guardian) or where there is a legal obligation to do so. The Office of the Australian Information Commissioner, which has responsibility for the Australian Privacy Principles, also stressed the importance of maintaining protection of psychologist’s records within the bounds of the primary purpose of that record. The Office indicated that use or disclosure of sensitive information held by a school psychologist/counsellor for a secondary purpose, without meeting the very strict exceptions, is a contravention of the Privacy Principles. A Principal accessing a record for administrative or disciplinary purposes would be considered using it for a secondary purpose. To quote from the correspondence received from the Australian Information Commissioner, “if the psychologist is an employee of the school and the school seeks to use the information for a secondary purpose the school will need to be confident that an exception applies.”
- 2.3 As part of their obligations to protect the privacy of the student, the school psychologist/counsellor must take responsibility for the protection of the information in the file. It is very clear from the interpretation of the legislation set out in the Bulletin that the school psychologist/counsellor is responsible for deciding when and how information from the file is shared. It is also clear with regard to the way in which the privacy legislation is interpreted that such protection of the privacy of the student is incumbent on any person in a counsellor role who is collecting such sensitive information regardless of whether that person is a registered psychologist.
- 2.4 While there is a clear requirement for the school psychologist/counsellor to maintain privacy, there is also an obligation to share important, relevant and critical information obtained from the student with the Principal and the rest of the staff where appropriate. It is clearly indicated in all documents referred to that the ultimate purpose and objective of the professionals in the school setting is the wellbeing and protection of the students. To this end, school psychologists/counsellors must be sensitive and aware of their obligations to the Principal, the teaching staff, the parents and the other students in the school with respect to the information they glean as a result of their relationship with a particular student. Regular and appropriate communication is as essential as the protection of privacy.
- 2.5 The Legal Issues Bulletin and the Australian National Privacy Principles explain how and when the exceptions to the principle of the protection of privacy of the student may occur without student or parental consent. These are usually legislated exceptions such as mandatory reporting of abuse/harm, or children at risk of abuse/harm, or in association with the requests of the Court system. It is important to note that when the school psychologist/counsellor is confronted with a situation that requires a mandatory report on behalf of a child, this responsibility lies with the psychologist and cannot be delegated to others. In such a situation, the Principal should be informed and may work collaboratively with the psychologist/counsellor.

2.6 It is apparent from both the Legal Issues Bulletin and the requirements of privacy legislation that the school psychologist/counsellor, while not being the owner of the file (school property), does manage the access to it. In response to the question of whether the school psychologist/counsellor should disclose confidential information to other staff, including executive staff, the Bulletin insists that this is a breach of the student's confidentiality and privacy, unless the conditions for an exception are met. "The management of the information collected" and the privacy of the student remains the responsibility of the school psychologist/counsellor. Any idea that the Principal, or a delegated staff member, may access or read the confidential file is a breach of the legislation. It is important to note that the psychologist's obligation to share important information refers to verbal communication or brief written reports rather than providing staff with access to the actual file. This is important because the actual file may contain sensitive information or content that is irrelevant to the current inquiry or issue.

### 3. Procedures and guidelines in the school

The advice received by the APS suggests that the State education system in New South Wales, in line with practices in other States and Territories, has satisfactorily resolved the tension that exists between privacy and the school's need to know.

To ensure that these principles are applied and implemented in each school, whether public or independent, it is suggested that firstly, a set of agreed procedures, in the form of a school psychological services policy, be established for each workplace. Such policies must comply with the legislated requirements and indicate the procedures that will be implemented to protect the privacy of school psychology/counselling notes, how they will be stored and their content protected, and what will occur when the current psychologist leaves the school. Secondly, a set of procedures is required to ensure regular and appropriate communication occurs between the school psychologists/counsellors and school staff, including the precise process that will be followed with regard to legal and mandatory requests and obligations.

Once suitable policy and procedures exist and are compliant with the legislation and the ultimate wellbeing of the school community, they should be conveyed to all parties and should form an adjunct document to the employee role and services statement. In such circumstances there should never be a need for misunderstanding or dispute and the rights and obligations of all involved should be readily met.



