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NCEC
AND
ISCA

Submission to the Australian Law Reform Commission

Review of Privacy

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Executive summary

This submission is lodged on behalf of the National Catholic Education Commission and Independent Schools Council of Australia (the Schools).

The Schools submit that:

- (a) a flexible approach should be taken when applying the National Privacy Principles and they should only apply high level guidance. They also submit that this flexible and discretionary approach should be recognised in legislation;
- (b) when deciding what to collect and when to use and disclose personal information of students reliance should be able to be based on the contracts with the parents and also dictated by the welfare of the student and the appropriate discharge of the school's duty of care to the student;
- (c) the NPP's should provide that schools should be able to deny access to personal information when providing access would be inconsistent with the school's duty of care to the students and staff, or both;
- (d) no changes should be made to the current practices and provisions relating to disclosure of information by people providing counselling to students.

Review of privacy

1. Introduction

- 1.1 This submission is lodged on behalf of the National Catholic Education Commission (NCEC) and the Independent Schools Council of Australia (ISCA) in response to the Issues Paper prepared by the ALRC in its 'Review of Privacy'. The National Catholic Education Commission represents approximately 1,700 schools in every state and territory of Australia which enrol 608,000 students. The Independent Schools Council of Australia through its affiliated state associations represents approximately 1100 independent schools which enrol approximately 500,000 students. In total approximately 33% of Australia's school students are enrolled in non-Government schools.
- 1.2 The great majority of schools represented by ISCA and NCEC are subject to the provisions of the Privacy Act.
- 1.3 Following the amendments to the Privacy Act to cover organisations operating in the private sector, NCEC and the National Council of Independent Schools Association (the former name of ISCA) commissioned the preparation of a Privacy Compliance Manual to assist schools operating in their respective jurisdictions and observing the obligations contained in the Privacy Act. Prior to its introduction, a draft manual was submitted to and discussed with the Office of the Privacy Commissioner, following which changes were made. A copy of the Privacy Compliance Manual is attached for the information of the ALRC.
- 1.4 While the Privacy Compliance Manual has been an effective tool in assisting compliance and there have been very few expressions of concern about infringements of privacy, NCEC and ISCA have some concerns about the operation of the Act and the obligations which currently are or may in the future, be imposed on schools.
- 1.5 In setting out their concerns and comments NCEC and ISCA have had regard to the particular list of questions set out in the Issues Paper but take the approach of grouping their concerns under five topic areas which are set out as follows: :
 - (i) Should federal privacy principals be prescriptive or should they provide high level guidance only? Should they aim for a minimum or maximum level of protection of personal information or aim to adopt a best practice approach?
 - (ii) Should schools be able to primarily rely upon their relationships with parents in order to obtain consents to collect, use and disclose personal information about pupils?
 - (iii) In what circumstances should schools be able to deny students or parents access to their personal information?
 - (iv) When is it appropriate for schools to pass personal information, including sensitive information, to other schools without the approval of parents or pupils or both?
and
 - (v) In what circumstances should school councillors disclose personal information of pupils:
 - to schools; and
 - parents of those pupils?

