LEGAL ISSUES BULLETIN

NSW GOVERNMENT | Education & Communities

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COLLECTION, USE AND DISCLOSURE OF INFORMATION ABOUT STUDENTS WITH A HISTORY OF VIOLENCE

This bulletin updates Legal Issues Bulletin 28 issued on 28 January 2004.

This bulletin looks at the issues of collection, use and disclosure of the personal information of students with a history of violence who seek enrolment in a DEC school or TAFE.

Throughout this bulletin, "safety" is intended to include issues concerning the health, safety and welfare of staff and students.

If the student is enrolling in high school outside of the normal enrolment period (that is outside of the usual movement from primary into high school or from Year 10 into Year 11) reference should be made to Memorandum DN/11/00007. School Counsellors should also refer to Section 4 of the School Counsellor Manual for other action.

What is the Department's policy on dealing with information about students with a history of violence?
The A/Director-General's memorandum Prevention of Violence in Schools and TAFE NSW Colleges: Provision of Information to Staff on Students with a History of Violence (DN/03/00589) indicates the following -

"Where a student enrolling in a school, TAFE college or DET facility has a history of violence, the principal, college director or senior officer should provide staff who may be affected with all relevant information available to the Department, to enable the school to assess the application for enrolment and to prepare for the arrival of the student……

Principals, college directors and other DET officers briefing staff on newly enrolling students with a history of violence should understand and respect the student's rights to privacy. Personal information on a student should be shared only to the extent that it is necessary to protect the health and safety of people at the school."

What is meant by the term "history of violence?"
"Violence" has a wide meaning and is not restricted to physical acts. It will include any behaviour that seriously interferes with the physical or psychological safety and well being of staff and students. Examples include threats to commit violence, aggressive behaviour which is non-contact in nature and may also include offensive, aggressive or abusive language directed to staff or students.

Which staff should be provided with information?
The facts of each case will need to be considered in order to determine which staff are at risk and therefore should be provided with information. Depending on the circumstances, it may be appropriate to advise not only teaching staff but also administrative staff and volunteer workers who may have contact with the student. It is also important to include consideration of casual staff.

What is meant by the phrase "all relevant information"?
Though staff members must be told what is necessary to ensure safety, not all staff necessarily need to be given all of the available information. For example -
- the school counsellor may need to know that a student has a history of sexual abuse while the classroom teacher need only know how the student behaves and how to manage that behaviour;
- it may be necessary to share details of a medical report with a classroom teacher but not with all members of staff if the health issue is not one likely to lead to a playground emergency;
- if a student has a potentially violent reaction to being prevented from carrying out an obsessive compulsive ritual, this may need to be told to some or all staff, depending on who is identified as being at risk.

Each case will need to be examined on its own specific facts to determine the level of information to

be provided to individual staff members including teaching and support staff who may come into contact with the student.

Depending on the circumstances, it may also be necessary for new or casual teachers to be briefed on individual students as part of the teacher's normal induction into the school or institute.

What are the Department's obligations under the OH&S legislation?
Under the Occupational Health and Safety Act 2000 an employer must provide such information as may be necessary to ensure employees' health, safety and welfare at work. An employer must also ensure that any employee who may be exposed to a risk to health and safety is informed of the risk and is provided with any information necessary to ensure the employee's health and safety. The information (and the timing of its provision) must be commensurate with the risk to health and safety concerned.

Further, an employer must provide all available information necessary to enable relevant employees to fulfil their responsibilities with respect to:
- identifying hazards
- assessing risks arising from those hazards
- eliminating or controlling those risks
- monitoring and reviewing the risk control measures
- providing information to others

How are the obligations of the occupational health and safety legislation reconciled with the Privacy Legislation with respect to students with a history of violence?
The Privacy and Personal Information Protection Act 1998 and the Health Records and Information Privacy Act 2002 ("the Privacy Legislation") place limitations on the collection, use and disclosure of personal information by New South Wales public sector agencies including the Department of Education and Communities.

(Similar restrictions are imposed on non-government schools by separate Commonwealth privacy legislation.)

The Privacy Legislation does not prevent the collection, use and disclosure of information if it is necessary to ensure health and safety. If it is necessary to collect, use or disclose information to ensure compliance with the occupational health and safety legislation then there is no breach of privacy.