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# Legal Issues Bulletin

No. 51 published May 2012

## SCHOOL COUNSELLORS, CONFIDENTIALITY AND THE LAW

### What issues does this bulletin address?

This bulletin examines the circumstances where there is a legal obligation to disclose confidential counsellor information and circumstances in which a student's confidential counsellor information can be disclosed to a person with legal authority to act on behalf of a student.

Advice on confidentiality can also be found in the School Counsellor Manual, Section 5.11 "Confidentiality and School Counsellors".

Information obtained in a confidential counselling context can be disclosed to others with the student's or parent's (as appropriate) informed consent. This bulletin does not deal with the issue of informed consent. Advice regarding consent in the context of working with children and young people is available in the Australian Psychological Society's "Guidelines for Working with Young People".

### What is the legal context to counsellor confidentiality and what do some of the terms used in this bulletin mean?

Counsellor confidentiality is quite a complex area which is affected by a range of legislation. New South Wales privacy laws apply to all State government agencies and their employees including school counsellors. The two major acts are the [Privacy and Personal Information Protection Act 1998](#) and the [Health Records and Information Privacy Act 2002](#).

The *Privacy and Personal Information Protection Act* relates to the collection, use and disclosure of personal information. 'Personal information' is defined very broadly in the Act to mean "information or opinion about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion".

The *Health Records and Information Privacy Act* deals with the collection, use and disclosure of health information. 'Health information' is also broadly defined to mean personal information that is information or opinion about the physical or mental health or a disability of an individual. The *Health Records and Information Privacy Act* also applies to both public and private sector health service providers.

A range of more detailed information about New South Wales privacy legislation and its application to the Department is available on the Legal Services intranet site at <https://detwww.det.nsw.edu.au/lists/directoratesaz/legalservices/ls/privacy/index.htm> (Intranet only).

In this bulletin information obtained in the context of a confidential counselling relationship is referred to as confidential counsellor information.

The term 'confidentiality' is used to refer to the professional obligation of counsellors not to disclose to others information obtained in the context of a confidential counselling relationship.

Use of the word 'privacy' is a reference to the rights and obligations under New South Wales privacy legislation mentioned above.

## What is the ethical context to school counsellor confidentiality?

The obligation of confidentiality is central to the practice of the profession of psychology. The assurance of confidentiality given by psychologists to clients is very important in enabling the psychologist-client relationship to work effectively. This principle applies to the work of school counsellors.

The Department of Education and Communities requires new appointees to school counselling positions be eligible for registration as a psychologist with the Psychology Board of Australia. The registration of psychologists is governed by the National Health Practitioner legislation and the Psychology Board of Australia (the Board) <http://www.psychologyboard.gov.au>.

The Board advises that the standards of psychologists are governed by the Code of Ethics of the Australian Psychological Society. The Australian Psychological Society's Code of Ethics [http://www.psychology.org.au/Assets/Files/Code\\_Ethics\\_2007.pdf](http://www.psychology.org.au/Assets/Files/Code_Ethics_2007.pdf) identifies the circumstances under which psychologists may disclose confidential information obtained in the course of their provision of psychological services.

The key relevant part of the Australian Psychological Society's Code of Ethics, Clause A.5.2, states:

A.5.2 Psychologists disclose confidential information obtained in the course of their provision of psychological services only under any one or more of the following circumstances:

- (a) with the consent of the relevant client or a person with legal authority to act on behalf of the client ,
- (b) where there is a legal obligation to do so

## In what situations may there be a legal obligation to disclose confidential counsellor information?

The following paragraphs outline those situations and relate when exceptions may apply. Previously issued legal issues bulletins are referred to where relevant and further information is given of specific relevance to counsellors.

### Subpoenas:

Generally, if documents containing confidential counsellor information are required by the terms of a subpoena they must be produced to the court.

[Legal Issues Bulletin No 25 - Subpoenas](#) provides advice regarding steps to be taken when a subpoena is served and refers to action to be taken by school counsellors in respect of school counsellor files. It is important counsellors determine precisely which documents are required by the terms of the subpoena. It is not necessary to create documents in order to answer a subpoena. If counsellors are in doubt as to which documents are required they should contact Legal Services Directorate for advice. Counsellors should not produce documents containing confidential counsellor information that are not covered by the terms of the subpoena.

