

The Hon. M. Burgmann MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

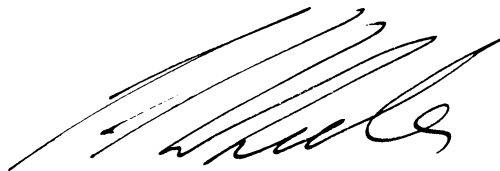
The Hon. J. Murray MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Madam President and Mr Speaker,

I submit a report pursuant to section 31 of the *Ombudsman Act*.
In accordance with the Act I have provided the Minister for
Education and Training with a copy of this report.

I draw your attention to the provisions of section 31AA of the
Ombudsman Act in relation to the tabling of the report and
request that you make it public forthwith.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Chris Wheeler', written in a cursive style.

Chris Wheeler
Acting NSW Ombudsman

May 2000

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Handling of Child Abuse Allegations Against Employees

A special report to Parliament
under s.31 of the *Ombudsman Act*

May 2000

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Executive summary

This report is about the adequacy of the Department of Education and Training's (DET) procedures for responding to allegations of child sexual abuse made against their staff. In particular, this report outlines weaknesses in the DET's disciplinary system for dealing with these types of allegations.

Background

The public expects the DET to minimise the risk of sexual abuse of children by their staff. The DET must be able to respond quickly and effectively to allegations of this kind.

Following adverse media reports in 1999, the Director-General of the DET referred two separate cases of alleged improper conduct of a sexual nature by teachers (T1 and T2) to us.

In both these cases, criminal charges against the teachers had been dismissed and departmental disciplinary charges were not proven. However, the Victims Compensation Tribunal (VCT) awarded compensation to the children who made the allegations against T1 and T2. This meant that, in circumstances where the DET had effectively cleared T1 and T2, the VCT was satisfied on the balance of probabilities that the involved children had been subjected to an act of violence and had suffered injuries as a result.

When referring the cases to us the Director-General drew our attention to the "anomaly" between the decision of the VCT to award compensation, and the outcome of the disciplinary proceedings. He sought our advice as to whether this was the result of any weakness in the DET's internal investigation procedures or whether the cause lay elsewhere.

We also examined the DET's handling of a third case involving allegations of sexual abuse against a school counsellor (C1). The matter was the subject of an earlier complaint to us by a parent who expressed concern about what he regarded as the DET's lenient treatment of C1. Two DET disciplinary charges against C1 arising from allegations of improper conduct of a sexual nature were found proven. In each case the teacher was reprimanded and cautioned. C1 was allowed to continue counselling students.

The investigation

Our investigation involved examining the relevant DET files and interviewing senior departmental staff who had determined the disciplinary charges in these three matters. Information was also obtained from a variety of other sources such as the VCT, the Police Service, and the Department of Community Services (DOCS). We also obtained specialist legal advice on a number of complex industrial law matters.

The DET's current approach

The DET is currently required to respond to allegations of child sexual abuse made against staff in strict accordance with the provisions of statutory disciplinary scheme: namely, Part 4, Division 5, *Teaching Services Act 1980*, Part 3, Teaching Services (Education Teaching Service) Regulation 1994 and Part 5, *Public Sector Management Act 1988*.

With allegations of this kind, the DET's Child Protection Investigation Unit (CPIU)¹ investigates the allegation in the first instance.

Where the CPIU determines an allegation is substantiated, a disciplinary charge against the employee is formulated. The charge must be concerned with a breach of discipline and, in relation to teachers, must fit within one of the definitions outlined in section 83 of the *Teaching Services Act*. T1, T2 and C1 were charged with alleged breaches of discipline on the basis that they engaged in improper conduct of a sexual nature.

Alleged breaches of discipline must be dealt with by the Director-General or a prescribed officer. Prescribed officers are drawn from staff at senior executive service level within the DET. The disciplinary charges against T1, T2 and C1 were determined by prescribed officers.

Where a prescribed officer finds a disciplinary charge proven, they can impose one or more of a limited range of penalties. They can also recommend to the Director-General that the staff member be dismissed or required to resign.

Significant limitations on the DET arising out of the statutory disciplinary scheme

Our investigation found that the rigid statutory disciplinary scheme that governs the DET's response to these matters restricts its ability to respond quickly and effectively to concerns about staff. Some of the limitations of the current disciplinary approach are that:

- the DET is very limited in how it can respond to alleged breaches of discipline (for example, the DET is unable to even caution a teacher unless it finds the disciplinary charge proven²),
- where a CPIU investigation concludes that an allegation against a teacher cannot be proven, the teacher has the right to return to the school environment, and the DET cannot take any other management action, even though there might still be identifiable risks,
- an extremely high standard of proof is required to prove a disciplinary charge relating to improper conduct of a sexual nature — while falling short of the criminal standard of beyond reasonable doubt, the standard of proof required is in practice almost indistinguishable from it,

¹ The DET renamed its Case Management Unit (CMU) the Child Protection Investigation Unit (CPIU) in February 2000. The bulk of this report refers to the Case Management Unit (or CMU) as this was the correct title as at the time of the investigation.

² See, for example, *Ward v Director General of School Education* (1998) 80 IR 175.

- where a charge is proven, the DET is authorised only to impose a very limited set of disciplinary penalties such as dismissal, caution, reprimand, fine, or reduction in the teacher's salary or classification (other than dismissal, none of these options directly addresses the risk to children);
- while the DET monitors teachers the subject of a proven disciplinary charge upon their return to school, this process is of limited effectiveness, may be difficult to implement locally and may be open to legal challenge.

Difficulties for teachers arising from the disciplinary approach

For teachers the subject of allegations, the DET's current disciplinary approach can be counter-productive because:

- it is essentially concerned with determining the guilt or otherwise of the teacher and is therefore characterised by a formal and legalistic adversarial/inquisitorial approach, and
- it is a protracted process, often lasting for many months, which can unnecessarily increase the pressure, uncertainty, embarrassment and damage to the reputation of the teacher.

The need to shift from the disciplinary scheme to a risk management approach

Our investigation found that the DET's current disciplinary scheme cannot protect children from sexual abuse by teachers to the level reasonably expected by the community. We believe that the principal problem is that the DET has insufficient scope to make flexible management decisions when responding to allegations of this kind.

Even where a disciplinary charge is proven to the requisite high standard of proof, the measures available to the DET are inappropriately restricted. Put simply, the DET does not have the power to implement sophisticated management responses to deal with these very difficult and sensitive matters.

The Royal Commission into the NSW Police Service (Royal Commission) concluded that the relevant criterion for employment screening in child related employment should be whether the employee poses an unacceptable risk. The DET is presently unable to carry out, or act upon, risk assessments of its staff where there may be concerns about risks to children in allowing employees to remain in, or return to, the school environment.

By contrast, the New South Wales Police Service has shifted away from a disciplinary approach in responding to allegations of misconduct against staff to the implementation of a management approach incorporating the concepts of risk assessment and management.

There would be considerable merit in the DET examining to what extent the Police Service's management options and risk management techniques could be applied by the DET in responding to allegations of child sexual abuse by staff.

The benefits of a risk management approach

Risk management is recognised as an important element of good management practice.

In the context of child protection, a risk management approach is concerned with:

- identifying,
- assessing,
- analysing,
- treating,
- monitoring, and
- reviewing

the risk associated with allowing a staff member the subject of an allegation of child sexual abuse to remain in, or return to, a position involving day to day contact with children.

In contrast to a disciplinary approach, a risk management approach to allegations or concerns about alleged or possible child sexual abuse:

- should have proper regard to the interests of all parties, whether students, teachers or the DET,
- is less formal, adversarial and time consuming than disciplinary proceedings,
- is directed towards achieving constructive outcomes as opposed to punishing individuals, and
- can produce more comprehensive management outcomes than a narrow disciplinary approach which simply applies legal tests to determine whether a very limited range of punishments should be imposed.

In some cases, a decision to remove a teacher could be made following a risk assessment. Such a serious step should be subject to external review. In the majority of cases where a decision is made to keep the teacher in their position, a risk management approach allows consideration of the best response in light of all of the prevailing circumstances. This will include the development of strategies to support teachers in their workplace. Training, counselling, mentoring, performance agreements or special supervisory arrangements could also be part of the overall management strategy under a risk management approach.

Fairness to teachers and other staff

Any system within the DET for responding to allegations that staff may have sexually abused a child must recognise the rights of accused. For this reason, any system within the DET for responding to these allegations must be underpinned by adequate safeguards to protect staff from unfounded and malicious allegations.

A risk assessment and management system will quickly fall into disrepute if decisions are made based on unfounded fears rather than solid evidence. We are not suggesting that the interests and rights of staff be adversely affected where there is insufficient evidence of a genuine risk to children.

A whole of government approach

It is desirable that there be a comprehensive and consistent risk management approach for responding to serious allegations of this kind.

While the DET is required to deal with allegations of child abuse against:

- members of the teaching service under the *Teaching Services Act*,
- non-teaching school staff under the provisions of the *Education (Ancillary Staff) Act 1987*, and
- other staff under the *Public Sector Management Act 1988*

the disciplinary systems under each of these schemes vary widely.

The DET is not the only government department with a responsibility to protect children. Other departments must also deal with allegations of sexual abuse of children by their staff. These departments are also presently required to use a restricted disciplinary regime when responding to such allegations. For this reason, consideration should be given to the benefits of a “whole of government” approach in addressing the issues highlighted in this report.

Recommendations

The report recommends that:

- the DET develop an appropriate legislative, policy and administrative framework to allow it to implement a timely and effective management response to allegations against staff in the area of child protection,
- a model framework should overcome the deficiencies of the DET’s current disciplinary approach as highlighted in this report,
- the DET consult with key stakeholders and relevant experts in developing an appropriate model framework,
- the Minister for Education and Training approach other Ministers with responsibility for departments with child protection responsibilities about developing a comprehensive and consistent public sector response to allegations of child abuse against staff,
- the DET conduct risk assessments in relation to T1, T2 and C1 to determine whether they should remain in their current duties, be moved to alternate duties or whether they should continue to be employed by the DET, and
- the DET provide formal progress reports to the Ombudsman on these matters.

1. The role of the Ombudsman in the child protection area

The Ombudsman is required to keep under scrutiny the systems for handling child abuse allegations or convictions against employees of designated government and non government agencies.¹

2. The Department of Education and Training

One of the agencies which we oversee in the child protection area is the Department of Education and Training (the DET), which is responsible for the public education system.

A key responsibility of the DET is to “protect students at school from sexual, physical and emotional abuse and neglect, and from improper conduct of a sexual nature”.²

Many departmental staff, especially teachers, are entrusted with the care of children on a daily basis. Unfortunately, some staff — admittedly very few in number — abuse their position of trust.

3. The purpose of this report

The DET should be able to respond appropriately to concerns that its staff have engaged, or may engage, in child sexual abuse. It is vital that the public has confidence in the DET’s ability to fulfil its obligation to minimise the risks to children in its care.

This report concludes that there is minimal scope currently available to the DET to make responsible management decisions in response to concerns that staff have allegedly engaged, or may engage, in child sexual abuse. This is the direct result of a rigid disciplinary scheme currently imposed upon the DET, requiring a disciplinary charge against an employee of improper conduct of a sexual nature to be proved to a very high standard before any substantive management action can be taken. Furthermore, if a disciplinary charge is found proven but the termination of the staff member’s employment is not considered appropriate, there is only a limited range of disciplinary sanctions available to deal with the often complex issues involved.

Ultimately, we recommend that the DET should be in a position to adopt a proper risk management approach in the area of child protection.

¹ *Ombudsman Act 1974*, Part 3A, introduced by the *Ombudsman Amendment (Child Protection and Community Services) Act 1998*.

² *Interagency Guidelines for Child Protection Intervention*, New South Wales Child Protection Council, 2nd edition, February 1997, page 16.

4. Background

On 15 February 1999, the Director-General of the DET, Dr Ken Boston, requested we review the DET's handling of the cases of two teachers, T1 and T2, who were alleged to have engaged in the sexual abuse of children. The referral followed media reports critical of the DET's handling of these cases.³

Criminal charges had been dismissed against T1 and T2. Departmental disciplinary charges had also been found not proven. However, compensation had been awarded by the Victims Compensation Tribunal (VCT) to alleged victims of the teachers.

The Director-General sought advice as to whether this “anomaly” was the result of any weakness in the DET's internal investigation procedures or whether the cause lay elsewhere. The Director-General also said: “I am anxious to ensure that our procedures are fully effective in minimising risk to children”.

On 17 February 1999, we agreed to conduct a review of the nature requested by the Director-General.

5. The two teachers allegedly involved in sexual abuse of children

5.1 Introduction

At the outset, it is necessary to describe in some detail how the DET handled the cases of T1 and T2. The cases exemplify the operation of the disciplinary system under which the DET is required to handle allegations of child sexual abuse by its employees.

5.2 The case of T1

The case of T1 concerned allegations that a primary school teacher had engaged in the sexual abuse of a number of young female students.

5.2.1 The allegations

On 27 April 1993, the principal of the school where T1 was employed received allegations that T1 had inappropriately touched a number of young female students on their backs, bottoms and breasts.

³ ‘Sex charge man cleared to teach’ and ‘A duty of care to our children’, editorial, *The Daily Telegraph*, 15 February 1999, and ‘Schoolgirl in damages claim over ‘sex assault’’, *The Daily Telegraph*, 16 February 1999.

5.2.2 *The criminal charges*

The allegations were reported to the police on 29 April 1993. Following a police investigation, T1 was criminally charged with ten counts of indecent assault and one count of aggravated indecent assault.

5.2.3 *The employment situation of T1*

The DET suspended T1 on full pay on the day the allegations were reported to the principal. On 18 May 1993, the DET learned of the criminal charges against T1 and suspended T1 without pay. However, in August 1994, T1 was returned to the payroll in accordance with a change in government policy. On 30 October 1995, the DET instructed T1 to report for non-teaching duties.

5.2.4 *Criminal charges dismissed*

On 27 February 1996, a district court jury acquitted T1 of the criminal charges.

5.2.5 *The question of disciplinary proceedings*

On 15 July 1996, the DET sought advice from the Crown Solicitor about the issue of possible disciplinary charges against T1 and, in particular, “the strength of the available evidence; the likelihood of finding of improper conduct against [T1] being sustained; and the most likely penalty”.

