

Education Law Today

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Issue 2



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MAKINSON & d'APICE
— LAWYERS —

Governor or Governance?

Issues of Governance arising in Private Schools

Anyone with children is aware of the difficulties that are faced by the acutely balanced relationship between the Board and the Principal of a Private School. We have found that it's good to remember where the boundaries lie and what the overall purpose of each member of the Board and the Principal are. Some of the handy hints below should set you on the right course if you are experiencing difficulties in this area.



Principal and Board

In essence, the role of the Board is not to manage the day to day issues at School but rather to consider the strategy for a School on a long term (measuring decades) basis. They will ask themselves questions such as "What should this School be like?" or "What sort of policy should we apply in respect of enrolment?" rather than the particularities of individuals applying for a place in the School or students at the School. While it is important that the Principal and the Board work harmoniously, the Principal is effectively implementing the policies that are strategised and designed by Board members.

Unique Context and Culture

The key to good governance in Private Schools is to consider the unique situation in which the School finds itself. It may have stakeholder groups ranging from current parents to former parents of students and from donors to the School to staff. Government will also play a role, in

granting funding or contracts and issuing tax concessional endorsements. All these stakeholders are finely balanced with the very real issues brought to the fore by directors who may be the parents of current students and who wish to focus on particular issues. Those directors who are parents of current students should remember the broader picture and turn their minds to the long term strategy of the School rather than the minutiae of day to day activities.

Commercial Directors

A creature that may find itself in an unfamiliar territory is the director of a School who is more familiar with operating in a commercial context. Private Schools are Not-For-Profit arenas and they will be less financially and more often be religiously or educationally focussed. They may be slower to make decisions and less structured in the way they make them. They may also give great consideration to the politics arising from the involvement of families in the area who have had generations of children attend the School.

Not-For-Profit Boards tend to be much larger than For-Profit Boards because the persons with roles on the Board can comprise educators as well as parents, alumni, teachers, donors and persons highly respected in the local community. Directors coming from the For-Profit world need to be aware that this can lead to greater deliberations between directors and longer meetings, more subcommittees and indeed more time. If the role on the Board is purely an unpaid role then it will necessarily cut in to personal and family time. As a result, many Board members find that the work in the Not-For-Profit organisation can be so intense that they burn out, leading to a greater turnover of directors on Not-For-Profit Boards.

The focus of a Not-For-Profit director also needs to be significantly different to that of its For-Profit counterpart. The reaction of an organisation that is unable to balance its budget might be to increase the productivity of staff in order to increase income received by the organisation, but the Not-For-Profit director needs to keep a keen eye on the mission and purpose of the organisation, which may sometimes result in running projects that preserve the moral and mission of the organisation but do not increase the income flow in to its coffers.

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Governor or Governance? Issues of Governance arising in Private Schools

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There is no point in a Not-For-Profit director announcing that it had a balanced budget for its organisation at a time when student applications are lacking and the state of the School is in disarray. If the School has a commitment, both on paper and in practice, of believing in a particular method of the delivery of education, adherence to this belief will be rewarded by the organisation much more readily than a balanced budget¹.

Education Policy Committee

One Harvard Business School graduate suggests that Not-For-Profit Schools in the United States often have a Committee charged with understanding and evaluating how well the organisation and its professionals are achieving the mission or morale of the School. One way that he suggests that a School achieved this was by having the Head of another School on the Educational Policy Committee to monitor progress².

“the Not-For-Profit director needs to keep a keen eye on the mission and purpose of the organisation, which may sometimes result in running projects that preserve the moral and mission of the organisation but do not increase the income flow in to its coffers”

Conflicts of Interest

Not surprisingly, the one area that commercial directors and Not-For-Profit directors will have in common is that they must both avoid conflicts of interest arising on the Board. For example, if the School would, by appointing a particular person as Chair, be sending a message to the School and wider community about how a particular issue that the School is facing will be resolved, then it may be recommended that a different Chair be selected, depending on whether the Board considers that that message should be sent³.



