

BOOK REVIEW

Sexual Misconduct in Education: Prevention, Reporting and Discipline

Second Edition

Grant Bowers & Rena Knox: Consulting Editor Justice Marvin A Zuker

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In their preface, dated July 2006, the authors and consulting editor state that the continuing purpose of the second edition is ‘to provide school administrators, teachers, parents and students who shape the playing field we call education with sources of information that will allow them to help make schools safe and respectful places for learning and teaching’. It is further stated that the book examines the moral and legal interaction of the participants in the educational system from the point sexual misconduct is first identified and that the book is ‘both comprehensive and brief’. The book is comprehensive because ‘it covers virtually every legal challenge faced by schools today dealing with sexual misconduct’ and brief because ‘the issues are summarized, emphasising the most important concepts’.

Grant Bowers is a practising lawyer with the Toronto District School Board (the largest in Canada), and Rena Knox is counsel with the Catholic Children’s Aid Society of Toronto (one of the largest agencies of its kind in Canada). Justice Marvin A Zuker is with the Ontario Court of Justice and has substantial experience as a family court judge. He has also published extensively in the area of education law.

This book discusses relevant principles of law and practical issues in the context of the general criminal laws of Canada and the laws and institutions of the Province of Ontario. It is written against the background of the history of institutional sexual abuse in Canada and the responses in the Province of Ontario in the last decade, flowing in particular from a report to the Attorney-General of Ontario by the Honourable Mr Justice Robins in 2002 entitled ‘Protecting our Students: A Review to Identify and Prevent Sexual Misconduct in Ontario Schools’. Whilst this enquiry had its origins in the conviction of a teacher who had sexually assaulted female students over a period of 20 years, Justice Robins was not only to enquire into the particulars of that case but was to make recommendations regarding protocols, policies and procedures that would assist in the identification and prevention of sexual assault, harassment, or violence in the publicly funded schools of Ontario. Following that report, legislative and practical changes (and it would seem substantial attitudinal changes) occurred in Ontario, and the general issues are considered in the light of those changes and with specific reference to them.

The structure of the book is 7 chapters, discussed below, taking up 200 pages, followed by approximately 70 pages of extracts from criminal education and child protection laws, and procedural documents issued by regulators and educational employers.

Chapter 1 is entitled 'The History of Institutional Sexual Abuse in Canada'. This chapter deals with a number of specific and disturbing events placed in a general historical context, and explains how in the case of Ontario these led to the enquiry by Mr Justice Robins. The complexities inherent in dealing with such issues, particularly sexual relationships with older or adult students, are well summarised on page 26. This chapter is well worth perusal by readers in Australia and New Zealand as, from the perspective of such readers, both the common features and the differences are useful background for reflecting on law and practice.

Chapter 2 is entitled 'Sexual Misconduct in Schools; Who is Liable and Why'. It deals particularly with principles of personal and vicarious liability and, in the case of educational authorities, the recent extensions of liability by decisions of the Supreme Court of Canada, in particular the development of a new basis of liability namely whether the employer's enterprise and empowerment of the employee has materially increased the risk of the sexual assault. On the basis of this doctrine, educational employers may be liable without fault on their part for sexual abuse, contrary to instructions, of an employee. This chapter should be read with care by readers in Australia and New Zealand as these principles are inconsistent with contemporary Australian and New Zealand principles for dealing with such issues. Again however, the comparative perspective is of value.

There is an extremely useful discussion at pages 67-72 under the heading 'Defending the Past and Protecting the Future' of the importance (particularly in relation to claims from long in the past) of securing all documentation, including that relating to insurance coverage, as far back as possible. This discussion is directly applicable to southern hemisphere readers.

Chapter 3 is entitled 'Children Under 16 — the Role of the Children's Aid Society'. This is the chapter of least direct applicability to other jurisdictions as the Children's Aid Societies have a number of important features specific to the Canadian or Ontario context. Nonetheless it is worthy of perusal, particularly passages such as the acknowledgment at page 82 of the valid concerns of teachers about being the victims of false allegations and the truly horrifying case of *Wanda Young* at pages 88-91. This case emphasises dramatically the importance of perspective and transparency by those initiating allegations in unusual circumstances. (In this case a university assignment was treated as evidence of an admission of sexual abuse.) At pages 96-97 there is a useful discussion of the 'need for integration of response' where enquiries are conducted, as is common, by a number of agencies.