The Crown Solicitor’s office subsequently briefed Counsel, who provided the following advice on 9 August 1996:

*There is nothing here which seems to me to prohibit the laying of charges alleging the improper or inappropriate (for a teacher) touching of children in 1992 to 1993 ... I would, however, have some difficulty accepting on the face of it that it was open to the Department to charge [T1] with **exactly the same allegations** [emphasis in original] that he has been acquitted of, namely, 11 counts of “acts of indecency and or assault” within the meaning of section 61M of the Crimes Act 1900. If the Department sought to charge [T1] with something less than or different from those charges which were brought before the District Court earlier this year, I have no problem in accepting ... that those charges may lawfully or validly form the basis of disciplinary charges. However, I have not been asked to advise on this, so I express no concluded view.*

*I am therefore asked to urgently advise upon **the strength of the evidence** [our emphasis] in relation to disciplinary charges which have not yet been devised or formulated. This task places me in a most difficult position. I take my instructions to mean I am asked whether there is enough evidence to support the framing and subsequent laying of disciplinary charges in relation to [T1]. In my view, generally speaking, there is clearly enough evidence to lay disciplinary charges against the teacher provided the charges are framed carefully and in such a way so as to not contradict or appear to contradict the acquittal verdict earlier this year ...*

*While it would be technically arguably lawful to lay disciplinary charges which effectively mirror those involved in the District Court proceedings, such action would be unsafe for a number of reasons ... The evidence was, in my opinion, sufficiently strong so as to prove **to the relevant disciplinary/civil standard of proof** that the accused did touch the girls in the approximate places on their bodies which they so allege [our emphasis]. What causes me to not accept the girls’ evidence as to the alleged **sexual** aspect of the District Court charges to*

*the so stated **disciplinary/civil standard** [our emphasis] is, generally speaking, their poor memory as to the alleged events, their mixing up of original recollection and recollection from the prepared statements to the police, inconsistencies in their evidence, in some cases a refusal to answer questions or cooperate in any way with the proceedings ...*

*As to my opinion as to **the likelihood of a finding of improper conduct** [our emphasis], presumably a finding to be made by the disciplinary authority after hearing all of the then available evidence, I would not care to speculate at this stage. I can say no more than a finding on charges drawn having regard to my comments above is open to the decision maker subject to whatever evidence the employee is able to properly adduce at the time of the disciplinary hearing and to what position or defence the employee adopts in response to the charges when formulated and presented.*

*As to **the most likely penalty** [our emphasis], again I do not wish to speculate in the absence of formulated charges, a defence (if any) and as yet further untested evidence. However, were the teacher to be charged with inappropriate touching charges, I would anticipate that the teacher would expect a heavy penalty but a penalty less in severity than dismissal or forcing him to resign from his employment ... If it can be proven that the teacher was formally instructed or directed not to touch children and that this instruction or direction formed part of the teacher's conditions or contract of employment, I would suggest that dismissal was probably appropriate. However, I am instructed that the only instruction the teachers receive in their training and preparation for teaching is in terms of the document ... titled "Advice You Should Heed" from the Department's "Teacher Induction". Point 7 of that document provides:*

Never touch a student of either sex — natural affection may be misunderstood, striking or pushing a student can give rise to serious legal charges.

In my view, that paragraph does not establish terms or conditions of employment or advice in respect of which breach would or necessarily should constitute a severance of the employment relationship. I note that Part 2 of the Teaching Services (Education Teaching Service) Regulation 1994 relates to the duties of members of staff and compliance with directions provided for in the regulations. However, I am instructed that no regulations or directions concern the touching or inappropriate touching of children.

Following receipt of Counsel's advice, the DET decided not to initiate disciplinary proceedings against T1.

5.2.6 Transfer and letter of warning

On 15 November 1996, the DET issued a letter of warning to T1, who agreed to a transfer to another school. The following day, the solicitor for T1 wrote to the DET seeking the withdrawal of the letter of warning. On 3 February 1997, the DET approved T1's transfer to another school, with T1 being issued with a revised letter of warning.

5.2.7 Review of the case by Judge Slattery

The Royal Commission into the NSW Police Service (Royal Commission) conducted an inquiry into the handling by various government and non government agencies of child sexual abuse by employees of those agencies. In the course of this inquiry, the Royal Commission heard evidence about the DET's inadequate handling of allegations of sexual abuse by departmental staff.

THE TWO TEACHERS

In March 1997, the Premier appointed former Supreme Court Judge John Slattery to review thirty seven cases where allegations of sexual misconduct with children had been made against departmental staff.

The DET subsequently referred T1's case to Mr Slattery for review. T1 was directed to work at home for the duration of the review.

According to an undated internal DET memorandum, Mr Slattery's comments and recommendations following his review of the case were as follows:

The advice of the Crown Solicitor should have been followed and a departmental investigation after the acquittal should have occurred. The plea bargaining which resulted in the teacher receiving a letter of warning should not have occurred.

5.2.8 Departmental investigation initiated

The DET noted in the memorandum quoted above:

Recommendations

Further departmental investigations should occur. A report on the teacher's conduct since resuming teaching should be obtained. At the conclusion of investigations the teacher's status should be reviewed.

Case Management Unit action

Further legal advice has been sought from the Crown Solicitor. Teacher advised on 24 July that the case will be re-investigated. On advice from the District Superintendent the teacher has been placed in a state office location.

The DET obtained advice from the Crown Solicitor which indicated that, notwithstanding the 'plea bargain' arrangement in 1996, the DET was still entitled to investigate the allegations against T1.

The DET's Case Management Unit (CMU), which was responsible for the investigation, ultimately found the allegations against T1 were substantiated.

5.2.9 Disciplinary charge

On 4 November 1997, T1 was charged with a breach of discipline. The breach of discipline notice contained twenty particulars, referring to nineteen allegations of improper conduct of a sexual nature involving eight female students, as well as a further allegation of improper conduct involving "a number of female students".

On 13 November 1997, T1's solicitor denied the first nineteen particulars and argued that the final particular had not been set out in the required form. There followed extensive correspondence between the DET and T1's solicitor about the adequacy of the final particulars of the charge.

On 16 March 1998, the disciplinary charge against T1 was referred to a departmental officer, known as a prescribed officer, for determination. This officer, PO1, sought and received submissions from T1's solicitor about the matter.

In her submission to the prescribed officer, the Assistant Director-General argued that the evidence in the case of T1:

- was direct, contextual, strong, comprehensive and consistent,
- suggested a clear pattern of T1 taking advantage of opportunities to be alone with small numbers of female students and touching them inappropriately, and
- indicated patterns of improper behaviour by T1 which must be seen as a grave breach of the trust placed in him by the community as a teacher.

5.2.10 Compensation awarded by the Victims Compensation Tribunal

In May 1998, the VCT awarded compensation of \$10,000 to four of T1's alleged victims.⁴

On 2 June 1998, the VCT also awarded compensation to another of T1's alleged victims, S1. The reasons for this determination included the following:

Notwithstanding the acquittal of the alleged offender in a jury trial in the District Court in February 1996, applying the lesser civil standard of proof, I find an act of violence established. On two separate occasions in April 1993, when [S1] was 10 years old she was indecently assaulted by a male teacher at her primary school ...

5.2.11 Parents express concern

On 31 July 1998, the DET learned a delegation of parents had met with the principal of the school where T1 had been working at the time of his alleged improper conduct. The parents expressed concern about the length of time it was taking for the prescribed officer to make a decision. They also referred to the fact that one of T1's alleged victims had been successful in her claim for compensation before the VCT.

On 12 August 1998, S1's father wrote to the Director-General to inquire about the outcome of the investigation of the allegations against T1. He referred to his daughter's successful claim for compensation before the VCT and provided the DET with a copy of a section of the tribunal's determination.

5.2.12 Further conduct of the disciplinary proceedings

Subsequently, the DET obtained a copy of the audio tape of the district court judge's summing up in the criminal proceedings against T1 and provided it to PO1.

On 14 October 1998, PO1 sought a submission from T1's solicitor with respect to the transcript of the summing up. In October 1998 and January 1999, T1's solicitor made submissions to PO1 about the matter.

⁴ 'Sex charge man cleared to teach', *The Daily Telegraph*, 15 February 1999.

THE TWO TEACHERS

On 29 January 1999, S1's father wrote to PO1 expressing concern as to the delay in determining the disciplinary charge against T1 and requesting information as to the future employment of T1.

5.2.13 Disciplinary charge not proven

On 5 February 1999, PO1 found the disciplinary charge against T1 not proven.

In his decision, PO1 made the following points:

For me to reach the conclusion that the weight of evidence before me justified a determination that the charge as particularised was proven I would have to be absolutely confident that the evidence before me in relation to each specific particular was substantial and compelling. I am not convinced that the material before me has these qualities.

and:

After careful, deliberate and lengthy consideration of the voluminous submissions of both parties I cannot be satisfied to the high standard required that even on the balance of probabilities the particulars of the charge are proven. [Our emphasis]

PO1 recommended that T1 "be afforded extensive counselling and support in regard to his teaching style and relationship with students". (The nature and extent of the 'extensive counselling and support' which the DET was to provide to T1 is unclear.)

PO1's decision cleared the way for T1 to return to classroom duties. However, following the referral of T1's case to us by the Director-General, T1 remains on non-school duties.

5.3 The case of T2

The other matter referred by the Director-General concerned alleged sexual abuse by T2, a high school teacher, of his own children.

5.3.1 Criminal charges

On 23 July 1993, while employed as a high school teacher in the NSW Teaching Service, T2 was charged with thirteen counts of sexual assault and acts of indecency involving his two young sons. The criminal charges concerned alleged incidents at T2's home during access visits by his children during the period 1989 to 1993.

5.3.2 T2's suspension and resignation

In August 1993, after learning of the criminal charges against T2, the DET suspended T2 from his teaching position. T2 resigned from the NSW Teaching Service on 24 May 1994.

5.3.3 Criminal charges dismissed

The criminal charges went to trial in May 1994, however, this trial was discontinued due to the illness of a juror. The charges subsequently went to trial before a district court jury in October 1994. On 19 October 1994, the jury found T2 not guilty of the criminal charges against him.

5.3.4 T2 re-employed on a casual basis

In March 1995, T2 applied to become a permanent member of the NSW Teaching Service again. In June 1995, the DET re-employed T2 on a casual basis.

5.3.5 Compensation awarded by the Victims Compensation Tribunal

On 2 May 1995, the solicitors acting for T2's two sons made an application to the VCT for victims' compensation to be awarded to them.

The application submitted on behalf of the older child stated that the acts of violence by T2 which justified an award of compensation were "fifteen occasions of apparently full penile intercourse by the offender on the victim".

The application submitted on behalf of the younger child stated that the acts of violence in question were:

... attempted anal intercourse of the victim, whilst his penis was in an erect state. On a number of occasions had anal intercourse with the victim. Place the victim's penis in his mouth on a number of occasions ejaculating on at least one occasion. Touching the victim's penis and squeezing it. Threatening the victim with violence. Putting his mouth over the victim's penis.

The solicitor for T2's sons included the following submissions in his covering letter to the VCT:

You are no doubt aware that when this matter went to trial the offender pleaded not guilty to the charges brought against him and he was subsequently acquitted.

The tribunal must now look at the matter and be satisfied that the charges are established on the balance of probabilities.

... The tribunal will also be aware that the criminal duty imposed on the Crown of proving the charge beyond reasonable doubt is significantly a heavier onus than a victim in these proceedings proving the allegations on the balance of probabilities ... of course the acquittal of the accused does not mean that the accused has been found innocent; it may mean that the jury was not persuaded beyond reasonable doubt of his guilt.

In relation to the jury not being persuaded beyond a reasonable doubt, the offender was able to put to the jury the following matters:

1. *His previous good character ...*
2. *Delay in reporting of the offences ...*
3. *The inconsistencies of different versions given by the victims ...*

After making submissions to the effect that these matters did not necessarily preclude the VCT from making an award of compensation, the solicitor went on to say:

We submit that the Tribunal should look at the following positive points:

1. *The direct evidence of the victims ...*
2. *The physical injuries to the victims ...*

In all the circumstance we submit there is more than sufficient evidence to find that the offences have occurred against these victims on the balance of probabilities.

THE TWO TEACHERS

On 25 July 1995, the VCT awarded victims compensation of \$20,000 to each of T2's sons on the basis of the information and submissions provided by the solicitors for T2's sons.

5.3.6 T2 employed on a permanent basis

On 29 January 1996, the DET reappointed T2 as a permanent member of the NSW Teaching Service.

It is not clear from the documentation obtained by us from the DET for the purposes of the investigation whether, and to what extent, the DET considered the evidence given at the trial of the criminal charges against T2. Nor is it clear whether the DET was in a position to be aware of, or consider, the basis for the awards of victims compensation to T2's sons.

5.3.7 Concerns expressed about T2

In February 1997, a person telephoned the CMU and said that T2 had been charged with child sexual assault in 1993 but had been acquitted in 1994. The caller also said T2's children had received compensation from the VCT, and expressed concern that T2 was still teaching.

5.3.8 Review of the case by Judge Slattery

In March 1997, the DET referred T2's case to former Judge Slattery as one of the cases where allegations of sexual misconduct with children had been made against departmental staff.

After reviewing T2's file, Mr Slattery concluded on 20 March 1997:

There was no departmental investigation of the incidents which gave rise to the Police charges, possibly because the teacher resigned. If he has been re-engaged as a teacher a full investigation should have been carried out in view of the seriousness of the allegations. Such an investigation should have included obtaining a copy of the transcript of the trial (not just the summing up), copies of statements and documents held by the Police and the Department of Community Services (if investigated by it) and a consideration of statements and material with the Department of School Education.

The investigation, if any, carried out was not a proper one.

If the teacher is still employed by the Department of School Education further investigation should be carried out as soon as possible. At the conclusion of the investigation the teacher's status should be reviewed.

5.3.9 The DET's investigation

On 10 April 1997, the Director-General wrote to T2, advising that the DET would undertake an investigation of the allegations about him and instructing T2 to undertake non-school duties for the duration of the investigation.

In the course of the CMU's investigation of T2's alleged conduct involving his sons, the CMU learned of a new and separate allegation concerning T2's alleged improper conduct of a sexual nature towards a female high school student, S5, who had resided with T2's family from 1982 to 1985.

5.3.10 Disciplinary proceedings

Ultimately, on 1 October 1997, T2 was charged with a breach of discipline relating to alleged improper conduct. The notice of charge contained four particulars concerning T2's alleged assaults upon his sons. The charge also contained an allegation that T2 had engaged in improper conduct of a sexual nature with S5 when she resided with T2's family.

On 1 October 1997, the DET sought a copy of the transcript of the criminal proceedings against T2.

On 10 October 1997, T2 denied the charge through his solicitor.