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¹Makinson & d'Apice acknowledge the assistance of the Article "Working on Non-Profit Boards: Don't Assume the Shoe Fits" YF Warren McFarlan, *Harvard Business Review*, November-December 1999.

²IBID, p9.

³IBID, p11.

Fundraising – The Road to Uniform Licensing Laws

At a time when a lot of charities are conducting their winter appeals, schools and educational institutions should remember that if they too are undertaking Australia-wide fundraising, they need to ensure that they obtain advice in relation to whether a licence is required under the relevant legislation of each of the jurisdictions that they are operating in.

Until Unification

Although the Council of Australian Governments (COAG) have indicated that in each jurisdiction (except for the Northern Territory) they have an intention to move towards uniform legislation in this area, presently the best advice that we can give is that you should be seeking to be registered in each State or Territory in which you intend to raise funds unless the school is subject to an exemption under the legislation for the particular State or the Territory. There are various exemptions that apply both in the education and in the religious sector. We recommend that charities obtain specific advice in relation to their activities and whether they can be characterised as religious organisations or educational institutions.

Religious Organisations

Religious organisations are exempt in New South Wales, Victoria, Queensland and Tasmania. New South Wales, Victoria and Queensland legislation define religious organisations as those which are proclaimed under section 26 of the *Marriage Act 1961* (Cth) or which are prescribed by the Regulations to the Act. In addition, the *Charitable Fundraising Regulation 2008* (NSW) lists 32 other religious bodies exempted by regulation from the operation of the Act, including such bodies as New South Wales Ecumenical Council Relief Institute Incorporated and Grace Evangelical Church Newcastle Inc.

Educational Institutions

Exemptions for Universities are to be found in the *Charitable Fundraising Regulation 2008* (NSW) (CFR) at regulation 8. In Victoria's *Fundraising Act 1998* (FA) section 16(b) sets the exemption for Universities.

TAFE is covered by Regulation 4(a) of the *Charitable Fundraising Regulation 2008* in New South Wales (which provides that if the donation is representative of a "genuine fee or charge" for, among other things, educational facilities

or services, then it will not be considered to be a fundraising appeal), while again, section 16(b) of the FA deals with the exemption for TAFE institutions in Victoria.

Government schools are granted an exemption under regulation 4(a) of the CFR on the same terms as for TAFE institutions. Section 16(a) of the FA provides an exemption for government schools in Victoria. School Councils, Parents Associations and school fees also have a general exemption under regulation 4(a) of the CFR and section 16(a) of the FA provides a similar exemption. Section 7(3)(h) of the *Charitable Collections Act 2003* and regulation 6(1)(a) of the *Charitable Collections Regulation 2003* in the Australian Capital Territory provide for an exemption in this area.

Kindergartens and child minding centres are granted an exemption under regulation 4(b) of the CFR (if it is a "genuine fee or charge") and section 16(ba) of the FA deals with this issue also.

Offences

Educational institutions are reminded that it is an offence in New South Wales to conduct a fundraising appeal without an authority from the NSW Office of Liquor, Gaming and Racing and that they must ensure that volunteer fundraisers are informed of the conditions on the authority before they energetically seek donations.

We also emphasise that in some States and Territories conducting fundraising collections without an authority from the relevant department or refusing to answer the relevant department's questions about your fundraising event carries a sentence of imprisonment.

Schools, Universities, TAFEs and child minding centres should watch this space for further developments in the area of fundraising and seek advice on the specifics on exemptions that may apply to them.



Commercial Agreements

Like any other commercial organisation, schools regularly enter in to commercial agreements with third parties. These are usually for the supply of particular goods or services.

In my experience, the areas which have resulted in the most dispute are:

- contracts for photocopying/printing equipment;
- contracts for waste management services;
- contracts for cleaning services;
- contracts for canteen services;
- contracts for the provision of school uniforms.

Photocopying and Waste Disposal Contracts

There are a few points for schools to bear in mind before entering in to such contracts.

First, make sure that the price being offered by the supplier is competitive. Do not necessarily accept the first price which is offered and check with multiple suppliers to see what is being offered in the market place. Prices can vary dramatically from supplier to supplier.