### Exceptions:

Confidential counsellor material may attract the exception of a protected confidence where the subpoena has been issued in criminal proceedings and the material sought relates to the victim of a sexual assault. [Legal Issues Bulletin No 23 - Protected confidences in relation to School and TAFE counsellor files concerning victims of sexual assault – update](#) provides advice in relation to protected confidences.

Another exception applies when the documents sought under subpoena relate to reports regarding children and young persons at risk of harm. School counsellors and other staff members usually make reports to the Department of Family and Community Services through the school principal but there may be circumstances where they make a report in good faith to the Department of Family and Community Services or to a person who has the power or responsibility to protect the child or young person. Generally the counsellor or staff member cannot be compelled to produce the report or a copy of, or extract from it, or to disclose or give evidence of any of its contents. The same protection applies to a referral made to the Child Wellbeing Unit. [Legal Issues Bulletin 25](#) deals with this exception. However there are some proceedings in which this exception does not apply. Additional advice may need to be sought from Legal Services Directorate in this area.

**Sharing information with other agencies in accordance with Chapter 16A Children and Young Persons (Care and Protection) Act 1998 ("Chapter 16A"):**

Under [Section 245D of Chapter 16A](#) a prescribed body (“the requesting agency”) may **request** the Department to provide it with any information held by the Department that relates to the safety, welfare or wellbeing of a particular child or young person. If the Department receives such a request it is required to comply if it reasonably believes the information requested may assist the requesting agency for any purpose specified in the section. The purposes specified include making any decision, assessment or plan or conducting any investigation or providing any service relating to the safety, welfare or wellbeing of the child or young person. If the confidential counsellor information is captured by the request, then it must be supplied. Where psychological information might be misinterpreted by the requesting agency consideration should be given to the way in which that information is supplied. Advice on this can be sought from District Guidance Officers or Student Support Coordinators – Student Counselling and Welfare.

Exception:

There is a “public interest” exception to the obligation to provide the information requested. For example if provision of the information might damage or undermine the relationship between the counsellor and the student, it may be against the public interest to provide it. This has to be weighed with relevant considerations regarding the safety, welfare or wellbeing of the student. If a counsellor thinks this exception may apply in a particular case, advice should be sought from District Guidance Officers or Student Support Coordinators – Student Counselling and Welfare.

Under [Section 245C of Chapter 16A](#) a prescribed body (including a school) may, **without a request**, provide information relating to the safety, welfare or wellbeing of a child or young person to another prescribed body if the prescribed body reasonably believes the provision of information would assist the recipient for a purpose consistent with that section. The purposes specified include making any decision, assessment or plan or conducting any investigation or providing any service relating to the safety, welfare or wellbeing of the child or young person. A school counsellor may provide confidential counsellor information in these circumstances. A person acting in good faith providing information in accordance with Chapter 16A cannot be held to have breached any code of professional ethics or departed from any accepted standards of professional conduct. [Legal Issues Bulletin No 50. - Exchanging Information with other Organisations Concerning the Safety, Welfare or Wellbeing of Children or Young People](#) provides advice in relation to the disclosure of information in accordance with Chapter 16A.

#### **Disclosure in accordance with a request by the Department of Family and Community Services under Section 248 Children and Young Persons (Care and Protection) Act 1998 (“Section 248”):**

[Section 248](#) empowers the Department of Family and Community Services to obtain information relating to the safety, welfare and wellbeing of a particular child or young person from a school (or other prescribed body). If confidential counsellor information is captured by the request, then it must be supplied. A person acting in good faith providing information in accordance with section 248 cannot be held to have breached any code of professional ethics or departed from any accepted standards of professional conduct. [Legal Issues Bulletin No 47 - Requests for Information from Other Government Agencies](#) provides further advice in relation to requests made by the Department of Family and Community Services under Section 248.