The disciplinary charge was subsequently referred to PO2 for determination.

In support of the case that T2 had committed a breach of discipline, the Assistant Director-General argued:

It is submitted that the evidence shows that the behaviour of [T2] has been improper in relation to his own children and to another who resided in his home. Such behaviour could lead one to the conclusion that this behaviour is unacceptable for a member of the Teaching Service of New South Wales.

A teacher is expected in the community to be a role model, obedient to standards to a degree higher than that expected of the ordinary person. When a teacher falls below this standard, his or her fall casts doubt upon the reputation of the Department of School Education which continues to employ such a person. It is the duty of the Department of School Education to protect the good reputation of and public confidence of the school system and the Department. So anything done by a teacher which could undermine or even tend to undermine, that image and reputation could be improper conduct.

The Assistant Director-General cited in support of her argument:

- the compelling detailed descriptions of each of the alleged incidents by T2's sons,
- the consistency between the information provided by T2's sons to the police and to a consultant psychiatrist, their evidence at court, and their successful application for compensation to the VCT, and
- the clinical examination reports of a paediatrician, psychologist and psychiatrist submitted during the criminal trial.

5.3.11 Disciplinary charge not proven

On 22 July 1998, PO2 decided all particulars contained in the notice of charge were not proven and dismissed the disciplinary charge. PO2 explained the basis for his decision in a letter to T2's solicitors about the dismissal of the disciplinary charge.

As to the alleged improper conduct of a sexual nature with T2's son, PO2 said:

I note in the criminal proceedings [the judge] considered that the only source of evidence that could be used to convict [T2] related to the direct evidence of the two boys ... [The judge] stated that medical evidence was given to suggest ... counselling could influence the views of the boys. He also stated that the crux of the issue was whether the incidents as described had indeed occurred at all.

The jury came to the conclusion that a finding of “not guilty” should be brought down. Inevitably this raises questions about the incidents having occurred. [T2] continuously refuted that they did and he took the usual course in the trial of submitting himself voluntarily to cross examination.

Given [T2's] acquittal on all charges and the implications for the weight of the evidence as detailed within the particulars of the charge, I find that on the balance of probability the particulars are not proven.

As to the alleged improper conduct of a sexual nature with S5 — incidents which had been reported to the police but which had not been made the subject of criminal charges — PO2 said:

In the circumstances of the uncorroborated evidence, the seriousness of the allegations and the apparent lack of action in the matter in other jurisdictions, it is difficult to give the evidence the weight required to find the particulars proven.

PO2's decision cleared the way for T2 to return to a classroom environment. On 8 October 1998, T2 was instructed to remain in a non-school role until a school placement could be found for him.

On 15 February 1999, the Director-General referred the DET's handling of the matter to us. T2 remains in a non-school location pending the outcome of our investigation.

6. The case of the school counsellor

6.1 Introduction

In addition to the cases of T1 and T2 referred by the Director-General, we also decided to examine the DET's handling of a third matter which had been the subject of an earlier complaint direct to us.

6.2 The allegations

A school counsellor, C1, was allegedly involved in two separate incidents involving the sexual abuse of children.

The first allegation concerned S3, the daughter of C1's then de facto partner, who was of high school age. The allegation was that, in February 1996, C1 entered S3's bedroom one afternoon and hugged and kissed her on the cheek. It was also alleged that C1 re-entered S3's bedroom later the same evening, grabbed her, and kissed her on the lips, before returning to her room a third time and climbing into bed beside S3 after closing the door and turning off the light.

In the course of investigating this allegation, the CMU received a second allegation about C1. The second allegation concerned C1's alleged sexual abuse of S4, the daughter of his previous de

facto partner. C1 was alleged to have entered S4's bedroom naked one evening in July 1993, climbed into bed beside her, cuddled her and kissed her on the cheek.

It can be seen that the types of conduct described in the separate allegations were very similar.

6.3 Disciplinary charges proven

Disciplinary charges in relation to both alleged incidents were brought against C1.

The charge relating to the alleged conduct involving S3 in 1996 was determined by PO1 on 31 December 1997. PO1 found the charge proven and imposed a penalty of reprimand and caution. In a letter to C1's solicitor dated 29 January 1998, PO1 said:

As a school counsellor, your client is in a unique, highly trusted and special position in relation to children. His training and experience place him in a position where he would be fully aware of the potential psychological and emotional impact of his physical actions towards the young girl involved.

A school counsellor is expected in the community to be a role model, obedient to standards to a degree higher than that expected of the ordinary person, particularly where children are involved. It is the duty of the Department to protect the good reputation of, and public confidence in public schools and the Department. Anything done by a school counsellor, within or outside school hours, which could undermine that image and reputation is viewed most seriously by the Department.

Any repetition of improper behaviour of the kind outlined in the particulars of charge would be cause for grave concern in regard to your client's fitness to be in a position of trust with children.

The second charge involving C1's alleged sexual abuse of S4 was subsequently determined by a different prescribed officer, PO3, on 18 February 1998. PO3 found the charge proven.

To assist PO3 in determining an appropriate penalty, the Assistant Director-General provided information to PO3 about the penalty of reprimand and caution which had been imposed following the earlier disciplinary proceedings determined by PO1. Subsequently, on 23 March 1998, PO3 imposed a penalty of reprimand and caution and wrote to C1's solicitor in the same terms as those used in PO1's earlier letter.

C1 was allowed to continue counselling in schools.

6.4 A parent's complaint

The father of S3 made a complaint to us about the matter. He expressed concern that, although two disciplinary charges of improper sexual conduct by C1 had been found proven, the only disciplinary penalty that had been imposed had been a departmental reprimand and caution. He also expressed concern that C1 had been allowed to continue school counselling.

We decided that the issues raised in this complaint should be addressed in the context of our investigation.

7. Our investigation

In order to gain a proper understanding of the issues involved, we obtained relevant information from a variety of sources.

7.1 The Department of Education and Training

We obtained documents outlining the DET's policies, procedures and practices, and other information relevant to our investigation.

We examined the departmental files on the cases of T1, T2 and C1, and met with the prescribed officers who had determined the disciplinary charges against these staff.

We also met with several senior staff from the CMU, including the Unit's chief investigator, and the then Assistant Director-General with responsibility for the CMU. The purpose of this meeting was to obtain information from the DET about its approach to risk management in the area of child protection. Subsequent to that meeting, the DET provided us with correspondence dated 12 March 1999 about the DET's approach to the issue of risk management.

7.2 The Victims Compensation Tribunal

We met with two senior staff of the VCT to discuss the manner in which claims for compensation are determined. We also viewed the VCT's decisions in relation to one of the alleged victims of T1 and both of the alleged victims of T2.

7.3 The NSW Police Service

We met with representatives from the Strategic Assessment and Security Centre of the New South Wales Police Service to discuss the Police Service's approach to risk assessment.

We also met with a representative from the Police Service's Child Protection Enforcement Agency (CPEA), which is responsible for the investigation of criminal matters involving alleged child sexual abuse, to discuss the nature of the risk assessments conducted by the CPEA.

7.4 The Catholic Commission for Employment Relations

We obtained information from a representative of the Catholic Commission for Employment Relations (CCER) about how non-government catholic schools respond to allegations that staff have engaged in child sexual abuse.

7.5 The Department of Community Services

We spoke with a representative from the Professional Conduct Unit within the Department of Community Services about its approach to the management of staff the subject of allegations of child sexual abuse.

7.6 Legal advice from Senior Counsel

Through the Crown Solicitor, we obtained specialist legal advice from Mr Wayne Haylen QC about the issues under review.

Mr Haylen has particular expertise in industrial law. It should also be noted that Mr Haylen represented the Police Service in proceedings before the Industrial Relations Commission involving an appeal by a police officer against an order by the Commissioner of Police removing the officer from the Police Service. Significantly, the Commissioner had used his new power under the 'commissioner's confidence' provisions of section 181D of the *Police Service Act* to remove the officer.⁵

We should observe that we obtained a copy of Mr Haylen's advice from the Crown Solicitor's office on 1 June 1999. As will be appreciated from a reading of this report, it was essential for us to have the benefit of Mr Haylen's advice before being able to prepare a fully informed and comprehensive Statement of Provisional Findings and Recommendations for the purposes of our investigation.

7.7 Statement of Provisional Findings and Recommendations

On 12 November 1999, we provided the Director-General of the DET with our Statement of Provisional Findings and Recommendations about the matter, inviting the DET's submissions on the statement.

On 7 December 1999, the Acting Ombudsman and other representatives of our office met with the Director-General and other senior departmental officers to discuss the DET's response to the statement.

7.8 Draft report

On 16 December 1999, we provided our draft report to the Minister for Education and Training for the purposes of a possible consultation with the Minister about the matter.

On 14 January 2000, the Minister advised us that he wished to consult with us about the draft report, and on 7 February 2000, the Acting Ombudsman and other representatives of our office met with the Minister to discuss the draft report.

7.9 Final report

The current document represents our final report on this matter.

⁵ The nature of the 'commissioner's confidence' power is discussed in detail later in this report at 21.3 The Police Service approach to management of its officers.

8. *Preliminary observations*

The DET's current approach to allegations that staff has engaged in improper conduct of a sexual nature with children — as illustrated in the cases of T1, T2 and C1 — depends on two distinct but related factors:

- allegations of this nature are dealt with under the DET's disciplinary scheme, and
- a high standard of proof is required to justify a disciplinary finding that the employee engaged in improper conduct of a sexual nature with a child or children.

In view of the fundamental importance of both of these factors, they are discussed in detail below. Chapter 9 describes the DET's disciplinary system, while Chapter 10 discusses the relevant standard of proof in disciplinary proceedings.

9. *DET's disciplinary system*

9.1 Introduction

This chapter of our report details the current manner in which the DET deals with allegations concerning the sexual abuse of children against its staff. It should be noted that some aspects of the DET's policy and administration in this area were changed in 1996 and 1997 against the background of the Royal Commission's inquiry into the handling of child abuse matters by various agencies.

9.2 Improper conduct of a sexual nature with children

According to the DET's guidelines, improper conduct of a sexual nature towards a child by an employee can be one or more of the following:

- matters of sexual assault — for example, sexual intercourse with a child; inappropriately touching the child; and exposing the employee's genitals to the child,
- inappropriate conversations, obscene language or jokes of a sexual nature,
- suggestive remarks,
- suggestive actions and obscene gestures,
- personal correspondence with a student in respect of the teacher's, or other staff member's, sexual feelings for the student,
- deliberate exposure of students to the sexual behaviour of other people.⁶

Matters of alleged sexual assault must be notified to the DET of Community Services. Such matters can also amount to criminal offences of indecent assault or indecent act capable of criminal investigation by the Police Service.

⁶ *Procedures to be followed in response to allegations of improper conduct of a sexual nature by a staff member against a student*, Department of Education and Training, dated 10 March 1997 and amended 12 March 1998.

9.3 Criminal investigations

Where a teacher or principal of a school receives or discovers an allegation of child sexual abuse by a staff member, they must notify the Department of Community Services (DOCS). If the matter is of a criminal nature, DOCS should notify the Police Service. The Police Service investigates the issue of possible criminal conduct and determines whether a criminal charge should be preferred.

9.4 Relationship between criminal investigations and departmental investigations

In some cases, the DET will not initiate or pursue its own investigation into the matter until the outcome of the criminal investigation and any criminal prosecution. In other cases, the DET will conduct some investigation of the matter in consultation with the Police Service.

The nature and extent of communication between the DET and the Police Service about the progress and outcome of criminal investigations appears to be somewhat ad hoc in nature. It is not clear whether the Police Service automatically advises the DET if and when a criminal charge has been preferred or of the outcome of any criminal prosecution.

9.5 Transfer and suspension of staff

Pending the outcome of the criminal process, the staff member involved can be transferred from their current duties in the school environment to administrative duties or be directed to work at home until a new work location can be arranged.

The Director-General is entitled to suspend an employee from duty who is charged with a criminal offence until the charge has been dealt with.⁷

9.6 Criteria for the transfer or suspension of a staff member

According to written advice provided by the DET to us, dated 12 March 1999, the issue of whether there is a “current risk to children” justifying transfer or suspension is initially determined on the following basis:

Factors to be considered in determining the risk include:

- the nature and or seriousness of the alleged improper conduct;
- whether the person has been charged by police with a criminal offence; and
- whether the [Police Service's] Child Protection Enforcement Agency or the Department of Community Services assesses the individual as posing a risk to children.

⁷ *Teaching Services Act 1980*, section 87(1)(b).

DET'S DISCIPLINARY SYSTEM

The DET also noted that relevant information might come to light in the course of an investigation that would justify a transfer of the teacher from the school environment:

... interviewees provide information which can change the case manager's assessment of the seriousness of a matter under investigation and of the risk to children. The staff member at this point may be transferred to non-school duties for the duration of the investigation.

The DET went on to say that, where an allegation of improper conduct of a sexual nature by a teacher involves possible criminal conduct, the CMU contacts the Police Service's CPEA in relation to the issue of risk assessment.

However, the CPEA advised us that it does not undertake risk assessments for employment purposes. Rather, the CPEA encourages departments and agencies to conduct their own risk assessments to determine whether or not a person should continue to be employed or whether restrictions should be placed on the staff member's duties in light of any identified risk. Nevertheless, if the CPEA is in possession of information which is relevant to the risk assessment of an employee, and the agency does not have access to that information, the CPEA advises the agency of the outcome of their risk assessment.

Recently, our child protection team had occasion to make further inquiries of the DET about the nature and extent of risk assessments conducted by the CMU in relation to teachers alleged to have engaged in child sexual abuse. On 17 September 1999, the relieving chief investigator of the CMU provided the following response:

In response to your question regarding the issue of a formal risk assessment, I believe that some officers from this unit have misinterpreted the term risk assessment when speaking with your officers. The term has previously been used to describe a report requested from the Child Protection Enforcement Agency. The Chief Investigator makes an assessment of risk in every case, using the criteria which are attached to this letter. The investigating officer takes the same criteria into consideration during the course of an investigation and as a result, recommendations are sometimes made to the General Manager of Executive and Legal Services to transfer an employee's duties to a non-school site.