Sharing of such information between staff members at the same school or college, between different government schools, between different TAFE colleges, between directorates of the Department and between schools and between schools and TAFE colleges is not collection or disclosure for the purposes of the Privacy and Personal Information Protection Act. Breaches of privacy do not arise in these circumstances.

In what circumstances will issues relevant to the Privacy Legislation arise in respect of student enrolments?
There is a number of different ways in which the collection, use and disclosure of personal information relevant to safety can arise with respect to student enrolments.

<u>Enrolment sought in a school by a student transferring from another DEC school</u>

When a student seeks to transfer to another DEC school, a Request for Student Records/Transfer Certificate is to be sent to the former school (see School Attendance Policy and Procedures 1991). Enrolment in the new school is not to be finalised (i.e. student details are not to be entered onto the admission register and the student not allowed to attend) until relevant student records from the previous school have been received and any risk assessment considered necessary is completed, and appropriate solutions, including control strategies, commenced.

Resources available through the Region via the School Education Director should also be considered (usually the form of a behaviour management plan in the case of a student with a history of behavioural difficulties). "Relevant student records" will include not only the student record card but also information relating to the student's student welfare and discipline record.

<u>Enrolment sought in a school by a student transferring from a non-government school or from interstate</u>

Where there are reasonable grounds to suspect that the student has a history of violence that gives rise to a risk at school, the enrolling parent(s) must be asked to authorise the principal of the previous school or schools to provide copies of relevant student records so that a risk assessment, if considered necessary, can be undertaken. In circumstances where the student is living independently of his or her parents, such authorisation may be given by the student.

It should be noted that the Department is not currently able to compel the giving of consent by parents or the provision of records from non-government or interstate schools.

If parent(s) do not give consent for the relevant information to be obtained or the information is not provided by the non-government school, assistance must be sought from the regional office of DEC with a view to resolving the impasse. Enrolment should not proceed until these matters are resolved and issues concerning the safety of staff and students are addressed.

In relation to students transferring from interstate schools, principals also need to comply with the national Interstate Student Data Transfer Note procedures. Further details about the procedures can be found on the *MCEECDYA webpage.*

Ultimately, if the information is not obtained, an appropriate Departmental educational placement for the student must be found.

Enrolment sought in a TAFE college by a student previously attending a government school

Where there are reasonable grounds to suspect that the student seeking enrolment has a history of violence that gives rise to a risk at TAFE, the TAFE college must obtain the student's relevant student records from the previous DEC school. What amounts to "reasonable grounds" will depend on the specific circumstances of individual cases.

The student's written consent must be sought prior to contact being made with the school. If the student declines to give consent, enrolment in TAFE should not be accepted.

Where consent is given, the TAFE college should send a request for a copy of the student's records to the previous DEC school enclosing a copy of the written consent. A school must provide a copy of the records requested within seven calendar days of receipt of the request. Enrolment in TAFE is not to be finalised until these records are received. A student consent form (Annexure A) and a sample letter to the school (Annexure B) are attached to this bulletin.

The same procedure applies to obtaining relevant records of students who were previously attending a Department of Community Services or Juvenile Justice institution and to obtaining safety related information from agencies such as the Department of Health. A student consent form (Annexure C) and a sample letter (Annexure D) are attached to this bulletin.

Enrolment sought in a TAFE college by a student previously attending a non-government or interstate school

Where there are reasonable grounds to suspect that a student has a history of violence that gives rise to a risk at TAFE, the enrolling student should be asked to authorise the principal of the previous school or schools to provide copies of relevant student records so that a risk assessment, if considered necessary, can be undertaken.

The student's written consent must be sought prior to contact being made with the school. If the student declines to give consent, enrolment in TAFE should not be accepted.

Enrolment sought in a school by a student who was previously attending a DoCS or Juvenile Justice institution, or for whom there is reasonable grounds to believe that DoCS, Juvenile Justice, Health, or other agency possess information relevant to safety that requests made to the Department of Juvenile Justice should be directed to the attention of:

Kay Elphick
Senior Project Officer
Department of Juvenile Justice
Ph: (02) 9219 9436
Fax (02) 9219 9511
Address: PO Box K399
HAYMARKET NSW 1240

In these cases the Learning Support Team or Principal (as appropriate) should seek the written consent of the student or parent/caregiver to obtain records relevant to safety from DoCS/Juvenile Justice/Health/other agency. The Learning Support Team/ Principal should then send a written request for a copy of the relevant records to the relevant agency enclosing a copy of the written consent.