Second, check that the terms and conditions are appropriate. What provisions are there to cover the situation where you are not happy with the quality of services provided; can you withhold payment; what does the agreement say is to occur if a dispute cannot be amicably resolved between the parties etc.

Third, make sure that the contract actually sets out what it is that the supplier is providing in return for the fees being received by them. All too often this is not set out in the contract.

Finally, make sure that you understand the termination provisions in the contract. Many of these contracts have an automatic roll-over provision which means that, after say the first 12 months, the contract automatically continues for another 12 months unless a Notice of Termination is given at least three months prior to the end of the first term. This can have significant consequences if the school wishes to terminate these services part of the way through the contract term.



Cleaning Contracts

A number of issues commonly arise in respect of such contracts including:

- the cleaner's access to the school premises;
- precisely what is to be cleaned and how often;
- to what standard the cleaning is to be undertaken;
- provisions about the storage of chemicals or other dangerous items on the school property;
- deliveries onto the school property;
- insurance;
- indemnities;
- clauses requiring compliance with child protection requirements;
- term of the contract, holding over and termination;
- dispute resolution processes.

Canteen Contracts

Some of the more common issues which arise out of such contracts include:

- will the canteen operator licence part of the school premises to conduct the canteen during certain times?;

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Commercial Agreements

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- the nature and quality of food and drink to be supplied from the canteen;
- who owns the fittings and fixtures in the canteen?;
- precisely what services will be provided by the canteen operator;
- cleaning of the canteen area;
- compliance with health and other statutory regulations;
- insurance;
- indemnities;
- compliance with child protection requirements;
- term of the agreement/holding over/termination arrangements;
- dispute resolution processes.

School Uniform Contracts

There are a number of issues which commonly arise in these contracts including:

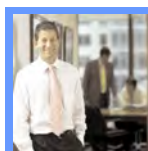
- licensing arrangements where the operator is to use part of the school premises to conduct their business;
- profit sharing arrangements;
- service quality;
- repair and replacement of defective garments;
- intellectual property issues relating to ownership of the school crest and logo;

- how much advance stock should be purchased by the supplier;
- what is to happen to existing stock if there is a change in school uniform?
- what is to happen to remaining stock on termination of the contract;
- does the contract have a fixed term or can it be easily terminated;
- dispute resolution processes.

A fertile source of dispute in school uniform contracts is the contractual arrangements which arise when the uniform supplier has large amounts of stock on hand which have been pre-purchased in the expectation that the agreement will continue for many years into the future. Where schools change their uniform, and do not give adequate notice to the supplier who has significant quantities of stock on hand, issues can arise as to compensation to the supplier for the stock which has been pre-purchased. Suppliers commonly purchase fabric in bulk for economies of scale and to ensure that they are not left in a position where, particularly at the beginning of a new season, they are unable to fill orders.

Similar issues sometimes arise on termination of a uniform agreement, even where a notice of termination has been given say six months in advance. There are often quite stringent stock buy-back provisions in such agreements and care needs to be taken by schools that they understand the commercial consequences of such obligations and preferable ensure that there are some limits in place to prevent the uniform supplier from “overstocking” and taking commercial advantage of the school.

“Where schools change their uniform, and do not give adequate notice to the supplier who has significant quantities of stock on hand, issues can arise as to compensation to the supplier for the stock which has been pre-purchased”



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School Counsellors

A professional relationship of trust and confidence underpins the dealings between a school counsellor and a student.

Students need to be able to talk openly with counsellors about issues of concern to them. These issues can range from anything between:

- problems the student may be having with other students;
- problems the student may be having with their teacher;
- problems the student may be having at home;
- personal issues concerning the student.

Most school counsellors explain to the student at the commencement of their relationship that the student should feel free to talk openly and frankly about what it is they have come to see the counsellor about and in return the counsellor agrees to keep such information confidential.

This duty of confidentiality arises at common law and also under privacy legislation. However, it is not simply a case of a school counsellor being able to guarantee confidentiality to the student, particularly when court proceedings are on foot.