#### **Notification of risk of harm regarding children and young persons:**

Under child protection legislation and the Department’s procedures [Protecting and Supporting Children and Young People](#) (the procedures), where any departmental employee, including a counsellor, has reasonable grounds to suspect a child or young person is at **risk of significant harm**, and the grounds arise in the course of the employee’s work, a report must be made to the Department of Family and Community Services. Where the employee has reported it to the principal or workplace manager he/she must ensure the principal or workplace manager has reported it to the Department of Family and Community Services. If the employee believes the principal or workplace manager has not made the report and still has concerns about risk of significant harm, the employee must report it to Family and Community Services directly. Where information giving rise to a counsellor forming the view there are reasonable grounds to suspect a child or young person is at risk of significant harm, is confidential counsellor information, this is not a basis for failing to report.

Where an employee has reasonable grounds to suspect a child is at **risk of harm (less than a risk of significant harm)** and those grounds arise in the course of the employee’s work, the employee must report it to the principal or workplace manager. The principal or workplace manager must then take appropriate action in accordance with the procedures. Where there is doubt about whether the risk of harm is significant the procedures must be followed. The fact information giving rise to a counsellor forming the view there are reasonable grounds to suspect a child or young person is at risk of harm is confidential counsellor information, is not a basis for failing to report to the principal or workplace manager.

#### **Reporting improper conduct of a staff member:**

The Department has a duty to provide a safe educational environment for children and young people. That duty includes responding to allegations of a child protection nature made against employees, including volunteers, with respect to children and young persons.

**Child protection, procedures for responding to allegations against employees** sets out the procedures to be followed in response to such allegations. They reflect legislative requirements upon the Department to report to the Department of Family and Community Services, the NSW Ombudsman, the Commission for Children and Young People and the Independent Commission Against Corruption. If there is an allegation (including an anonymous allegation) of a child protection nature against an employee the principal or workplace manager must be informed. If the allegation is against the principal or workplace manager, their supervisor must be informed. The fact the allegations against an employee, including against a volunteer, is confidential counsellor information, is not a ground for failing to report to the principal or workplace manager nor to the supervisor.

## **Disclosure of information about a student who represents a risk of injury to themselves or others:**

The Department and all school staff including counsellors have obligations relating to duty of care and work health and safety. Sometimes a student will disclose information to a counsellor that gives rise to concerns about the safety of the student, of other students and/or of staff. (For advice about confidential counsellor information and children at risk of harm see “**Notification of risk of harm regarding children and young persons**” above)

Counsellors need to exercise careful judgement when deciding whether confidential counsellor information should be disclosed to the principal, workplace manager or others who need to know because of safety concerns. In coming to a decision counsellors need to consider a number of matters including:

- the seriousness of potential injury should the risk to safety materialise, and the likelihood of the risk materialising,
- whether the information is relevant to the risk of injury,
- whether the risk is real and proximate not hypothetical or remote. A risk is remote and hypothetical when, for example, it is contingent upon other unlikely events, and
- the currency of the risk.

For example, a student discloses to a counsellor in a confidential counselling context that he is about to attend a practical class where powered machinery will be used and he is under the influence of prescription medication that is making him dizzy. The counsellor’s evaluation of the risk in the circumstances is: (i) there is a risk that could give rise to serious injury and its materialisation is reasonably likely (ii) the fact the student is under the influence of medication that is making him dizzy is relevant to the risk arising from the machinery, (iii) the risk to the student or to other students or staff is real and not too remote, and (iv) the risk is current. In such circumstance information sufficient to inform action should be disclosed to those who need to know in order that safety can be maintained.

Section 5.11 of the School Counsellor Manual “Confidentiality and School Counsellors” states circumstances “where one or more individuals may experience serious harm if someone with the power to act is not informed” include: (i) threat of harm by a student to self or others (for example suicide or anticipated violence) (ii) pregnancy of a student under 16 years of age (iii) use and/or possession of illegal substances at school or at a school related activity. In these circumstances information sufficient to inform action must be disclosed to persons who need to know.

## **Disclosure under part 5A Education Act:**

Part 5A, Division 2 of the *Education Act 1990* (“Part 5A”) provides that the Department, a non-government schools authority, a government school or a registered non-government school may request a school to provide information about a particular student that would assist in:

- assessing whether the enrolment of the student is likely to constitute a risk (because of the behaviour of the student) to the health and safety of any student (including the student) and
- developing and maintaining strategies to eliminate or minimize any such risk.