Where consent is not given the Learning Support Team/Principal should advise the student/parent/caregiver that the records will still be sought. Again, a written request should be made to the agency concerned seeking a copy of the relevant records. The following standard paragraphs should be included in all such letters to external agencies -

"I understand that the information being sought is personal information under the Privacy and Personal Information Protection Act. This information is being sought in order to meet the State's obligations under section 8 of the Occupational Health and Safety Act to ensure the health, safety and welfare at work of its employees and non-employees. In particular it is noted that the Occupational Health and Safety Act requires employers to provide such information as may be necessary to ensure employees health and safety at work.

I note that section 25 of the Privacy and Personal Information Protection Act exempts compliance with the relevant information protection principles where non-compliance is required, permitted, necessarily implied or reasonably contemplated under an Act. It is on this basis that the information is sought."

If the agency declines to provide the records, the regional office of DEC must be notified so that negotiations can take place between regional office staff and the other agency with a view of obtaining the records. Pending those negotiations, enrolment must not be finalised.

What action is to be taken when the records are received by schools or colleges?
Once student or other relevant records are received, they need to be examined by the Principal/College Director, or his/her delegate, to identify any risks to safety and to assess the risks. If necessary advice and resources sought also be sought from the Region via the School Education Director.

In accordance with the Occupational Health and Safety Regulation 2001, any staff member who may be exposed to a risk must, commensurate with the risk, be informed of the risk and provided with any information necessary to ensure their safety.

In accordance with the Occupational Health and Safety Act, staff must be consulted at all stages of the risk assessment process. The staff who must be consulted are those whose safety may be affected by decisions concerning the risks, particularly concerning how the risks are to be managed. Typically the primary measure to deal with the risk of violence from a student will be a behaviour management plan. This should be formulated in close consultation with the staff, including teaching and support staff who will be teaching or otherwise have frequent contact with the student.

In isolation, information about a student's violent background can cause alarm to staff. Such information needs to be communicated in the context of a risk assessment (i.e. behaviour management plan) that contains measures to deal with any relevant risks. When communicated in this way, the information is less likely to cause alarm and is less likely to cause prejudice to the student's commencement in class.

A student's rights to privacy must be considered and protected, so that personal information about the student should only be shared to the extent necessary to discharge occupational health and safety obligations. Staff who are provided with personal information should be reminded from time to time that the information is disclosed only to ensure safety and needs to be handled with appropriate sensitivity.

What happens if new information is received about a school student after enrolment has occurred?
If at any time after a student is enrolled, the school becomes aware of reliable and credible information that might alter assessment of the risk to safety, the risk assessment needs to be reviewed and, if necessary, the further relevant information needs to be conveyed to staff who may be exposed to the altered risk. If no previous risk assessment has been carried out, an appropriate assessment should be completed.

What happens if information is received about a TAFE student after enrolment has occurred?
In many cases, reasonable grounds to suspect a history of violence will not arise until after TAFE students have enrolled.

If at any time after a student is enrolled reasonable grounds arise, a risk assessment will need to be undertaken. Reviews of the risk assessment will also need to be undertaken if and when further information becomes available. Action should also be taken to advise relevant staff who may be exposed to any identified risks.

In relation to TAFE students who have previously been enrolled in a DEC school, the student's written consent must be sought to obtain relevant student records from the previous school. If consent is refused, the relevant records must still be sought from, and provided by, the school.

If DEC school counsellor records exist in relation to a violent student, what action should be taken?
Where records that indicate a risk of harm are held by the School Counsellor, the School Counsellor must provide a copy to the principal of the school at which the student is enrolled or seeking enrolment. The provision of such records is in accordance with obligations under the Occupational Health and Safety Act and is not a breach of privacy or of professional ethics of psychologists. Wherever practical, counsellors should advise the student concerned that the information is to be disclosed prior to this occurring. Information not relevant to the assessment of risk of harm must continue to be held in confidence. Counsellors should obtain any necessary advice on what is relevant and not relevant to the assessment of risk of harm from their counsellor line managers.