A vexed question can often arise as to whether written or oral communications between a counsellor and student are privileged from production both in the context of criminal proceedings and civil proceedings.

For example, school counsellors sometimes receive a Subpoena to Produce Documents or a Subpoena to Give Evidence in relation to criminal proceedings which somehow involve the student. An example may be where the father of the student is charged with assaulting the mother of the student and, during the course of those proceedings, the prosecution or the defence may hope to obtain information from the counsellor's file

which might assist their particular purpose. The father may allege that the mother has embellished the story relating to the alleged assault and that the child may have made some disclosure about the incident to the school counsellor and may, therefore, be seeking notes of counselling sessions to be produced to the court.

The counsellor's notes may qualify for privilege as a "protected confidence" under section 296 of the *Criminal Procedure Act* 1986 in relation to sexual assault proceedings. If such privilege is sustained, a counsellor may be excused from divulging their notes to the parties involved in the court proceedings.

Similarly, in a civil context, the counsellor's notes may be privileged from production as a "protected confidence" under section 126A and 126B of the *Evidence Act* 1995.

In either case, it is necessary for a counsellor to carefully consider what it is that is being sought under the Subpoena. It is common for non-contentious documents to be separated from those over which the counsellor wishes to claim privilege. This is generally done by separating documents in to distinct envelopes and providing the Judge with an affidavit setting out the basis of the claim for privilege.

It is common in such an affidavit for a school counsellor to set out the following details to enable the Judge to determine whether the claim for privilege is justified:

- the counsellor's qualifications;
- the length of time the counsellor has been at the particular school;
- when the counsellor first commenced counselling with the particular student;
- what was said by the counsellor to the student in relation to being open and frank in their discussions and whether the counsellor promised the student to keep the information confidential;

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“However, it is not simply a case of a school counsellor being able to guarantee confidentiality to the student, particularly when court proceedings are on foot.”

School Counsellors

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- the process the counsellor took during counselling sessions - ie, *"I took handwritten notes summarising what the student told me during each session and I kept them in a separate file"*;
- the reasons why the counsellor wishes to keep the notes confidential;
- if applicable, whether the counsellor is aware that the student wishes to maintain confidentiality over the notes;
- what consequences the counsellor believes might flow to the relationship between them should the court require disclosure of the counselling material.

Where there is a contest between the parties involved in the proceedings as to obtaining access to the counselling records, it is common for the Judge to examine the envelope of documents over which privilege is claimed. On some occasions, the counsellor may be requested to attend court to answer any questions the Judge might have before a ruling is made as to whether those documents are privileged from production.

If the Judge rules that the documents are privileged then they will be returned to the counsellor without them being disclosed to the other parties.

However, if the Judge rules that the documents must be disclosed, then the Judge will make appropriate orders for access to the other parties. Depending on the nature of the case, there may be significant restrictions to access including a limited right of access only to the legal representatives (on condition that the documents not be shown to their respective clients).

A school counsellor who provides access to documents pursuant to a court order is protected from any personal ramifications should the student or one of the parents become upset by reason of the disclosure of counselling material.

Similar considerations apply also in respect of counsellors being subpoenaed to give evidence in court either in criminal or civil proceedings. A school counsellor may object to the giving of evidence which would breach a student's confidence and which arises from a counselling session but ultimately that claim must be determined by the Judge and the counsellor must comply with the Judge's determination.



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Are your School financial statements meeting current expectations?

Given the recent significant changes to the Financial Questionnaire requirements for Non Government schools, including the new requirement to report assets and liabilities of a school, there are many issues to consider for school managers and board members in meeting their financial reporting obligations. Matters that impact on these obligations include:

- Whether the school is incorporated as a company under the Corporations Act 2001 or structured otherwise.
- Whether it is a System or Independent school.
- The relevance of ASIC's Regulatory Guide 85 covering Reporting Requirements for Non Reporting Entities.
- What financial reporting framework is to be applied including the application of accounting standards

In considering the above a number of key decisions need to be made in determining the appropriate format of a school's annual financial report including:

- The application of accrual or cash accounting.
- Determining whether the school is a reporting or a non reporting entity.
- Considering whether general purpose financial statements are required to be prepared or whether these can be prepared in a special purpose format.
- Whether it is appropriate to apply the Reduced Disclosure Requirements (RDR) of Australian Accounting Standards or whether full disclosure is required.