2. Should principles be prescriptive or provide high level guidance?
 - 2.1 When the present government introduced legislation to amend the Privacy Act by extending its operation to the private sector, Mr Williams the then Attorney General stated that the Government wished to adopt a 'light touch' approach in applying the laws. Both Privacy Commissioners who have been administering the operation of the Act since that time have followed that approach in interpreting the National Privacy Principles (**NPPs**), and have generally followed a commonsense approach to interpreting the requirements of the Act. For example, as the Issues Paper notes, at present the Privacy Commissioner takes the view that there may be occasions when 'taking reasonable steps' will involve taking no steps.
 - 2.2 This approach, while commendable, has never been tested in the Courts and there remains a concern that a Court may find that the Privacy Commissioner should apply the principles more strictly.
 - 2.3 NCEC and ISCA believe that the current flexible approach with the provision of high level guidance is both appropriate and necessary. The Compliance Manual contains examples of areas where a degree of flexibility is needed in addressing issues such as consents and disclosure. We draw particular attention to Part 3 of the Manual entitled 'Special Issues for Schools', which elaborates on the way to approach some situations where discretion needs to be exercised. Some of these issues will be addressed in more detail later.
 - 2.4 NCEC and ISCA would be more comfortable if this 'discretionary' approach was given legislative backing, and submit that it would also be appropriate if the Act specifically recognised that the NPPs provide high level guidance. This would accommodate the approach needed when facing a myriad of circumstances such as those that schools face regularly when dealing with the personal information of pupils and their parents and guardians.
3. Should schools be able to primarily rely upon their relationship with parents in order to obtain consents to collect, use and disclose personal information about pupils?
 - 3.1 This issue is touched upon in paragraphs 9.50 to 9.53 of the Issues Paper. At paragraph 9.53, the Issues Paper states:

'The ALRC is interested to hear about the way in which public and private schools collect, store and disclose personal information, and whether any concerns arise from these practices.'
 - 3.2 Non government schools collect personal information about pupils in a variety of ways. The initial point of collection will usually be when parents of a pupil apply for enrolment of that pupil at a school. This will involve collecting personal information about both the pupil and the parents. The information about the pupil will often extend to health information as the school requires such information in order to exercise the duty of care not only to the pupil but to other pupils who are enrolled. As the enrolment proceeds, the school collects increasing amounts of information about a pupil relating to the pupil's results, achievements, discipline, health and activities both at the school and outside the school environment. This may be supplied by the parents or the pupil, the teachers and, on occasion, third parties. There will also be occasions when the school will collect information about parents, siblings or other relations of the pupil which may be provided by the pupil or the parents. This is usually only collected if it is necessary for the school to know for the purposes of the pupils or other pupils' education, health and wellbeing.

- 3.3 The information about the pupil will, in many circumstances, be disclosed to the parents. Schools rely upon the consents of the parents to disclose this information or will do so on the basis that it is either a primary purpose of collection or a related secondary purpose which would be normally expected.
- 3.4 Schools will generally rely upon parental consents or the provisions of NPP 2.1 throughout a pupil's time at the school regardless of the pupil's age. However they recognise that there will be occasions when it may not be in the pupil's interest to disclose materials to parents, in which case they may decline to do so or will, alternatively, seek the pupil's consent before making such disclosure.
- 3.5 On occasions, no specific consent will be sought to disclose information, including sensitive information, if it is felt that the circumstances warrant it. For example, school pupils taking part in sporting events may have their names disclosed to the organising body. If a pupil suffers from a particular illness which is relevant, such as asthma, the person organising the sporting activity may well be advised of that disability.
- 3.6 These practices have been adopted in schools since the introduction of the provisions of the Act relating to the private sector. They have generally operated well and it would appear that no serious difficulties have been encountered.
- 3.7 NCEC and ISCA believe that it should be recognised within the school education area that there are a number of primary factors dictating how personal information may be used and disclosed in a particular situation, including:
- (a) contracts with the parents;
 - (b) the welfare of the child; and
 - (c) the discharge of the school's duty of care towards the child and/or other children.
- 3.8 All these interrelate and sometimes require the making of fine judgments as to the appropriate course. While the NPPs provide useful guidance, they cannot in this area provide a prescriptive remedy. Indeed a prescriptive approach could result in outcomes contrary to the best interests of the child that is a student under 18 years of age.