The letter enclosed a pro forma document used by the CMU entitled *Intake/Registration/Risk Assessment*. This document, reproduced below, includes the criteria used by the CMU for their risk assessments:

The information provided to the Case Management Unit is assessed by the Chief Investigator to determine whether it:

- 1. amounts to a potential breach of discipline [improper conduct of a sexual nature] which should be investigated by the unit*
- 2. meets the threshold for registration as a case which is to be investigated*
 - (a) name or information which could reasonably identify the staff member*
 - (b) names of student victims or information which could reasonably identify the victims*
 - (c) name of school or information which could reasonably identify the school*
 - (d) specific nature of improper conduct (including date and place if possible)*
 - (e) whether another agency is investigating the allegation*

In the event that 1 and 2 are met, a further assessment of the available information is made by the Chief Investigator in order to determine the risk which may be posed to both students and staff. This is to determine whether the matter:

- 3. requires immediate action of any kind*
- 4. requires the removal of the employee from their normal duties*
- 5. requires that the employee be informed and/or directed in any other way*

In making this assessment, the Chief Investigator considers the circumstances surrounding the alleged behaviour, including, but not limited to:

- the nature of the alleged conduct*
- frequency and duration of the alleged conduct*
- number and age of the alleged victim/s*
- date/s of the alleged incident/s*
- details of the complainant*
- involvement of other agencies*
- location of the alleged incident/s*
- access that the person subject of the allegation has to alleged victim/s*
- previous allegations*
- perceived risk of the destruction of evidence and/or suborning of witnesses*
- physical risk to the alleged perpetrator to others*

9.7 Management action where the staff member is not transferred or suspended

The DET advised us that the following management action is taken where a teacher is not transferred from the school environment pending the outcome of an investigation:

... they are advised in writing that during this period their conduct must be professional and in keeping with their legal responsibilities as a teacher. In some cases the teacher is directed to avoid specific kinds of conduct such as a direction not to touch children unless their safety is at risk. The principal is given a copy of the letter containing the direction and asked to monitor the situation.

It appears that, from the standard letter sent to teachers the subject of investigation, the principal is asked to draw the teacher's attention to the sorts of behaviour listed by DET that can constitute improper conduct of a sexual nature by a staff member against a student. The letter to the teacher also advises them of the availability of confidential counselling support under the Employee Assistance Program and of support through the DET's local staff welfare officer.

9.8 Criminal convictions

If an employee is charged and subsequently convicted of a criminal offence, the employee is deemed to have committed a disciplinary offence under the DET's disciplinary scheme and is therefore subject to the range of penalties available to the Director-General in dealing with breaches of discipline.⁸ (The relevant penalties are discussed in detail in 9.20 Proven charges and penalties.)

9.9 Where there is no criminal charge or conviction

If an employee is not charged with, or not convicted of, a criminal offence it is still open to the DET to deal with the employee under its investigative and disciplinary scheme.

9.10 The DET's investigative and disciplinary scheme

The statutory basis for the DET's investigative and disciplinary scheme is found in Part 4 of Division 5 of the *Teaching Services Act* (the Act) and Part 3 of the Teaching Services (Education Teaching Service) Regulation (the Regulation).

9.11 The role of the CMU

The CMU investigates allegations that teachers and other departmental staff have engaged in sexual abuse of students and/or other children. (The DET also has an Industrial Relations Services Unit within its Personnel Directorate which investigates allegations of child abuse against staff where the alleged abuse does not involve a sexual element.)

Responsibility for the CMU originally resided with an Assistant Director-General. This responsibility has since been given to the General Manager, Legal and Executive Services.

It is important to note at this point that the present report focuses on the process following an investigation by the CMU, particularly where the allegation becomes the subject of disciplinary proceedings. We do not propose to discuss in this report the quality of the DET's investigations into allegations of child abuse by teachers and other departmental staff, since the issue of the adequacy or otherwise of the CMU's investigations is to be the subject of a separate report by us.

9.12 Transfer of staff pending the outcome of the investigation and any disciplinary proceedings

Pending the outcome of the CMU's investigation and any subsequent disciplinary proceedings, the staff member involved can be transferred from their current duties in the school environment to administrative duties or be directed to work at home until a new work location can be arranged.

⁸ *Teaching Services Act 1980*, section 86.

9.13 Where the CMU finds the allegation not substantiated

The CMU's investigation may find that the allegation of improper conduct of a sexual nature is not substantiated. In this case, no disciplinary proceedings are instituted.

Where the staff member the subject of the allegations was directed to work at home or transferred to non-school duties pending the outcome of the CMU's investigation, they can expect to return to the school environment.

The DET provided us with copies of two letters that it had sent to staff where allegations of improper conduct of a sexual nature had been found not substantiated. One letter was concerned with the result of an investigation into an allegation that the teacher had engaged in conversation and comments of a sexual nature in a class. The Assistant Director-General, after advising the teacher that "the available evidence does not support the allegation", went on to say:

However, it is important to all teachers to understand that any interaction with students which is likely to cause the student embarrassment, bewilderment, not to feel safe, distress or fear, or which breaks the student's trust in teacher, is regarded as totally unacceptable and is to be avoided.

Teachers must be aware that their interactions with students are based on a special trusting relationship, and those relationships are open to intense scrutiny. The community has clear expectations that all teachers will avoid personal conversation and comments of a sexual nature when interacting with students.

The letter also advised the teacher of support available to him through the DET's local staff welfare officer, senior counsellors at the CMU, the Employee Assistance Program and the teacher's industrial union.

The other letter, to another teacher the subject of an ultimately unsubstantiated allegation concerning the use of improper sexual language, included the following:

In future you will need to be more watchful in regard to the language you use with students. Some students are more sensitive to certain words and descriptions than others. You, as a teacher, must acknowledge this and avoid creating situations where students may be embarrassed and even offended by the language used by their teacher.

I strongly counsel you to take notice of the advice that has been provided to you in this letter and given by your supervisors.

9.14 Disciplinary charges

If the CMU finds the allegation substantiated, the Assistant Director-General formulates a disciplinary charge.⁹ Such a charge must be concerned with a breach of discipline as defined by section 83 of the Act. Section 83 sets out various matters which can constitute a breach of discipline. One of these matters is engaging in improper conduct. According to the DET, improper conduct includes improper conduct of a sexual nature with children.

⁹ It appears that disciplinary charges are now formulated by the General Manager, Legal and Executive Services, who has responsibility for overseeing the CMU.

A notice charging a staff member with a breach of discipline contains particulars detailing the alleged improper conduct.

9.15 Officers who deal with disciplinary charges

Alleged breaches of discipline must be dealt with by the Director-General or a prescribed officer.¹⁰

The following types of departmental officers are prescribed officers:¹¹

- Deputy Directors-General
- Assistant Directors-General
- directors
- executive directors
- district superintendents
- general managers

All of these positions are within the Senior Executive Service of the DET, beyond the level of school principal. There are currently 112 prescribed officers.

The Assistant Director-General appoints prescribed officers to deal with disciplinary charges involving alleged improper conduct of a sexual nature. According to the DET, in appointing a prescribed officer, the Assistant Director-General considers whether the prescribed officer:

- has had any involvement with any of the parties in the case,
- can give the matter a very high priority in terms of other work commitments,
- has undertaken appropriate prescribed officer training, and
- is the most senior person available.

According to the DET, only four of the 112 prescribed officers have dealt with the bulk of disciplinary matters involving alleged improper conduct of a sexual nature.

9.16 Conduct of disciplinary proceedings

Following notice to the staff member of the disciplinary charge, the prescribed officer invites the staff member to respond to the allegations as particularised in the notice of charge.

Where a staff member denies the truth of the allegations, the prescribed officer may deal with the charge by either conducting an inquiry or seeking a written explanation from the staff member within fourteen days.¹² (In the cases considered in this report, the prescribed officers reached their decisions after considering written submissions from the Assistant Director-General and the legal representatives of the teachers involved.)

¹⁰ *Teaching Services Act 1980*, section 84.

¹¹ Teaching Services (Education Teaching Service) Regulation 1994, clause 13.

¹² Teaching Services (Education Teaching Service) Regulation 1994, clause 15(2)(a).

The CMU submits a detailed report to the prescribed officer concerning the evidence obtained in the course of its investigation. The report includes relevant documents such as statements from the alleged victim(s) and any witnesses, and extracts from the transcript of any relevant criminal proceedings against the staff member. The report may include information about evidence before the VCT where the alleged victim has applied for, or has been awarded, compensation by the VCT.

9.17 Decisions on disciplinary charges

The prescribed officer decides whether the disciplinary charge has been proven or not proven. In reaching this decision, the prescribed officer considers the available evidence, including the submission from the CMU as well as any material submitted by the teacher or their legal representative. The prescribed officer then determines whether the facts alleged in the particulars of the charge are sufficiently established and, if so, whether the facts as proven amount to a breach of discipline.

9.18 Standard of proof

The standard of proof required to determine whether a disciplinary charge has been proven in matters involving alleged improper conduct of a sexual nature is particularly significant in the present context. In view of the importance of this issue, it is discussed separately and in detail in chapter 10 of this report.

9.19 Where disciplinary charges not proven

If the prescribed officer finds the charge not proven, any existing suspension or transfer of the staff member must be terminated¹³ and the staff member can expect to return to their usual employment.

The CMU advises the principal of the teacher's school and the relevant district superintendent of the outcome of the disciplinary charge and asks the principal to provide support to the staff member upon their return to duty.¹⁴ It is not clear from the DET's formal written policies and procedures what is specifically required of a principal in supporting a staff member.

9.20 Proven charges and penalties

Where the prescribed officer decides a disciplinary charge is proven, they are entitled to impose one or more of the following penalties:

- caution
- reprimand

¹³ Teaching Services (Education Teaching Service) Regulation 1994, clause 19(1).

¹⁴ Teaching Services (Education Teaching Service) Regulation 1994, clause 19(3), introduced by the Teaching Services (Education Teaching Service) Amendment (Disciplinary Authorities) Regulation 1998. The finding must be recorded separately from the staff member's personal record and kept under strictly limited access as approved by the Director-General.

- fine
- reduction of the staff member's salary or wages, or reduction of the staff member to a lower classification or position in the NSW Teaching Service.¹⁵

The prescribed officer can also recommend to the Director-General that the staff member either be dismissed or be required or allowed to resign. Where such a recommendation is made, the Director-General decides whether to accept the recommendation or impose a lesser penalty.

9.21 Submissions on penalty

The prescribed officer seeks submissions from both the Assistant Director-General and the teacher or their legal representative as to the penalty to be imposed.

It is the DET's policy not to make submissions to the prescribed officer on an appropriate penalty. However, the DET does provide the prescribed officer with information about any other disciplinary charges previously proven against the employee and the nature of the penalty or penalties imposed.

9.22 Management action where the employee has not been dismissed or has not resigned

The DET advised us of the action which it takes where a disciplinary charge concerning improper conduct of a sexual nature has been found proven but the teacher has not been dismissed or has not resigned:

When the Prescribed Officer finds the charge proven and imposes the penalties of a caution and/or reprimand or demotion or salary reduction, then a formal program of in-school monitoring is put in place for a minimum of one year. The principal is given very specific information about conduct which has been found to be improper. The principal is asked to provide a report on the staff member's interaction with students each term and in particular to report on whether the conduct that was found to be improper has ceased. After four terms, and four reports, the Chief Investigator [of the CMU] decides whether or not further monitoring is required.

The CMU, in conjunction with the DET's Legal Services Unit, has prepared a document entitled *Monitoring guidelines in relation to improper conduct of a sexual nature by a staff member*. The document states: "These guidelines are designed to assist principals and supervisors in monitoring a teacher's conduct in relation to students", and goes on to include the following description of the monitoring process:

- Monitoring is a form of supervision which as with all supervision should be an honest, clearly understood, jointly discussed and supportive process.
- At the outset the principal/supervisor and the staff member will discuss what actions or behaviours are inappropriate and how these will be avoided in the classroom, playground, on excursions, at sport and during all extra curricular activities involving students, within and outside the school.

¹⁵ Where a charge has been found proven against a senior executive officer, a prescribed officer cannot impose the reduction penalties, and the matter is dealt with by the DET under the terms of the officer's senior executive service contract.

- There will be a clear understanding about how the principal/supervisor will monitor conduct, including the timeframe and the kind of evidence to be provided in the report.
- Monitoring must be a confidential process. If the principal decides to involve one or two other senior staff, this is to be done confidentially and with the staff member's awareness.
- When the monitoring has been completed and the matter is finalised, a letter will be sent from the CMU to the staff member, informing him or her that the monitoring has been completed.

It should be noted that these guidelines are not explicit as to the type of evidence which should be included in the reports. Nor do they contain any further information on management strategies designed to protect the legitimate interests of children, the teacher and the school's reputation generally, when a staff member returns to their former place of employment following disciplinary action.

10. The standard of proof in disciplinary proceedings

10.1 The DET's guidelines on the standard of proof in disciplinary proceedings

The DET's draft guidelines for prescribed officers¹⁶ discuss the standard of proof to be applied in disciplinary proceedings generally:

It is accepted as a matter of law that although in disciplinary matters the standard of proof required is the civil standard, that is, on the balance of probabilities, it is also well established that in determining whether or not the standard has been reached a Prescribed Officer must have regard to the gravity of the allegation and the serious consequences which may flow from a particular finding (commonly called the "Briginshaw Test" after a family court case Briginshaw -v- Briginshaw (1938) 60 CLR 336).

If the consequences of making a finding against the employee are serious then the standard of proof which a Prescribed Officer must require of the Department is also high. For example, if a finding will be likely to result in dismissal from employment then, as that consequence is of an extremely serious nature, the standard of proof which would be expected would necessarily be a very high one. Likewise, however, if in respect of another charge a particular finding would be more likely to result in a caution then the standard of proof required would not be as high.

Irrespective of the seriousness of the consequences, the standard is always on the balance of probabilities.

¹⁶ Department of Education and Training Prescribed Officer Guidelines, Draft, January 1999.

10.2 Senior Counsel’s advice on the standard of proof to be applied in disciplinary proceedings involving allegations of improper conduct of a sexual nature with children

As part of our investigation, we sought advice from Mr Haylen QC on the appropriate standard of proof to be applied in disciplinary proceedings relating to allegations of improper conduct of a sexual nature.

Mr Haylen advised that the DET “is obliged to apply the civil standard of proof [that is, the balance of probabilities], however, to the level referred to in the famous passage from the judgment of Dixon J in *Briginshaw v Briginshaw*”.

The crucial excerpts from *Briginshaw* are as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony or indirect inferences. ... [T]he nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises as to whether a crime has been committed, the standard of persuasion is ... the same as upon other civil issues ... but ... weight is given to the presumption of innocence and exactness of proof is required.