There have been many changes in recent years to a number of the areas mentioned above which impact on the current financial reporting requirements of schools. A number of these changes have seen reduced reporting requirements for some entities while others have been increased. It is important that school leaders and boards are familiar with these changes in order that the school continues to meet its obligations and achieves this in the most efficient manner.

Corporations Act Entities

Where a school is incorporated under the *Corporations Act 2001* it is clear that at a minimum the school is required to prepare its annual financial statements in accordance with accrual accounting principles and the other requirements of the ASIC Regulatory Guide 85. This means that all assets, liabilities, income and expenses of a school should be recognised in line with the measurement and recognition criteria of all applicable Australian Accounting Standards. In addition, if the school is considered to be a reporting entity, at a minimum it would need to prepare its annual financial report in accordance with the Reduced Disclosure Requirements of the Australian Accounting Standard AASB1053 '*Application of Tiers of Australian Accounting Standards*'.

Further, any company preparing its annual financial report in accordance with the requirements of the Corporations Act, whether or not the school is a reporting entity, is required to apply the following accounting standards in full in its preparation of its annual financial report:

- AASB 101 '*Presentation of Financial Statements*';
- ASB 107 '*Statement of Cash Flows*'
- AASB 108 '*Accounting Policies, Changes in Accounting Estimates and Errors*'; and
- ASB 1048 '*Interpretation of Standards*'.

As most schools that operate under the Corporations Act are incorporated as companies limited by guarantee you should also be aware of changes that came into force in 2010 reducing a number of reporting obligations including differential aspects depending on the size of the company. As

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most schools will be at the larger end of the size criteria these reduced requirements would be limited compared to those that apply for smaller companies limited by guarantee.

Other Entities

For schools which are not incorporated under the Corporations Act the Financial Questionnaire instructions are less clear although they clearly state that, if the school considers itself to be a non reporting entity, the minimum accounting standards to be applied shall be those set out in the ASIC Regulatory Guide 85 referred to above. This would indicate that all schools should ensure that their assets, liabilities, income and expenses are measured and recognised in accordance with the relevant requirements of applicable accounting standards and also with full compliance with the four specific standards outlined above.

For schools where a cash approach is allowed for inclusion of financial data in the Financial Questionnaire, it is even less clear how such information is to be determined in terms of compliance with the accounting standard framework outlined in the previous paragraph, as cash accounting is not foreseen within Australian Accounting Standards as being an appropriate financial reporting framework. From my experience most Non Government schools already prepare financial reports under an accrual framework while a number of system schools still report on a cash basis within the Financial Questionnaire.

Accounting Issues

From my involvement with schools it is also apparent that there are a number of present Australian Accounting Standards which are problematic in terms of ensuring transactions are recognised in accordance with their requirements. In particular these include the following:

- AASB102 'Inventories';
- AASB116 'Property, Plant and Equipment';
- AASB117 'Leases';
- AASB119 'Employees Benefits';
- AASB136 'Impairment of Assets';
- AASB137 'Provisions, Contingent Liabilities and Contingent Assets'; and
- AASB139 'Financial Instruments: Recognition and Measurement'

For a typical school these obligations are very onerous and thus it is imperative that schools have systems and processes in place to ensure an efficient and effective approach to address these requirements. The use of tailored model financial accounts as a tool to aid this process is something for school boards and managers to consider. Given the current Federal Government's proposals for a not for profit regulator similar to the UK Charity Commission and the demand for a greater transparency for school financials generally we are likely to see these obligations becoming more standardised although with a high risk of increasing reporting and other obligations.

If you would like to discuss any of this information in further detail please contact the writer.

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In the previous issue:

- Education malpractice
- Race discrimination in schools
- Duty of care owed during school excursions
- Minimising risk for schools under the OHS Act