4. In what circumstances should schools be able to deny students or parents access to their personal information?

- 4.1 As has been previously mentioned, schools regularly collect a significant amount of personal information relating to pupils and, to a lesser extent, their parents. The nature of the information will vary widely but will always have a degree of connection to the school and the pupil's association with it.
- 4.2 There will be occasions where the school will collect personal information about pupils from their parents or other people. There will also be occasions where the school will collect information about parents from pupils and other people. Other people supplying information may be councillors, priests, other parents, sporting instructors, staff of government departments concerned with child safety, police or other people having relevant contact with the pupil or his or her parents.
- 4.3 Not every piece of personal information the school receives about a pupil or parents is 'collected'. However, the school will make and retain a record of personal information where it considers collection is necessary for the purposes of the pupil's schooling and wellbeing in the school environment. This may also occur when the retention of such information is necessary for the school to exercise its duty of care for other students and/or teachers.

- 4.4 There will also be occasions when it's considered not appropriate to disclose:-
- (a) personal information of the pupil to the pupil;
 - (b) personal information of the pupil to the parents; and
 - (c) personal information about the parents to the parents.

In making assessments about this issue the school will always consider what is in the best interests of the child. On occasions it will also be necessary as a consequence of a school's duty of care to other students and staff.

- 4.5 An example of when it may be inappropriate to pass on personal information about a pupil to the pupil is where the school has received a report from a school councillor or psychologist which if released to the child could result in serious loss of self esteem or worse, depression. An example of when it would be inappropriate to release to parents information held about them by the school is where a child has informed the school of domestic circumstances which may result in the child being subject to abuse should the parent find out that the child had released that information.

- 4.6 The bases on which the school can refuse to grant access to personal information are set out in NPP 6. The grounds upon which schools can generally rely to refuse access are very limited. Two principal reasons for denying access to which the school may avail themselves will usually be where:

- (a) providing access would have unreasonable impact on the privacy of other individuals; and
- (b) providing access would be unlawful.

NCEC and ISCA believe that a third ground should be added:

- (c) providing access would be inconsistent with the school's duty of care to other students and staff.

The reasons for advancing this request are developed below.

- 4.7 One area where it is particularly important to retain confidentiality is in the area of investigation of allegations of child abuse. Initially NPP 6.1(i) (disclosure would be likely to prejudice an investigation of possible unlawful activity), may be relied upon to deny access into an investigation of the activity. However, once the investigation is complete that ground is no longer available. In these circumstances people who have given evidence to the enquiry on a confidential basis may be put in a position where that confidential material is the subject of an application for access. In these circumstances, access may again be denied, on the basis that the provision of such evidence would have an unreasonable impact on the privacy of other individuals. However, whether this would be successful is uncertain. It would be beneficial for the NPPs to contemplate this situation. In the absence of such assurances it is quite possible that people who would otherwise be prepared to give evidence and information would no longer wish to do so.
- 4.8 In relying upon the ground of unlawfulness, the schools have contended that they have an obligation under the general law to provide a duty of care to pupils in their care and that the release of that information in some circumstances may result in a breach of that duty of care. This approach appears to have been accepted by the office of Privacy Commissioner and NCEC and ISCA would not wish to be seen as suggesting this is not a valid approach. However, they would prefer there was a more precise and defensible basis on which access could be refused when circumstances justify it.

- 4.9 NCEC and ISCA submit that there should be three explicit allowances set out in the NPPs to cover circumstances where it would be appropriate not to provide access to personal information. These are:
- (a) where providing access may be detrimental to the safety or wellbeing of a child; and
 - (b) where providing access will be likely to discourage free flow of information between a school and parents or a school and its pupils; and
 - (c) where access may discourage people from providing information in the course of inquiries about possible unlawful activities or other inquiries affecting the well being of pupils.

5. When is it appropriate for schools to pass on personal information, including sensitive information, to other schools without the approval of parents or pupils or both?