An allegation against a staff member of improper conduct of a sexual nature with a child or children is extremely serious as are the implications for the career of the teacher if the alleged conduct is found proven. Indeed, it is difficult to think of a more damaging allegation to a teacher’s career than they engaged in improper conduct of a sexual nature with a child. This is a point frequently made by legal representatives of departmental staff facing disciplinary action relating to child sexual abuse.

Mr Haylen advised:

Applied to a member of the teaching profession in circumstances where the allegation is one of improper conduct of a sexual nature, Briginshaw requires a high degree of proof which nevertheless falls short of the criminal standard but in a practical sense is something close to it. [Our emphasis]

11. Observations by senior counsel on the outcome of the disciplinary proceedings against T1 and T2

11.1 Introduction

We requested Mr Haylen to review the material considered by the prescribed officers in determining the disciplinary charges against T1 and T2. In response, Mr Haylen advised that the decisions reached by the prescribed officers in the cases of T1 and T2 were reasonably open to them.

11.2 The case of T1

In relation to the case involving T1, Mr Haylen said:

I am satisfied on a consideration of his report that the Prescribed Officer has addressed the right question in relation to the standard of proof and has effectively applied the Briginshaw standard without crossing the line in applying the test of proof beyond reasonable doubt.

11.3 The case of T2

In relation to the case involving T2, Mr Haylen said:

The Prescribed Officer dealt with this matter [the standard of proof] briefly but I am satisfied that he was aware that he did not have to apply the criminal standard although the nature and seriousness of the allegations required him to apply a high standard of proof before finding that the charges were made out. In all the circumstances I believe the Prescribed Officer has applied the appropriate standard of proof.

12. The 'anomaly' between the awards of compensation by the victims compensation tribunal and the outcome of the disciplinary proceedings

12.1 Introduction

A particular concern raised by the Director-General was the apparent anomaly between, on the one hand, the decisions by the VCT to award compensation to alleged victims of T1 and T2 and, on the other hand, the outcome of the disciplinary proceedings against T1 and T2, in which the disciplinary charges of improper conduct of a sexual nature were found not proven.

In order to explain this apparent anomaly, consideration needs to be given to the nature of, and processes involved in, the two types of proceedings.

12.2 VCT proceedings

The VCT deals with applications for compensation by people who claim they have been victims of crime.¹⁷

The fact that the alleged perpetrator cannot be identified or was not convicted of a relevant crime does not of itself exclude an award of compensation.

¹⁷ *Victims Compensation Act 1987 and Victims Compensation Act 1996.*

In order to obtain compensation from the VCT, the claimant must demonstrate on the balance of probabilities that they were subject to an act of violence and suffered an injury as a result of that act.

It is important to note that there is no involvement of the alleged offender in the process leading to the VCT's decision. This means that the alleged offender's version of events is not necessarily placed before the VCT.¹⁸

12.3 The DET's disciplinary proceedings

The DET's disciplinary system is distinct and different from the system for victims compensation used by the VCT. In essence, the purpose of the DET's disciplinary proceedings is to determine whether a teacher has engaged in improper conduct of a sexual nature with a child or children, thereby committing a breach of discipline warranting a disciplinary penalty.

12.4 Relevance of VCT decisions to the DET's disciplinary proceedings

A decision by the VCT to award compensation to an alleged victim of a teacher should be of some significance in the DET's approach to dealing with an allegation against the teacher of improper conduct of a sexual nature.

However, it is important to recognise that the DET cannot simply rely on the VCT's decision. In other words, a decision by the VCT to award compensation to an alleged victim does not of itself entitle the CMU to find the allegation against the teacher in question substantiated nor a prescribed officer to find a relevant disciplinary charge proven.

In this respect, a crucial point is that the DET is obliged to conduct its own investigation into the allegation against the teacher of improper conduct of a sexual nature. The terms of the VCT's decision, or the evidence relied upon to support that decision, may be available to the DET for the purposes of the investigation. Nevertheless, the DET must examine the cogency of that evidence for the purposes of its own investigation into the teacher's alleged conduct. In other words, the evidence before the VCT, and the VCT's decision, are, in the words of Mr Haylen, only of relevance in "opening up some relevant lines of inquiry". Mr Haylen's advice suggests that it would be necessary or appropriate for the DET itself to conduct interviews with those people who have been involved in the giving of evidence to the VCT.

A second crucial point is that the requirements of procedural fairness in disciplinary proceedings impose an obligation on the DET to put the substance of the alleged breach of discipline to the teacher and invite their response. In this respect, Mr Haylen advised:

In a practical sense it may well be that evidence and documents from previous proceedings may be tendered or relied upon in disciplinary proceedings but the teacher must always be on notice of the material being relied upon and be given an opportunity to make his or her own submissions and call his or her own evidence to call that material into doubt.

¹⁸ However, if the VCT makes an order for restitution against a person who has been convicted of an offence in relation to the incident in question, that person may appeal the order .

... should the teacher call into question the accuracy of the information, the Prescribed Officer may find it difficult to substantiate the allegations.

A third point of particular significance in the context of this report is that the standard of proof to establish a disciplinary charge relating to alleged improper conduct of a sexual nature with a child or children is particularly high. It is worth repeating here the terms of Mr Haylen's advice on this point:

*Applied to a member of the teaching profession in circumstances where the allegation is one of improper conduct of a sexual nature, Briginshaw requires a **high degree of proof which nevertheless falls short of the criminal standard but in a practical sense is something close to it.** [Our emphasis]*

12.5 Explaining the anomaly

In light of the matters discussed above, there is not necessarily an anomaly between, on the one hand, a VCT decision to award compensation to the alleged victim of improper sexual conduct by a teacher and, on the other, a departmental finding that a disciplinary charge against the teacher relating to the same conduct is not proven. In this respect, a number of distinctions between the respective types of proceedings should be emphasised.

The VCT only had to determine whether the alleged victims of T1 and T2 who were claiming compensation had established, on the balance of probabilities, an act of violence and resulting injury which would justify an award of compensation. Furthermore, in reaching its decision on these issues, the VCT did not have to take into account, and was in fact unaware of, the version of events which might have been provided by T1 and T2.

By way of contrast:

- The DET was required to conduct its own investigation into the allegations against T1 and T2. While the evidence before, and decisions by, the VCT may have been of assistance in the DET's investigations, they were not in themselves sufficient to conclusively establish the allegations against T1 and T2.
- Furthermore, the requirements of procedural fairness in the disciplinary proceedings against the teachers meant that the teachers were entitled to produce evidence and make submissions which had to be taken into account by the prescribed officers in reaching a decision as to whether the disciplinary charges were proven.
- Finally, the prescribed officers were required to apply a high standard of proof in determining whether the disciplinary charges against T1 and T2 should be found proven.

All of these matters assist in explaining why there is not an inherent inconsistency between the awards of compensation by the VCT to the alleged victims of T1 and T2 and the findings by the DET's prescribed officers that the disciplinary charges against T1 and T2 were not proven.

13. Scope and limitations of the DET's disciplinary system

As we observed in the introduction to this report, the DET should be able to respond appropriately to concerns that its staff have engaged, or may engage in, child sexual abuse.

Against this background, chapters 14 and 15 of this report discuss whether and how the DET's general duty of care to children and concepts of risk management can be taken into account in a context where allegations of child sexual abuse by teachers are dealt with in a disciplinary manner. Chapter 15 also canvasses the nature and extent of the management options open to the DET where disciplinary proceedings are not instituted or where a disciplinary charge is found not proven.

14. The DET's duty of care to children in the child protection area

14.1 Request for Senior Counsel's advice

We asked Mr Haylen the following questions about the relationship between, on the one hand, the DET's duty of care towards students and, on the other, the conduct of disciplinary proceedings involving departmental charges against staff of alleged improper conduct of a sexual nature with children:

- What is the nature of the DET's duty of care to students?
- Does this duty of care have any relevance to disciplinary proceedings conducted by the DET arising from allegations of improper conduct of a sexual nature?
- Would it be improper or inappropriate for a prescribed officer to take the DET's duty of care into account in making a determination in disciplinary proceedings conducted by the DET arising out of allegations of improper conduct of a sexual nature?

14.2 The DET's general duty of care to students

After referring to relevant legal authorities, Mr Haylen described the DET's general duty of care to students as follows:

... the duty is ... to take those steps which are reasonable in the circumstances such as to prevent injury to the students ... those steps are to be considered along with any conflicting responsibilities which the Department may have.

14.3 The DET's duty of care to students in the area of child protection

Mr Haylen also observed:

[The DET's general] duty of care is ... difficult to apply with clarity in considering what steps the Department should take to protect students from possible sexual abuse while conducting a disciplinary investigation concerning a teacher's alleged improper conduct of a sexual nature. The question ... is not without its difficulties and is one which does not appear to have been addressed in the reported cases. To answer the question it is necessary, therefore, to return to first principles.

Mr Haylen concluded:

*Where the Department or a Prescribed Officer is conducting a disciplinary investigation arising out of allegations of improper conduct of a sexual nature **the Department's duty of care remains a consideration in the broadest sense but so does the Department's obligation to fairly deal with its employees and to fairly conduct a disciplinary investigation.** I do not believe that these two obligations intersect or necessarily conflict with each other: in my view the better description is that **the two duties operate side by side.** In protecting the student population against possible improper sexual abuse the legislature has left in the hands of the Department a comprehensive process for investigating and testing those allegations and to take action against any person found guilty of those improper actions including termination of employment. In conducting such investigations and inquiries, however, the Department through its Prescribed Officers must act fairly in its dealings with the teacher who is the subject of the allegations and **ultimately must be satisfied to the degree referred to in Briginshaw that the allegations are made out.** [Our emphasis]*

14.4 The relevance of the DET's duty of care to students to the standard of proof in disciplinary proceedings

In light of the above analysis, Mr Haylen observed:

*In my view it is abundantly clear that **the Department's duty of care to its students does not operate so as to reduce the level of onus of proof which must be satisfied in order to prove against a teacher allegations of improper conduct of a sexual nature ...** (emphasis by us)*

[I]t would be improper and inappropriate for a Prescribed Officer to take into account the broad duty of care of the Department by reducing the otherwise high level of proof required in order to find made out allegations of improper conduct of a sexual nature. Put another way, a decision to find a charge of improper conduct of a sexual nature established would be open to challenge if the Prescribed Officer was not satisfied that the allegations were proved but made the decision on the mere balance of probabilities influenced by a perceived obligation to protect the students from such further conduct that might take place.

15. The scope for risk assessment and management action in the context of the current disciplinary system

15.1 Request for Senior Counsel's advice

We sought Mr Haylen's advice on the following questions:

- *Does determination of risk have a part to play in the assessment of matters before a disciplinary tribunal?*
- *Would a disciplinary tribunal be impeded from taking risk into account in reaching a determination on a case before the tribunal?*
- *Is the Department entitled to undertake a risk assessment in the absence of disciplinary proceedings?*
- *Is it open to the Department to take management action in response to a risk assessment, without commencing and concluding disciplinary proceedings?*
- *Which of the following management responses would not be open to the Department without it having first concluded disciplinary proceedings:*
 - *mandatory counselling;*
 - *relocation to another school;*
 - *reassignment to non-teaching duties;*
 - *placement of limitations on the gender and/or age of the children to whom the teacher is permitted to have unsupervised and/or supervised access;*
 - *imposition of supervision and/or monitoring of the teacher's work performance; and*
 - *giving specific directions in regard to the teacher's behaviour and/or interaction with students?*

15.2 The scope for risk assessment in disciplinary proceedings

In response to our questions, Mr Haylen advised:

If the Department is doing no more than laying down general guidelines in order to avoid situations in which allegations of improper conduct of a sexual nature may arise, then there appears to be little legitimate complaint which could be made.

Mr Haylen also recognised that the DET could undertake risk assessments of teachers:

... the Department may from time to time conduct a risk assessment of teachers to determine, from information known about them, to what extent they pose a risk of being responsible for improper conduct of a sexual nature.

However, Mr Haylen provided the following advice about the lack of any practical scope for the application of the concept of risk assessment in the disciplinary process:

[I]t is difficult to characterise the undertaking of a risk assessment in relation to a particular member of staff where the conduct being assessed is improper conduct of a sexual nature, as other than disciplinary in nature. If it is in truth disciplinary in nature then the provisions of the Act and Regulations relating to disciplinary processes must be followed.

[T]o use [a risk assessment] in order to find the charge made out when it was otherwise not be made out on the evidence would be improper and would be contrary to the Briginshaw test.

15.3 The scope for management action outside the disciplinary system

Mr Haylen also provided the following advice on the scope for the DET to take management action without instituting disciplinary proceedings or to take forms of management action beyond the imposition of one of the penalties available under the disciplinary system:

If the conduct being investigated or considered and which is to be the subject of "management responses" is in substance conduct which is disgraceful or improper conduct within s83 of the Teaching Services Act, then the full disciplinary process of that Act must be followed and the only punishment available is the punishments set out in s85.

Mr Haylen relied upon the 1998 Supreme Court case of *Ward v The Director-General of School Education*¹⁹ in support of this conclusion.

15.4 The case of *Ward v The Director-General of School Education*

In the Ward case, the DET received allegations that a teacher had engaged in improper conduct of a sexual nature with students. The DET investigated the allegations, found some of them substantiated, and sent the teacher a letter of warning which included the following:

... it has been determined that disciplinary action is warranted.

... it has been decided that you will receive this letter of warning, together with directions as to your future behaviour.

You are directed that you will not:

- touch any student unless it is necessary to protect them from immediate danger.*
- allow students to touch you in any way.*
- behave toward students in any way which could constitute improper conduct of a sexual nature as specified under the relevant departmental policy ...*

You should understand that any further transgression will result in immediate formal disciplinary action. ...

A copy of this letter will be provided to your District Superintendent and to your Principal who is required to monitor your conduct in relation to students ...

¹⁹ (1998) 80 IR 175.

THE SCOPE FOR RISK ASSESSMENT

The teacher commenced action in the Supreme Court, challenging the letter of warning on the basis that it could not be issued in the absence of a formal finding of a breach of discipline against him.

Shortly after the institution of the proceedings, the DET's then Assistant Director-General again wrote to the teacher, saying:

As a result of my further consideration of the matter I have decided that material in support of the allegations does not justify the taking of disciplinary action against you. Accordingly, I have rescinded my [previous] letter to you ...

However, as you are undoubtedly aware the community and the Department expect that your interaction with students should be beyond reproach. In this regard, it is essential that teachers scrupulously avoid any contact that may be misconstrued as involving some element of impropriety.

Consequently, so as to avoid the possibility of any further allegations with respect to your interaction with children you are hereby directed that you will not: [the letter then repeated the directions from the previous letter].