What documentation should be maintained in relation to violent students in schools and TAFE institutes?
Principals and institute managers must ensure that

procedures are in place to facilitate the identification of risks posed by violent students. This will include ensuring that any violence related incidents occurring in schools or institutes are full documented and the records retained.

For further information in relation to the legal issue identified in this bulletin, please contact the Legal Services Directorate on telephone 9561 8538.

Annexure A

(On TAFE NSW letterhead)

CONSENT FOR GOVERNMENT SCHOOL TO PROVIDE INFORMATION TO TAFE NSW

NAME: _____ DOB: _____

ADDRESS: _____

I am seeking to enrol in the following Course/s at TAFE NSW (insert location) Campus:

_____

_____

I attended the following schools:

SCHOOL NAME:

ADDRESS:

SCHOOL NAME:

ADDRESS:

SCHOOL NAME:

ADDRESS:

I give permission to the Principal or Designated Officer to release information and/or records pertaining to me held by the above school/s.

I am aware that the information will be used in deciding my enrolment and possible assistance within TAFE NSW.

_____ _____
NAME .....DATE

_____
SIGNED

Annexure B

(On TAFE NSW letterhead)

The Principal
(insert name and address of school)

Dear Principal

CONSENT FOR GOVERNMENT SCHOOL TO PROVIDE INFORMATION TO TAFE NSW

Please find enclosed a signed consent form from (insert name of student). This person has requested enrolment in a TAFE course.

I refer to the Legal Issues Bulletin titled "Collection Use and Disclosure of Information about Students with a History of Violence". TAFE NSW has reasonable grounds to suspect that the above-named person has a history that may give rise to a risk at TAFE NSW.

With regard to this potential risk, could you please provide a copy of any records you hold on this person, detailing behaviour and any disciplinary matters during their time at your school, including any material concerned with the management of the person's behaviour.

As this enrolment is pending the receipt of this information, I would be most grateful for your response within seven (7) days.

If you wish to discuss this request, please contact me. Thank you for your assistance with this educational matter.

Sincerely,

(Insert name of campus manager or delegate)
TAFE NSW (insert location) Campus

Annexure C

(On TAFE NSW Letterhead)

CONSENT FOR DEPARTMENT OF (insert name of relevant NSW Department) TO PROVIDE INFORMATION TO TAFE NSW

NAME: _____ DOB: _____

ADDRESS: _____

I am seeking to enrol in the following Course/s at TAFE NSW (insert location) Campus:

_____

_____

I am (or have been) a client of the Department of (insert name of relevant NSW Government Department) at _____

I give the Manager permission to release information and/or records about me held by the department.

I am aware that the information will be used in deciding my enrolment and possible assistance within TAFE NSW.

_____ _____
NAME .....DATE

_____
SIGNED

Annexure D

(On TAFE NSW Letterhead)

The Manager
(Insert name and address of relevant Government Department)

Dear Sir/Madam

CONSENT TO PROVIDE INFORMATION TO TAFE NSW

Please find enclosed a signed consent form from (insert name of student). This person has requested enrolment in a TAFE course.

TAFE NSW has reasonable grounds to suspect that the above-named person has a history that may give rise to a risk at TAFE NSW.

With regard to this potential risk, could you please provide a copy of any records you hold on this person, relevant to behaviour and the management of that behaviour.

As this enrolment is pending the receipt of this information, I would be most grateful for your response within seven (7) days.

If you wish to discuss or clarify this request, please contact me. Thank you for your assistance with this educational matter.

Sincerely,

(Insert name of campus manager or delegate)
TAFE NSW (insert location) Campus

About Legal Services…..

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

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

The Legal Services Directorate has a web-site on the Department's intranet. The website contains:

- all past legal issues bulletins in both web-page and pdf format
- questions that the Legal Services Directorate most frequently encounters
- information about Government Information (Public Access) Act 2009 (NSW)
- links to other related legal web-sites
- other information for the use of schools and TAFE colleges

Of course, the Legal Services Directorate continues to offer its phone advice service to DEC personnel. We have a duty officer system. Just phone 9561 8538 to make contact with the legal officer on duty. Our fax number is 9561 8543. Or you may wish to contact us via email on legal@det.nsw.edu.au