Chapter 4 is entitled 'Initial Reporting: Three Types of Sexual Misconduct, Three Types of Response'. The structure of this chapter arises out of the laws in force in Ontario and deals with victims under the aged of 16, victims aged 16 or 17 who are physically or mentally disabled, and victims 18 years of age and older who are physically or mentally disabled. At pages 114-115 there is an interesting summary of some of the circumstances where physical contact is appropriate and those where it is inappropriate. The importance of the motivation of a teacher initiating physical contact with a student is (properly) emphasised. This reviewer has a query about one of the useful examples set out there. The authors appear to be suggesting that 'an active restraint in a situation of classroom violence' is 'inappropriate'. No explanation is provided. It seems to the reviewer that there may be circumstances in which some involvement is in fact required of the teacher to discharge the duty of care. Notwithstanding this one issue however, the discussion of examples is very helpful, and the conclusion ought to be disseminated widely in educational institutions.

These distinctions demonstrate that the simplistic direction to teachers not to touch children ... is misguided. Touch can represent a basic form of human communication of love, sympathy or support. Teachers and other school staff should be directed, more specifically, not to touch students in anger or for a sexual purpose.

This reviewer, whilst endorsing that proposition when one is judging the conduct of teachers, would add the qualification that teachers should be very prudent in initiating physical contact as it can so easily be misinterpreted. There is the additional risk that teachers' conduct may be judged by persons who adopt the 'simplistic' approach.

At page 118 there is a very helpful discussion of the meaning of 'reasonable suspicion', a term widely used to trigger the duty to report. In particular a distinction is drawn between reasonable suspicion, and reasonable belief. There is also at pages 118-119 a summary of research conducted on the concept of 'indirect' disclosures of abuse by children, which is particularly relevant to younger children. In the context of discussing relationships with older students, there is a useful summary at page 129 of the reasons that one should be cautious about accepting as appropriate such relationships.

Chapter 5 is entitled 'After the Investigation' and deals with a range of issues. The summary of criminal procedure, whilst based on Canadian experience, is reasonably comparable with criminal procedures elsewhere, at least for the purposes of a discussion which deals with appropriate responses by educational authorities and regulators following the completion of criminal proceedings. There is a particularly useful discussion at pages 170 and following under the heading 'When Conduct may be Culpable but not Criminal' of the sorts of behaviours which are increasingly under consideration in various jurisdictions.

Chapter 6 is entitled 'Internal Investigation of Sexual Misconduct Allegations'. This is a very useful chapter dealing with a subject where much higher standards are both important and needed, and will be of use to educational administrators. The authors are to be commended for stating candidly:

There is a tendency, by investigators, to try to gather information to prove what they have already determined or suspect to be true rather than what actually happened.

A feature of this chapter which impressed the reviewer was the advice to inform support persons attending interviews that they might be subpoenaed to give evidence of what was said at the meeting. (Obviously taping such interviews, rather than merely making notes, would significantly reduce that possibility.) There is also very wise advice given that promises of anonymity or confidentiality should not be given where they cannot be honoured.

For Australian readers it is important to bear in mind that the position in Australia in relation to the standard of proof in disciplinary enquiries is more complex than that discussed at page 182. Although the test is 'the balance of probabilities', rather than the criminal standard, in Australia that (lower) test must take into account the seriousness of such an allegation against a trained and registered professional person. Decisions of the High Court of Australia establish in more precise terms the correct approach.

Chapter 7 is entitled 'Sexual Misconduct Scenarios'. There are 10 scenarios set out and quite detailed commentary follows. Readers have the opportunity to consider their own response before turning to the comments. Although this advice contains material which is specific to the Ontario legal framework, it is also true that these responses contain universally applicable advice. Twice the very wise comment is made:

It is often a mistake to base decisions on reporting on personal judgments of character.

Clearly the authors have in mind both favourable judgments of character and unfavourable judgments when making this remark.

The appendices referred to above are of limited relevance, although for lawyers considering the drafting of documents or possible changes to legislation they are of some value. For educational administrators and teachers, the most useful passage is at pages 205-206 under the heading 'Using Good Judgment'. The advice set out there is most useful as a basis for considering what should be said to teachers when advising them about preserving appropriate professional boundaries.

This is a text which would be of great value to persons in Ontario and, to a lesser extent, Canada generally. However, as is apparent from the discussion above, it is also of considerable value to southern hemisphere readers, subject to their approaching the text with an awareness of the need to bear in mind the significance of particular provisions not applicable in their jurisdiction.

The writer's only significant concern is that the text does not, in his judgment, sufficiently acknowledge the significant incidence of incorrect allegations made against teachers. Nor does it address in any detail the procedural protections necessary to minimise the risk of innocent teachers being wrongly found to have offended.

Nonetheless, this is a valuable text for those grappling with these difficult issues.

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