The teacher argued that this later letter, together with the subsequent monitoring of his future conduct, were in the nature of disciplinary action which did not comply with the procedures required by the *Teaching Services Act*.

In response, the DET submitted that:

[T]his is not a case about discipline ... [T]he Department has merely given a lawful direction to one of its employees ... in the light of the Department's obligations in the public interest to have regard to the care and protection of the children entrusted to it.

In the event, the Supreme Court concluded that the *Teaching Services Act* and the Regulation made under the Act:

... set out how breaches of discipline are to be dealt with. This they do exhaustively, as part of a code, leaving no room for such a breach to be dealt with in any other way.

Significantly, the court observed:

Whilst it is appreciated that the Department has a most serious duty to protect the children entrusted to its care ... it does not ... have the authority to set up a disciplinary procedure different to the procedure mandated by the Act.

The court decided that the letter of warning to the teacher was indistinguishable from the penalties of caution or reprimand — penalties which could only be administered following a finding of a breach of discipline. The letter was therefore “invalid” because successful disciplinary action had not been taken against the teacher.

The court also rejected the lawfulness of the directions to the teacher on the following additional basis:

... I cannot regard the directions as reasonable in that they were not given to primary school teachers generally, but only to this one teacher ... The plaintiff [teacher] was ... targeted for special directions applicable only to him on account of unsubstantiated allegations. Such special directions cannot, in my view, be regarded as reasonable, and accordingly are not lawful.

16. Approaches to child protection matters

As can be seen from the above discussion, the DET is currently required to use a disciplinary approach to dealing with allegations against teachers of child sexual abuse. This approach imposes the following significant limitations on the DET's capacity to make responsible management decisions when dealing with the issues involved:

- while a teacher can be transferred from the school environment pending the outcome of a CMU investigation and any ensuing disciplinary proceedings, a disciplinary charge must be proved against the teacher before any other action can be taken,
- a high standard of proof is required to establish a disciplinary charge,
- this standard of proof is not diminished by reference to the DET's general duty of care towards children or concepts of risk assessment and risk management,
- even if a disciplinary charge is found proven, the DET appears to be limited to imposing one or more of the penalties stipulated by the disciplinary system.

Given the limitations of the DET's current disciplinary system, the following chapters of this report examine whether there are other better approaches to the handling of allegations against teachers of improper conduct of a sexual nature towards children.

Chapter 17 discusses the Royal Commission's approach to the recruitment and management of teachers and other employees involved in the care and supervision of children. The Royal Commission recommended a system of employment screening which would use the criterion of "unacceptable risk" — namely, whether "the involvement of any person in [child-related employment] would expose a child or children to an unacceptable risk or sexual abuse".

Chapter 18 discusses the implementation of the Royal Commission's recommendation through the introduction of the *Commission for Children and Young People Act*. This Act has made provision for a system of employment screening for child-related employment. Significantly, the Act provides that:

The welfare of children and, in particular, protecting them from child abuse, is the paramount consideration in employment screening.²⁰

The procedures for employment screening require an "assessment of the risk to children".

²⁰ *Commission for Children and Young People Act 1998*, section 32.

Chapter 19 describes the work of an interagency investigative forum which is examining a number of crucial issues concerning child protection by both government and non-government agencies. The forum's mission is to "lead a quality approach to investigating and managing allegations of child abuse made against employees". One of the forum's objectives is "enhancing the systems for protecting children". The strategies for achieving this objective include developing guidelines for risk assessment and the management by various agencies of allegations against their staff of child abuse.

Since there is reference throughout the above chapters to concepts such as risk assessment and risk management, chapter 20 explains the meaning and application of these concepts.

Chapter 21 describes how a major public authority, the New South Wales Police Service, has abandoned a disciplinary approach to allegations of misconduct against its staff and adopted a management approach, incorporating concepts of risk assessment and risk management.

17. The approach of the Royal Commission — The concept of unacceptable risk

17.1 The Royal Commission's terms of reference

The Royal Commission conducted an inquiry "into the policing of paedophile and pederast activity, and into the protection of children from unlawful sexual abuse".²¹

One of the Royal Commission's specific terms of reference was:

Whether Government departments and agencies have sufficiently effective monitoring and screening processes to protect children in the care of or under the supervision of Government departments and agencies from sexual abuse; if not, what measures should be put in place to provide sufficient protection in this respect.²²

17.2 Unacceptable risk certificates

Against this background, the Royal Commission considered the problem of the recruitment and management of teachers and other employees involved in the care and supervision of children.

The Royal Commission adopted the approach that the relevant criterion for exclusion from such employment should be whether "the involvement of any person in any such work or services would expose a child or children to an unacceptable risk of sexual abuse".

The Royal Commission recommended the establishment of a Children's Commission which would have statutory authority to issue an Unacceptable Risk Certificate in the following cases:

- where a person is convicted of a criminal charge involving child sexual abuse,

²¹ *Royal Commission into the New South Wales Police Service*, Final Report, Volume IV, para 1.26 at page 571.

²² *Royal Commission into the New South Wales Police Service*, Final Report, Volume IV, para 1.27(l) at page 571.

- where a person is found guilty of a breach of discipline involving child sexual abuse, or
- where the Children's Commission was satisfied after due inquiry that the person poses an unacceptable risk.

It is important to note that the Royal Commission did not envisage that the only basis for an Unacceptable Risk Certificate would be a relevant criminal conviction or a departmental finding of a breach of discipline. Instead, the Royal Commission envisaged that the Children's Commission would be entitled to issue an Unacceptable Risk Certificate even in the absence of a conviction or disciplinary breach.

17.3 Employment screening for current employees

The Royal Commission contemplated screening for both potential and current employees.

In the case of current employees, the Royal Commission recommended the following system:

- *[I]f the Children's Commissioner ... forms the view that the employee poses an unacceptable risk to be employed in the care or supervision of children, the [Commissioner] should call upon the employee to show cause why an unacceptable risk certificate should not issue;*
- *the Children's Commissioner should be able to require the employee to answer any questions and/or produce any documents that the Commissioner requires, subject to the protection that anything the employee says or produces that may be incriminatory would not be capable of use in criminal proceedings, but might be used in disciplinary proceedings;*
- *if the employee refuses to answer the questions the Children's Commissioner should be entitled to draw an adverse inference from that refusal;*
- *once the Children's Commissioner has heard the employee, the holder of that office or delegate should either:*
 - *issue a certificate that the employee constitutes an unacceptable risk to be employed in the care or supervision of children; or*
 - *advise that no certificate will issue;*
- *the employee should have a right of appeal in respect of such certificate preferably to the Administrative Decisions Tribunal or otherwise to the Industrial Relations Commission; and*
- *a person the subject of a certificate should have a right to make a subsequent application to the Children's Commission to cancel the certificate, with a right of appeal from any refusal to do so.*²³

17.4 Comments on disciplinary investigations

The Royal Commission made the following general comments on the question of disciplinary proceedings generally:

²³ *Royal Commission into the New South Wales Police Service, Final Report, Volume V, para 20.49 at page 1305.*

THE APPROACH OF THE ROYAL COMMISSION

Disciplinary inquiries in respect of each of the departments and agencies concerned should continue to be conducted in the usual way and the Royal Commission does not wish to disturb those procedures.²⁴

(However, the Royal Commission did recommend some changes in relation to those who should be responsible for disciplinary investigations into allegations of child sexual abuse against employees of certain major government departments.)

The Royal Commission also said:

*The Children's Commission should have the power to monitor [disciplinary] investigations, the progress of which should be reported to it. Further it should have the power to initiate the procedure for the issue of an unacceptable risk certificate **at any time it thinks fit**.²⁵ [Our emphasis]*

17.5 Rationale for the Royal Commission's recommendations

The Royal Commission made the following observations in support of its recommendations for employment screening (we have added our own emphasis to some of the Royal Commission's observations for the purposes of this discussion):

*It is recognised that [the power to issue an "unacceptable risk" certificate] is an **exceptional power** and one that might have significant ramifications for the person who is the subject of an unacceptable risk certification. However, in the light of the evidence received which demonstrates the tenacity and duplicity of paedophiles, the repetitive and obsessive nature of their offending, the low detection and conviction rates and the inability of the system in the past to remove paedophiles from positions in which they have direct access to children, **special measures are required**.*

In coming to this conclusion the Commission has paid particular regard to the problem in dealing with employees who have been involved in a series of incidents (involving the sexual abuse of children), none of which has reached a criminal court or resulted in a finding of a breach of discipline ...

In many such cases, assuming that the overall position was recorded and known, a reasonable person would conclude that the person in question constituted an unacceptable risk to be employed in the care or supervision of children.

*It is important to understand that the exercise of this power by the Children's Commission would **not involve a finding of guilt or innocence in respect of any specific complaint**. Rather it is intended that the Children's Commissioner would review the overall circumstances of the person in question to determine whether there is an unacceptable risk for that person to be employed in the care and supervision of children.*

The issue of a certificate to this effect would not be a matter for whim or vague suspicion. Although an administrative decision, it would be necessary for the Children's Commissioner to be satisfied, after hearing the applicant, that there was reasonable cause for the exercise of the relevant power.

²⁴ Royal Commission into the New South Wales Police Service, Final Report, Volume V, pages 1304–1308

²⁵ Royal Commission into the New South Wales Police Service, Final Report, Volume V, para 20.50 at page 1305.

The issue of a certificate would be an administrative act, confined to restricting employment in areas where the person has direct contact with children. For example, a person the subject of a certificate who is a teacher could be removed from a position of teaching in the classroom, but placed in some other position not placing children under his direct care or supervision.²⁶

18. Employment screening in child-related employment

18.1 The legislative background

Following the Royal Commission's report, three separate Acts were passed in 1998:

- the *Ombudsman Amendment (Child Protection and Community Services) Act* established the jurisdiction of the Ombudsman in relation to child protection matters,
- the *Commission for Children and Young People Act* established a Commission for Children and Young People (the Commission) with a variety of functions,²⁷
- the *Child Protection (Prohibited Employment) Act* prohibits the employment in child-related employment of people found guilty of committing certain serious sex offences.

18.2 Employment screening

The *Commission for Children and Young People Act* has made provision for a system of employment screening for child-related employment. (It should be noted that the provisions of the Act establishing that system have not been proclaimed and are therefore not yet in operation.)

For people who have **applied for paid employment** with agencies involved in child-related employment, employment screening will be **mandatory**, as required by the Act. However, for **existing employees** of agencies involved in such employment, employment screening will be **discretionary**.

The Act imposes a duty on an employer to carry out all the relevant procedures involved in employment screening of a preferred applicant for employment before employing that person. The employer may conduct this screening itself, or it may engage the Commission or another employer or employer-related body approved by the Minister, to carry out any or all of the relevant procedures on the employer's behalf.

The Premier's Department has issued draft procedures in relation to employment screening.²⁸ These have been the subject of consultation with various stakeholders. It is interesting to note the following commentary in the introduction to the procedures:

²⁶ *Royal Commission into the New South Wales Police Service, Final Report, Volume V, pages 1304–1305.*

²⁷ These functions are set out in section 11 of the Act.

²⁸ *Draft Employment Screening Procedures for Child Protection, Premier's Department, February 1999.*

No employment screening procedures can guarantee children from coming into contact with people who abuse them. There are, however, steps which organisations can reasonably take to deter such people from applying for positions working with children. Well developed and consistently applied screening procedures reduce the likelihood of selecting people who pose a risk, as well as demonstrating that organisations have met their duty of care by acting responsibly. The community's expectation is that organisations with a primary responsibility for children's services will make every effort to protect children from harm.²⁹

18.3 Procedures involved in employment screening

Employment screening is defined to include any or all of the following procedures:³⁰

- (a) a check for:
 - the person's criminal record with respect to offences involving sexual activity, acts of indecency, child abuse or child pornography punishable by penal servitude or imprisonment for twelve months or more,
 - any apprehended violence orders made against the person for the protection of a child,
 - completed disciplinary proceedings against the person involving child abuse or sexual misconduct by the employee or acts of violence committed by the employee in the course of employment,
- (b) any probity check relating to the person's previous employment or other activities,
- (c) an assessment of the risk to children involved in that child related employment arising from anything disclosed by checks of the above kind, having regard to all the circumstances of the case, and
- (d) the disclosure of the results of any check or risk assessment to any person who must provide advice, or make a recommendation or decision, as to whether the person is to be employed or continue to be employed.

18.4 Criteria for employment screening

Significantly, the Act provides that:

The welfare of children and, in particular, protecting them from child abuse, is the paramount consideration in employment screening.³¹

Under the Act, the Minister will be required to publish guidelines relating to the procedures and standards for employment screening.³² The Commission will also be entitled to make recommendations to the Minister on appropriate procedures and standards for employment screening.³³

²⁹ Draft Employment Screening Procedures for Child Protection, Premier's Department, February 1999, at page 9.

³⁰ *Commission for Children and Young People Act 1998*, section 34.

³¹ *Commission for Children and Young People Act 1998*, section 32.

³² *Commission for Children and Young People Act 1998*, section 35.

³³ *Commission for Children and Young People Act 1998*, section 36(1)(d).

18.5 The process of risk assessment in employment screening

The draft procedures for employment screening discussed above include the following commentary on risk assessments for the purposes of employment screening:

Risk assessments should only be conducted by appropriately selected and trained staff. Accordingly, the implementation of these procedures will require the provision of appropriate staff training in both government and non-government organisations.

The risk assessment might look at factors such as:

- *standard of proof reached in the particular case;*
- *nature of the allegations and their seriousness;*
- *degree of “confirmation” by the victim;*
- *degree of corroboration from other sources (witness, specialist reports/assessments, etc.);*
- *issues of “credit” and “validity” of the allegations;*
- *number of allegations and timeframes;*
- *reasons for not proceeding further to a higher level of decision- making with a higher standard of proof.*

18.6 Concluding observations

It is a matter of concern that there is a significant discrepancy between, on the one hand, the criteria used for the screening of **potential employees** of the DET who would be involved in child related employment within the DET and, on the other hand, the criteria used in the disciplinary system currently imposed by statute on the DET to deal with alleged or possible child abuse by **current employees**. This discrepancy is a matter which will be the subject of further comment in the Conclusions chapter in this report.

19. Other developments in relation to risk management in the child protection area

19.1 Interagency investigative forum

As a result of the legislation which conferred jurisdiction on the Ombudsman in the child protection area, we established a child protection team. In turn, this team took steps to create an interagency investigative forum to examine a number of crucial issues in child protection by both relevant government and non-government agencies.

