

6 ways private school boards can minimise legal risk and operate more effectively

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School boards and other governance structures can have a strong influence on culture in a private school. School is one of the most important institutions in children's lives and therefore it is imperative that school boards and councils be properly constituted and adequately equipped to perform their function and legal responsibilities.

Schools face a higher level of legal and reputational risk compared to other organisations given the complexity of the stakeholders, which include children, regulators, unions, and parents. Not surprisingly, parents increasingly expect greater levels of transparency and accountability from school leaders.

Set out below are six tips central to ensuring contemporary governance expectations form a key part of a school board or council legal risk management strategy:

Composition of the Board: In its final published report in December 2017, the *Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission)* found that the composition of school boards can contribute to poor governance outcomes. This may be the case where school boards are predominantly made up of school alumni with a personal stake in upholding the reputation of the school. According to the Commission, some "past students may identify strongly with their old schools and continue to participate in various ways such as serving on school boards, returning to teach at their old school, or sending their children to the school. Alumni may identify strongly with the school and its reputation". In some cases, a strong historical connection to the entity may cloud sound governance decisions.

Child safety training: School boards tend to have responsibility for school strategic direction, performance, and reporting to a governing body. Not all board or council members will perceive child safety as part of their role on a school board, as they may feel they have been selected for their professional skills. Good governance must include mandatory child protection training for all board and council members as well as having child protection as a regular agenda item in governance meetings. As The Truth, Justice and Healing Council told the Royal Commission: "Ensuring that the school is compliant with all legal and statutory responsibilities while having staff meet best practice standards in the area of child safety is a core responsibility whatever the governance structure."

Student representatives: The most obvious constituents in a school 'the students' often have little or no voice in governance decisions. According to the Royal Commission, a central role of the Board or Council "is to ensure effective policies and practices are in place to fulfil the council's or board's legal obligations, including protecting children at school. Boards might ensure school principals are committed to child safety, invite student representatives to board meetings, and engage with parents and the community about issues of safety, bullying and identifying child abuse."

Human resources: Schools generally have large workforces but fewer human resource staff when compared to other corporate employers. Boards and Councils must ensure adequate resources are dedicated to human resources, training and recruitment. Complex industrial relations and child safeguarding issues should not be delegated to

academic staff who are not trained and skilled in the area. According to the Royal Commission, historical case studies demonstrate that poor or inadequate human resource management can contribute to failures to keep children safe in schools. For example:

- inadequate recruitment practices – such as failing to undertake referee checks, allowing staff to work with children without a working with children check and inadequate induction processes;
- subjects of a complaint not being disciplined or held to account – such as allowing teachers to resign when complaints were made against them, transferring them to other schools, or giving them positive references that enabled them to teach in other schools, thereby exposing other children to risk;
- poor management of non-teaching staff – such as failing to ensure that all staff who could come into contact with children are suitable and supported, including administrators, contractors, gardeners, sports coaches, parent volunteers, and maintenance staff

Enrolment contracts: The enrolment contract between the school and parents is a legally binding document. In the event of disputes, such as unpaid fees, teacher/student misconduct, expulsion or allegations of breach of duty of care, the enrolment contract will be the basis for many of the rights and responsibilities of the respective parties. However, it is surprising how outdated and unsophisticated many of these documents can be. For example, in *Whitworth v Christian Brothers College Adelaide* [2019] SASC 154, an independent Catholic school was unable to recover almost \$20,000 in unpaid tuition fees from a parent because the original enrolment contract signed by the parents contained deficiencies. As parents become more willing to take legal action against schools, it is critically important that boards identify legal risks by ensuring terms of enrolment contracts are consistent with the law and cater for the broad range of issues that arise in the student relationship.

Board disputes: Disputes between board/council members can tend to spill into the public domain, thereby damaging the reputation of the school and having an impact on its operations. A recent academic analysis emphasised the “detrimental effect” of “power imbalances” between board members and school principals, finding that “excessive influence over board decisions on long term strategic issues may interfere with the accountability of the board and impair the board’s independence in monitoring and advising functions”. Board/Council codes of conduct may be an appropriate way of managing governance obligations and expectations by setting out the roles and duties of participants, articulating expected behaviours, and providing guidance around dispute resolution and public relations.

School boards and councils cannot eliminate risk but can get better at managing it. A robust approach to good governance at the board or council level which takes into account contemporary expectations in this area is a crucial starting point.

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1. Chin Moi Loh et al, “Board Effectiveness and School Performance: A Study of Australian Independent Schools,” *School Effectiveness and School Improvement*, v32 n4 p650-673 2021.1

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