If confidential counsellor information is caught by a request made under part 5A then it must be provided. However Part 5A does not require the disclosure of information about the identity of a person who has made a notification to the Department of Family and Community Services concerning a child or young person at risk of harm.

## **Reporting knowledge of a serious criminal offence:**

If someone knows or believes a person has committed a serious criminal offence (an offence punishable by imprisonment for 5 years or more) and he/she has information that might be of material assistance, it must be reported to the police unless there is a reasonable excuse not to report. The fact the knowledge or belief was formed or the information was obtained in a confidential counselling relationship is not of itself a reasonable excuse for failing to report. Prosecution of persons from certain categories

of professionals including counsellors, for failure to report a serious criminal offence cannot occur without the approval of the Attorney General.

### What if I disclose information when not actually required?

Disclosure of information not required by the terms of the request or not otherwise legally required could constitute a breach of the student's confidentiality and privacy. Care needs to be taken in deciding whether the information is required by the terms of the request or circumstances and requires disclosure.

### Can I disclose confidential counsellor information to other departmental staff?

Generally, the disclosure of confidential counsellor information to non-counselling staff, including executive staff, is a breach of the student's confidentiality and privacy. Non-counselling staff, including executive staff, should not request the disclosure of counsellor confidential information unless legal or policy obligations require it. **This advice does not at all negate the practice where counsellors, with the student or parent's (as appropriate) consent, make appropriate disclosures to staff or others to support the student's educational success and wellbeing.**

Notwithstanding the confidential nature of a counsellor's role it is important for counsellors to keep their school principal informed about their work in general terms including negotiating and evaluating work plans.

### In what circumstances can confidential counsellor information be disclosed to a person with legal authority to act on behalf of the student?

Generally parents and caregivers have legal authority to act on behalf of a child in matters concerning the child's schooling. If in a particular case a question arises about disclosure of confidential counsellor information to a parent or caregiver who may not have legal authority to act on behalf of a child, advice should be sought from Legal Services Directorate.

The Department's [Privacy Code of Practice](#) (Intranet only) made under the *Privacy and Personal Information Protection Act* provides that when it is in the best interests of a preschool or primary aged student, or student with a significant intellectual disability, and where the student has been referred to a counsellor by a parent or caregiver, the counsellor may disclose personal information to the parent or caregiver without breaching the student's privacy. Disclosure of personal information to the parent or caregiver in these circumstances is also not a breach of the student's confidentiality.

However if the information is health information the counsellor may only disclose it to an "authorized representative" of a student if the student is incapable by reason of age, illness, injury, physical or mental impairment of understanding the general nature and effect of the *Health Records and Personal Information Protection Act* or of communicating their intentions with respect to the Act. An authorised representative includes a person with parental responsibility for the student.

If the school initiates individual psychological or educational assessment, parental permission should be obtained for a school student of any age (see Section 2.1.3 of the School Counsellor Manual "Referral and Reporting Procedures") and the parents/caregivers should be informed of the outcome of the assessment. Parental/caregiver permission should also be obtained for any significant therapeutic interventions and they should be informed of the outcome of any such interventions.

### What should I do if I am in doubt about whether to disclose information?

Issues in this area can be complex. If counsellors are in doubt advice should be sought from Legal Services Directorate. It is not a breach of confidentiality or of privacy to seek such advice from Legal Services. However a legal officer should only be provided with the information they need to know in order to properly advise.

## About Legal Services

Legal Services provides legal support and advice to staff in schools, colleges, regions, state office directorates and specialist boards and authorities. It arranges for the Department to be represented before a range of courts and tribunals and assists with the preparation of legal documents. It is also available to provide legal advice in respect of any departmental policies or procedures that may have a legal complexion.

The Legal Services Directorate can provide legal advice to departmental staff only. It is not able to provide legal advice or assistance to parents, students or members of the public.

The Legal Services Directorate posts a large amount of information on the Department's intranet. This includes:

- all current Legal Issues Bulletins
- questions the Legal Services Directorate most frequently encounters
- information about the Government Information (Public Access) Act
- links to other related legal web-sites
- other information for the use of schools and TAFE

The Legal Services Directorate continues to offer its telephone advice service to DEC personnel.

The service is available between **9.00am to 5.00pm** weekdays.