In addition to the involvement of senior members of our child protection team in the forum, the following agencies are also represented on the forum:

- Department of Education and Training
- Department of Health

- Department of Community Services
- Department of Sport and Recreation
- Department of Juvenile Justice
- Catholic Commission for Employment Relations
- Commission for Children and Young People
- New South Wales Police Service.

The mission statement of the forum is to “lead a quality approach to investigating and managing allegations of child abuse made against employees”.

One of the forum’s objectives is “enhancing the systems for protecting children”. The forum’s strategies for achieving this objective are listed as:

- developing guidelines for risk assessment,
- developing guidelines for managing allegations,
- developing guidelines for best practice in investigation, and
- utilising the range of child protection experience across agencies.

19.2 The forum’s working parties

The forum has recently established working parties to examine the issues of risk assessment, suspension policy and standard of proof. It has been recognised that, while separate working parties have been established to consider the respective issues, the issues are nevertheless related in the context of an overall quality approach to investigating and managing allegations of child abuse against employees.

It is important to emphasise that the recommendations in this report are largely consistent with the forum’s objectives. Indeed, they should ultimately add value to the forum in its assessment of the issues which the working parties are considering.

20. The concept of risk management

20.1 Introduction

As noted above, the Royal Commission concluded that the relevant criterion for employment screening in child-related employment was whether the employee posed an unacceptable risk. There has been reference throughout the above discussion to concepts of risk management and risk assessment. It is also significant that a process of risk assessment is part of the proposed employment screening procedures and that one of the working parties established by the forum is specifically examining the use of risk assessment in the child protection area.

The purpose of this chapter is to explain more fully the meaning and application of concepts such as risk assessment and risk management.

20.2 Australian/New Zealand Standard on Risk Management

The *Australian/New Zealand Standard on Risk Management*³⁴ is designed to provide a broad generic framework for risk management. The standard provides the following general definition of risk management:

Risk management is the term applied to a logical and systematic method of identifying, analysing, assessing, treating, monitoring and communicating risks associated with any activity, function or process in a way that will enable organisations to minimise losses and maximise opportunities.

The standard also makes the following comments on the purpose of risk management:

Risk management is recognised as an integral part of good management practice. To be most effective, risk management should become part of an organisation's culture. It should be integrated into the organisation's philosophy, practices and business plans rather than be viewed or practised as a separate program.

The design and implementation of the risk management system [for a particular organisation] will be influenced by the varying needs of an organisation, its particular objectives, its products and services, and the processes and specific practices employed.

The standard summarises the main elements of the risk management process as follows:

- (a) Establish the context
- (b) Identify risks
- (c) Analyse risks
- (d) Assess and prioritise risks
- (e) Treat risk
- (f) Monitor and review

The standard elaborates in detail upon the meaning and application of these various elements.

21. The Police Service's approach

21.1 Introduction

We have outlined in earlier discussion the significant limitations which the DET's disciplinary system imposes on the DET's capacity to respond effectively to allegations against its staff of child sexual abuse. One of the major issues examined in this report is whether the DET's disciplinary system is an adequate means of responding to concerns about staff in the child protection area, or whether some other system for management of the issues involved would be preferable.

³⁴ *Australian/New Zealand Standard on Risk Management*, Standards Australia and New Zealand, 1995.

Accordingly, the purpose of this chapter is to outline how a major public authority — the New South Wales Police Service — has abandoned a disciplinary approach to allegations of misconduct against its staff and is moving towards the implementation of a management approach, incorporating concepts of risk management and risk assessment. The Police Service's increasing use of management options to deal with officers of concern, and the use of specific risk assessment techniques, are important strategies for the effective management of the Police Service's employees and the environment in which they work.

We should emphasise at this point that it would be inappropriate for the DET to simply adopt, without any further consideration, techniques used in the Police Service's management system to deal with allegations of child sexual abuse against teachers and other departmental staff. Nevertheless, we are of the opinion that there would be considerable merit in the DET examining whether, and to what extent, the Police Service's management options and risk management techniques could and should be applied by the DET when responding to concerns about alleged or possible sexual abuse of children by departmental staff.

21.2 The Royal Commission's recommendations

The origin of the Police Service's revised approach was the work of the Royal Commission into the New South Wales Police Service.

The Royal Commission examined the manner in which the Police Service dealt with complaints and allegations of improper or unreasonable conduct on the part of its officers. Significantly, the Royal Commission was critical of the Police Service's disciplinary system for dealing with alleged misconduct, noting "its dependence on the proof of specific charges in a legalistic, adversarial context and its punitive nature".³⁵ The Royal Commission also observed: "A primary concern in relation to the complaints system is that it is not well related to supervision, or to managerial improvement of the performance of staff about whom complaints are made".³⁶

The Royal Commission stated that it was "firmly of the view that the Service should endeavour to move from the formal adversarial model to a more managerial or remedial model".³⁷ In this respect, the Royal Commission observed:

The responsibility of Local Commanders for their staff should not be limited to a response to complaints. A good manager must be alert to all circumstances affecting their area of command that pose risks or potential matters for concern. They must be prepared to intervene and exercise the broad range of options available. This is an important consideration since the complaints system must fit in with the overall managerial approach of the Service.³⁸

³⁵ *Royal Commission Into New South Wales Police Service*, Final Report, Volume II, May 1997, paragraph 4.9 at page 329.

³⁶ *Royal Commission Into New South Wales Police Service*, Final Report, Volume II, May 1997, paragraph 4.7 at page 328.

³⁷ *Royal Commission Into New South Wales Police Service*, Final Report, Volume II, May 1997, paragraph 4.12 at page 330.

³⁸ *Royal Commission Into New South Wales Police Service*, Final Report, Volume II, May 1997, paragraphs 4.27 and 4.28 at pages 334 and 335.

21.3 The Police Service approach to management of its officers

The Police Service has recently introduced, and is in the process of developing, a management system of the nature recommended by the Royal Commission to deal with complaints about the conduct of its officers. The following discussion is designed to outline the management scheme authorised by the *Police Service Act*. We should also observe that our oversight of the Police Service's complaint systems has revealed that the Police Service's practical development and implementation of a general management system still has some way to go.

There are no longer disciplinary charges requiring proof of the charges before the Police Tribunal and the imposition of a penalty on proof of the charges. Instead, a range of management options is available to Police Service managers to deal with officers whose conduct is of concern. These options range from non-reviewable actions through to more stringent reviewable actions and the ultimate managerial sanction, the use of a power conferred on the Commissioner of Police to remove an officer on the basis that the Commissioner has lost confidence in the officer's suitability to remain in the Police Service.

Non-reviewable actions include³⁹:

- coaching
- mentoring
- training and development
- increased supervision
- counselling
- reprimand
- warning
- retraining
- personal development
- performance enhancement agreements
- non-disciplinary transfer, and
- restricted duties.

Reviewable actions are the reduction of a police officer's rank, grade, or seniority or the deferral of the officer's salary increment.⁴⁰ These can be used for police officers who have engaged in misconduct or whose performance is unsatisfactory after participation in a formal remedial performance program.

The Commissioner may remove an officer from the Police Service "if the Commissioner does not have confidence in the police officer's suitability to continue as a police officer having regard to the police officer's competence, integrity, performance or conduct".⁴¹

³⁹ *Police Service Act 1990*, Schedule 1.

⁴⁰ *Police Service Act*, section 173.

⁴¹ *Police Service Act*, section 181D.

A police officer is entitled to seek review by the Industrial Relations Commission (IRC) of the use of a reviewable action or their removal from the Police Service.⁴² The officer is required to establish that the order in question is “harsh, unreasonable or unjust”⁴³. In deciding whether to uphold, revoke or vary the order, the IRC must have regard to both “the interests of the applicant [officer]” and “the public interest”.⁴⁴ In the case of a review by the IRC of an order for removal of the officer, the legislation specifically states that the public interest “is taken to include the interest of maintaining the integrity of the Police Service”.⁴⁵

The process involved in considering an officer for possible removal under the commissioner's confidence provisions includes scope for issuing the officer with a performance warning notice rather than removing the officer from the Police Service. The notice warns the officer of the possibility of their removal from the Police Service in the event of further misconduct. The officer's commander is also expected to take appropriate management action in relation to the concerns which prompted the issue of the notice.

It should be said that the Police Service has had to address difficult issues surrounding the level of evidence required to justify an officer's removal from the Police Service. With the recent introduction of other reviewable actions, the Police Service will also have to define the types of misconduct and unsatisfactory performance justifying the use of those actions. While officers who have been removed from the Police Service by the Commissioner of Police have been entitled to seek review of the Commissioner's decision by the IRC, there has only been one review finalised, and there has not yet been a definitive ruling by the IRC on the practical issues relating to the use of the commissioner's confidence power. In particular, the IRC has not yet articulated the degree of evidence of apparent or alleged misconduct by an officer which would justify an officer's removal.

Underlying all of the Police Service's managerial options to deal with issues of unsatisfactory performance and misconduct are concepts of risk management.

21.4 Risk assessments

In addition to this general approach of risk management, the Police Service has developed some specific risk assessment techniques.

The Strategic Assessments and Security Centre (SASC) of the Office of Internal Affairs has developed a model “for use in identifying the risk posed by an individual police officer in terms of corruption and/or unethical behaviour”. The model is an adaptation of the ASIO threat assessment model. SASC has noted that the model has been developed to ensure risk identification is “fair, just and reasonable, thorough, disciplined and focused on performance, competence, conduct and integrity”.⁴⁶

⁴² *Police Service Act*, section 174, section 181E.

⁴³ *Police Service Act*, section 174(1) and 181F(2).

⁴⁴ *Police Service Act*, section 175(4) and 181F(3).

⁴⁵ *Police Service Act*, section 181F(3)(b).

⁴⁶ *Risk Identification Model*, Strategic Assessments and Security Centre, June 1998, page 1.

In summary, the SASC model measures an officer's capability and intent to engage in corruption and/or unethical behaviour. These measurements allow a determination as to the degree of threat posed by the officer. There is then an assessment of the nature and extent of the threat and the potential harm, which in turn leads to a determination as to the degree of overall risk posed by the officer. The ultimate result of the risk assessment assists the Police Service in treating the risks and developing a suitable management response.

In October 1998, we made a special report to Parliament entitled *Risk Assessment of Police Officers*. The report noted that the Police Service was implementing a number of initiatives in the area of risk management, and recommended that the Police Service should develop and implement these initiatives within the next twelve months. In making this recommendation, we observed:

One indicator of the success of the Service's strategies will be whether there is a greater level of understanding by police managers of the need to identify and assess disturbing trends about the behaviour of officers within their command, with appropriate reference to complaint profiles.⁴⁷

As a result of our report, the Police Service brought forward training sessions on risk assessment for regional commanders and Internal Affairs consultants. This training, conducted by SASC, took place over December 1998 and January 1999.

The risk assessments conducted by SASC itself are elaborate and may take a number of weeks to complete. However, risk management does not necessarily require complex risk assessments of the type undertaken by SASC. As a result of the SASC training sessions, some commands are developing risk assessment techniques to deal with situations that cannot wait for, or do not require, the more thorough SASC assessments.

22. Conclusions

22.1 Summary of the problems

The DET is currently required by statute to use a disciplinary approach in dealing with allegations of child sexual abuse by teachers. As discussed in detail above, the practical effect of this disciplinary approach is as follows:

Upon becoming aware of any allegation(s) of child sexual abuse against a teacher, the DET is entitled — but not required — to transfer the teacher to non-school duties pending the outcome of the investigation of the allegation(s) by the CMU and any disciplinary proceedings that may subsequently be instituted against the teacher.

However, the statutory disciplinary regime has a number of significant limitations:

- Because the DET is required to comply with a rigid disciplinary regime, it cannot take any management action which would or might be inconsistent with the requirements of that regime.

⁴⁷ *Risk Assessment of Police Officers*, NSW Ombudsman's Special Report to Parliament, October 1998.

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- If the CMU's investigation finds the allegation(s) unsubstantiated, the teacher is entitled to return to the school environment. The DET is not entitled to take any specific management action in response to any risk which this situation may pose.
- If the CMU's investigation finds the allegation(s) substantiated, the DET is only able to take significant management action affecting the teacher if a disciplinary charge is preferred and then proven to the satisfaction of a senior departmental staff member. In this respect, there is the added difficulty that, to prove a disciplinary charge concerning alleged improper conduct of a sexual nature with children, there is a particularly high degree of proof required. This standard of proof is, in practical terms, almost indistinguishable from the criminal standard of proof beyond reasonable doubt.
- If the disciplinary charge is found not proven by the prescribed officer, the teacher is entitled to return to the school environment. As in the situation where the CMU has found the allegation(s) not substantiated, the DET is not entitled to take any specific management action in response to any risk which this situation may pose.
- If the disciplinary charge is found proven, the DET is entitled — but not obliged — to impose the penalty of dismissal. If the teacher's employment is not terminated, the only action specifically authorised by the legislation is the imposition of one or more of a limited number of disciplinary penalties — caution, reprimand, fine, or reduction of the teacher's salary or classification.
- Although the DET apparently monitors teachers against whom a relevant disciplinary charge has been found proven, this process may be both open to legal challenge and be difficult to implement at a practical level.

All of these limitations inherent in the disciplinary system do not give the DET sufficient scope to make responsible management decisions when dealing with the issues involved. The DET's disciplinary approach, currently imposed on the DET by statute, is incapable of achieving a level of protection for children from sexual abuse that the community is entitled to expect.

In particular, the disciplinary scheme does not allow the DET to carry out, and act upon, risk assessments of its staff where there are or may be concerns about alleged or possible child sexual abuse by current employees of the DET. Examples of situations that might give rise to concerns about an unacceptable risk to children appear in the Appendix to this report.

Furthermore, even when allegations against staff of child sexual abuse have been found proven to the requisite high standard of proof, the measures available to the DET to deal with the situation are inappropriately restricted. On the one hand, there is the most extreme management sanction available — namely, the termination of employment. However, if the DET decides that the termination of the staff member's employment is not justified, the DET is limited to the imposition of specific disciplinary sanctions. These disciplinary sanctions hardly constitute a sophisticated management approach to the issues involved for the individual staff member, the DET and the community generally.

We quote below Mr Haylen's concluding observations in his advice on the legal issues involved, to reinforce our own conclusions about the serious limitations of the DET's current disciplinary system in the area of child protection:

The growing awareness of sexual abuse of children and legislative initiatives in this area have highlighted the need to take preventative steps and to introduce regimes designed to isolate and reduce the potential risk of such improper conduct occurring. The existing disciplinary provisions of the Teaching Services Act and the Teaching Services (Education Teaching Service) Regulation are more directed to traditional grounds of misconduct and therefore the remedies are drawn from traditional public sector responses to proven breaches of discipline. If teachers are to be subject to monitoring, counselling and a variety of protective or preventive measures such as transfer because of suspected improper sexual conduct, then the present legislation is inadequate for the task.