- 5.1 There are two principal times when personal information about pupils may be provided to other organisations, including other schools. The first is when pupils are competing against others and it is necessary to provide personal information to enable the competition to take place safely. The second is when pupils are leaving one school to go to another school and the receiving school wishes to obtain information about the entering pupil for the purpose of assisting the incoming students and determining whether there are matters of which it should be aware for the benefit of the school community.
- 5.2 The need to provide information to other schools or organisations may extend to sensitive information, particularly health information. For example, if a school knows a pupil is suffering from a particular illness or infirmity, it may be necessary and indeed an obligation for the school to provide that information for the health and wellbeing of the pupil concerned. Generally, disclosure of personal information in these circumstances would be authorised under NPP 2.1.
- 5.3 However, the provision of information about pupils who are moving schools may not be justified under the NPPs. Schools often find knowledge of a pupil's progress at the previous school to be of great assistance in catering for the pupil at the new school. The sharing of such information can often be essential to the establishment of a safe learning environment for all students and staff and enhancing the spirit of care and concern within the school community. On many occasions pupils or their parents give permission for this information to be transferred, however, there are some occasions when this is refused. The school then has to assess whether or not it wishes to enrol the pupil.
- 5.4 There are some situations where it is vital that a school is informed about a student who is to be enrolled. The New South Wales Parliament has made amendments to the *Education Act 1990 (NSW)* which provide, in summary, that a school may request another school to provide information about a particular student to assess whether the enrolment of that student is '*likely to constitute a risk (because of the behaviour of the student) to the health and safety of any person (including the student)*'. Under the amended Act, the school to whom the request has been made, will have a duty to provide the information, if that information is in its possession or under its control. The Act further provides that a school may voluntarily provide the information without a request. (See, "Education Legislation Amendment Act 2006", passed 22 November 2006). The Queensland (General Provisions) Act 2006 has similar provisions which

allow a school principal to obtain from a former school 'transfer notes' relating to assessments or behavioural issues relating to the former student. (See Chapter 14).

5.5 The purpose of these provisions is to ensure the health and safety of pupils attending schools. In the past, schools have been reluctant to provide such information on the basis that privacy may be infringed.

5.6 While this is now law in New South Wales and Queensland and therefore falls outside the general provisions of the NPPs relating to disclosure of information, we believe that such a provision is unique to these states. The NCEC and ISCA submit that consideration should be given to including a provision in the NPPs which would allow such information to be given from one school to another in the particular and limited circumstances where there is a real concern about the health and safety of either the pupils at the school or the person who is seeking enrolment. Such a modification to the NPPS is particularly required in respect of the interstate transfer of students between schools.

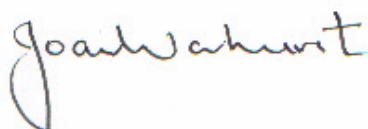
6. In what circumstances should school counsellors disclose personal information of pupils:
(a) to schools; (b) to parents of those pupils?

6.1 On occasions school counsellors have adopted the view that they are unable to disclose information to a school as it is the subject of confidential discussions between the pupil and the counsellor.

6.2 School counsellors will either be employed by the school, be independent consultants, or employed by consultancy services. Where a counsellor is not employed by a school, the counselling service will need to obtain the approval of the pupil or, in some cases the parents, before personal information obtained about a counselling session is disclosed to the school.

6.3 A more serious concern arises for schools where the counsellor is an employee or the employee of a related agency to the school, for example a Catholic welfare agency retained by a Catholic school. In these circumstances, schools believe that where the counsellor becomes aware of information which may affect the health or wellbeing of the pupil, and which is relevant to the school performing its contractual duties to provide schooling, or its common law duty to exercise a duty of care, it is important that the school principal, at the very least, be informed about such information in order to determine that course of action which is in the best interests of the child given the total information available to the school decision maker. In these circumstances, the school principal should be able to and may direct the counsellor to disclose the contents of the discussion.

6.4 NCEC and ISCA believe that this situation should not be disturbed. In particular they believe that school counsellors employed by the schools should not be given special rights not to disclose information to authority representatives of the employer's school, as has been suggested by some Counsellors.



Chief Executive Officer
National Catholic Education Commission

For and on behalf of NCEC

For and on behalf of ISCA

Annexure 1: Privacy Compliance Manual