22.2 Suggested solutions

It will be recalled that, in requesting our advice as to the adequacy of the DET's child protection system, the Director-General of the DET, Dr Boston, specifically said: "I am anxious to ensure that our procedures are fully effective in minimising risk to children".⁴⁸

More recently, the Director-General was quoted in the media as saying: "No one who is considered a risk to young people will ever work in our schools again"⁴⁹ and was also reported to have said: "New South Wales Schools had the best child protection system in Australia".⁵⁰

Despite the Director-General's optimism about the adequacy of the DET's system for dealing with allegations of child sexual abuse against departmental staff, this report indicates that there are inherent problems in the statutory disciplinary system currently imposed on the DET by the *Teaching Services Act*. These problems have been discussed in detail in this report and encapsulated in the immediately preceding discussion entitled Summary of the problems. **In short, the statutory disciplinary scheme has inherent limitations which seriously restrict the capacity of the DET to make responsible and effective management decisions in response to concerns that its staff have allegedly engaged, or may engage, in child sexual abuse.**

22.3 Fairness to teachers and other departmental staff involved in the care of children

While the DET should have an adequate system in place to protect children in its care, it is vital to acknowledge that there are dangers in any system which does not properly and fully recognise the rights of an accused person.

An allegation that a teacher has engaged in improper conduct of a sexual nature with a child is extremely serious. In this respect, it is important to acknowledge the potential impact on a

⁴⁸ See chapter 4 of this report at page 6.

⁴⁹ 'Risky teachers screened out' *The Daily Telegraph*, 11 October 1999.

⁵⁰ 'Teachers sexually harassed students', *The Sunday Telegraph*, 10 October 1999.

teacher of such an allegation and the ensuing investigation, and the dangers associated with the taking of departmental management action which is either unjustified or inappropriate to the circumstances of the particular case.

It is therefore essential that any system within the DET for responding to allegations or concerns about alleged or possible child abuse, must recognise the rights of a teacher or other staff member involved in the care of children.

Accordingly, there should be proper procedures in place within the DET which ensure that staff the subject of concern are treated fairly. In this respect, it must also be emphasised that there is the potential for undermining the teaching profession generally, as well as individual members of the profession, and other staff of the DET involved in the care of children, if adequate safeguards are not in place to protect teachers and other staff members the subject of allegations of child abuse.

23. Proposed amendments to the relevant legislation

23.1 The DET's advice

Our Statement of Provisional Findings and Recommendations included all of the above discussion of the operation and shortcomings of the DET's current disciplinary scheme.

Following the completion of our statement, we received a letter from the DET advising of proposed amendments to the Teaching Services Regulation. The letter noted:

Three significant areas still need to be considered by the Parliamentary Counsel for possible incorporation into the replacement regulation. Those areas are:

- 1. Provisions to deal with teachers whose actions, while not considered appropriate for formal disciplinary proceedings are nevertheless regarded as requiring some form of ongoing informal monitoring. The provisions have been sought by the department in an attempt to overcome the decision of the Supreme Court in Ward v Director-General of Education and Training in which Dunford J ruled such monitoring provisions to be invalid.*
- 2. Provisions that will require prescribed officers to take into account when dealing with breaches of discipline any unacceptable risk to children that may apply. While this concept is relatively easy at the "penalty" stage of the discipline process, the department is keen to explore the possibility of having the issue of unacceptable risk to children being the paramount consideration to be taken into account at all stages of the discipline process.*
- 3. Provisions to overcome any possible negative effects of the Court of Appeal decision (yet to be handed down) in the matter of Wood, Jarvis & Young v Director General of Education and Training. This case concerned the powers of the prescribed officer to deal with breach of discipline cases, in particular, what action the prescribed officer is required to take when determining how to deal with a discipline matter in accordance with clause 15 of the Regulation.*

Having regard to provisions of the recently enacted Part 3A of the Ombudsman Act, it is considered appropriate to seek your comments on the proposed regulation. Any advice you may wish to provide on how you believe the proposed regulation may be improved to deal with discipline related issues would be of assistance to the Department and the Parliamentary Counsel.

23.2 Our response

On 15 November 1999, we acknowledged receipt of the DET's letter and said:

This office appreciates the opportunity which your Department has provided to us to comment on the draft regulation. This office will provide those comments as soon as possible and in light of further developments in relation to the matter as discussed below.

This office's comments will, of course, take into account the issues canvassed in our provisional statement. In turn, may I suggest that your Department should also consider the draft regulation in light of our Provisional Statement. Should your Department wish to suggest any changes to the draft regulation in light of the Provisional Statement, we would appreciate receiving a copy of those proposed changes, together with any other advice from your Department relevant to the matter, for our consideration.

23.3 Further developments

On 17 February 2000, we contacted the DET to obtain its advice as to the progress of any proposed amendments to the Teaching Services Regulation. The DET's Principal Legal Officer advised that the proposed amendments were still under consideration and that we would be provided with the proposed amendments in due course.

24. *The interests of teachers and other DET employees*

We consider that a risk management approach to allegations or concerns about child abuse accommodates the interests of all parties, including teachers and other departmental employees, the DET, the children in its care and the community in general.

The disciplinary approach is primarily concerned with establishing whether the alleged conduct occurred. In determining whether the allegation is well founded, a disciplinary approach generally considers an allegation in isolation. As the current disciplinary scheme is primarily concerned with determining the guilt or otherwise of a teacher, this results in an adversarial/inquisitorial approach operating within a formal, protracted and legalistic process. The formal and adversarial nature of disciplinary proceedings makes the process an unnecessarily stressful and negative experience for many teachers. The very fact that a disciplinary system requires the DET to prefer a disciplinary charge against a teacher also creates the impression that the proceedings involve the DET's interests opposing those of the teacher.

On the other hand, a risk management approach is focused on achieving constructive outcomes rather than punishing individuals. This approach is also capable of producing more comprehensive management outcomes than the disciplinary approach which simply applies legal tests to establish whether a very limited range of punishments should be imposed. With

the risk management approach there is the need to fully consider what is the best response in light of all of the prevailing circumstances.

In a very limited number of cases, a decision could still be made following a risk assessment to remove a teacher. However, this serious step must always be open to external review. For the vast majority of cases where a decision is made to keep the teacher in their position it will be critical to determine via a risk assessment process the best way of dealing with the consequences of that decision – this must include developing strategies for supporting teachers in their work environment. In many cases training, counselling, mentoring, special supervisory arrangements, or performance agreements etc. could also be part of the overall management strategy.

The risk management approach should also help to identify those cases in which teachers have been subjected to a series of malicious allegations: this is very important to the overall integrity of the system.

A properly conducted risk assessment process should also eliminate much of the delay involved in disciplinary proceedings and the resulting tensions for the involved teachers.

25. Implications of this report for other government departments

This report is specifically concerned with the disciplinary scheme used by the DET when dealing with allegations of child sexual abuse against its staff. The report has highlighted the limitations of the DET's rigid disciplinary scheme and recommends the introduction by the DET of a risk assessment methodology.

However, it is important to note that the DET is not the only government department with responsibility for the protection of children. There are a number of other departments which have a responsibility in this area and which, like the DET, must also deal with allegations against their staff of child abuse. Significantly, these departments are also required to use a disciplinary regime when responding to these allegations. Accordingly, these departments will encounter similar limitations to those arising from the disciplinary scheme imposed on the DET — in particular, a limited ability to adopt a risk management approach in responding to allegations against staff of child abuse.

While the DET is required to deal with allegations of child abuse against:

- members of the NSW Teaching Service under the *Teaching Services Act*,
- non-teaching school staff under the provisions of the *Education (Ancillary Staff) Act 1987*,
- and other staff under the *Public Sector Management Act 1988*,

the disciplinary schemes under each of the above vary widely.

In addition, there is a plethora of different disciplinary procedures which apply to other departments and authorities with child protection responsibilities. In these circumstances,

consideration needs to be given to the benefits of a whole of government approach to address the sorts of problems highlighted by this report. In this regard it would seem desirable that there be a comprehensive and consistent risk management approach governing the response of these departments to at least allegations of child abuse against their employees; if not to all conduct issues relating to their employees.

26. Recommendations

In light of the matters discussed in this report, we make the following recommendations:

26.1 Development of a model system by the DET for child protection

- (a) The DET should develop a proposal for an appropriate legislative, policy and administrative framework which should allow the DET to implement a timely and effective management response to allegations against, and concerns about, possible child abuse by teachers and other departmental staff involved in the care of children.

The proposed framework should seek to overcome the deficiencies of the current system, which have been highlighted in this report and summarised above in 22.1 Summary of the problems. (In developing this proposal the DET should consider whether the new framework might be applicable to deal with a wider range of conduct issues.)

- (b) The DET should submit the proposed framework to the Minister for Education and Training for consideration as soon as possible. At the same time, the DET should provide us with a copy of the proposed framework provided to the Minister.
- (c) Upon receipt of the Minister's response to the proposed framework, the DET should advise us of the Minister's response.

26.2 Whole of government approach

The Minister for Education and Training should approach ministers of departments with child protection responsibilities about developing a comprehensive and consistent risk management approach to govern the response by these departments to allegations of child abuse against their employees.

26.3 Consultation with key players

For the purposes of the development of an appropriate model framework, the DET should consult with key stakeholders and relevant experts.

The relevant players for the purposes of such consultation should include (but not necessarily be limited to):

- appropriate organisations representing the legitimate interests of teachers and other employees of the DET involved in the care of children,

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- appropriate organisations representing the legitimate interests of children and their parents or other guardians,
- the interagency investigative forum established by us and the forum's working parties, and
- people with other relevant expertise and experience in the area of child protection.

The DET should also obtain appropriate advice on the legal issues involved in developing the proposed framework, from lawyers within and/or external to the DET. Appropriate external legal expertise might well be in the form of advice to the DET from the Crown Solicitor.

26.4 The cases of T1, T2 and C1

The DET should conduct appropriate risk assessments in relation to each of T1, T2 and C1 in order to determine whether these staff should remain in their current duties or on different duties or whether they should continue to be employed by the DET.

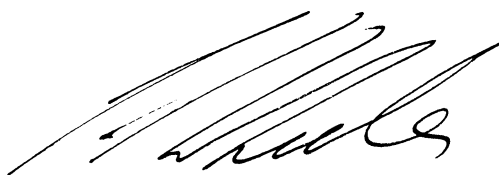
In making this recommendation, we acknowledge that the DET's ability to conduct and act upon appropriate risk assessments of the type recommended may not currently be possible. The risk assessments recommended may therefore have to await the development and implementation of a risk management system of the type recommended in this report.

26.5 Progress reports to the Ombudsman

The DET should provide us with formal written reports in relation to the above matters within the following timeframes:

- an interim report or reports on the development of the DET's model child protection system — within three months from the date of this report and, if necessary, every three months thereafter,
- a report on the model system submitted to the Minister — at the time of the submission of the proposed model system to the Minister,
- a report on the Minister's response to the DET's model system — within one week from the date of the Minister's response, and
- full copies of the risk assessments of T1, T2 and C1, and reports on the DET's determinations as to the continued employment situation of T1, T2 and C1 — as soon as practicable.

Chris Wheeler



ACTING OMBUDSMAN

Appendix

Our report concludes that the disciplinary scheme currently imposed on the DET does not allow the DET to carry out, and act upon, risk assessments of its staff where there are or may be concerns about alleged or possible child sexual abuse by members of staff.

This appendix sets out examples of situations which might give rise to concerns about an unacceptable risk of child sexual abuse. It would appear that the DET is currently precluded from adopting and acting upon a risk management approach to situations of this nature.

- A former student (now an adult) makes an allegation that his teacher at a school camp sexually assaulted him. The former student is not prepared to make a formal statement about the matter for the purposes of any criminal or disciplinary proceedings, but nevertheless supplies details of the alleged assault. The allegation is accompanied by claims by the former student that the teacher has assaulted other boys.
- The parents of a young man accuse a 25-year-old female teacher of having commenced a sexual relationship with their son when he was 16 years old. The parents make this allegation when their son is 18 years old and living with the teacher. The son refuses to make any statement about the matter and the teacher denies having had a sexual relationship with him while he was a student.
- A teacher is accused of sexual assault upon a 14 year-old female student. The student supplies a statement about the alleged assault to the police and gives evidence at the subsequent hearing of a criminal charge against the teacher. While a number of other female students have alleged similar behaviour by the teacher, they are not prepared to give statements as they do not wish to attend court. The teacher is acquitted of the sexual assault charge against him. The student now says that her current emotional state means that she is unable to provide a further statement for the purposes of possible disciplinary proceedings against the teacher. She also says that she would not be prepared to face an appearance in any such proceedings.
- Five female primary school students make a complaint against a teacher that he dresses up and takes pornographic photographs of the girls in after school sessions. There are no adult witnesses as the other teachers have gone home. The girls all say that they are too frightened to give a statement about the matter as the teacher has threatened them.
- Allegations that a teacher has sexually abused various children have been made over a number of years. The sort of improper conduct alleged in each case is remarkably similar. However, none of the individual allegations has been substantiated.

All of the above examples are taken from notifications of child sexual abuse provided to our child protection team. The following example is not based on a specific notification, but has been prepared by our child protection team to illustrate the increasing degree of concern about the risk to children that a particular scenario may pose, depending upon the extent of detail and evidence available.

APPENDIX

A male teacher invites several students to his house for an end of year barbecue. A 15-year-old female student and the teacher are seen to go into a bedroom and the door is closed. Some students see the student and teacher re-emerge after about 30 minutes, with the student looking flushed with her clothing and hair in some disarray.

Scenario 1

One of the students reports this situation to the school. The student in question is interviewed but states that there was no inappropriate conduct by the teacher. She claims she was looking at teacher's collection of prints. The teacher provides a similar explanation of the events in question.

Scenario 2

The student in question has allegedly told other students that she and the teacher were kissing and cuddling. However, when interviewed, she denies this occurred, saying she made up the story to impress her friends. She says she was just looking at the teacher's collection of prints.

Scenario 3

The student in question is interviewed and says that she and the teacher engaged in sexual activity on this and another occasion. She says she does not want any action to be taken against the teacher and she will not provide a statement of complaint. Other information suggests the teacher may have formed inappropriate relationships with two other female students in the past.