

PROTOCOL

Liaison between Counsel for Child and Schools

A Guide for Lawyers Representing Children

INTRODUCTION

General

1. Lawyers involved in cases relating to the care of children (guardianship, custody, access, and care and protection matters) frequently, and correctly, identify schools as a likely source of important and relevant information.
2. Conversely schools are understandably cautious in providing information about children where Court proceedings are involved.
3. Most schools have now established their own protocols for dealing with enquiries from lawyers in such situations.
4. This document is specifically intended as a guide for lawyers who have been appointed by the Court to represent children and who wish to obtain information from, or interview children at, schools. It is intended to be of general application to primary, intermediate and secondary schools and may have some relevance to pre-school programmes (including kindergarten). Because of the different character of these educational facilities some adaptation to specific circumstances may be required.
5. This document may also be of benefit to schools in receipt of requests for information but should not be seen as a substitute for legal advice.

School Protocols

6. Pursuant to the Education Act 1989 Schools effectively manage their own affairs.
7. Where a school has established a protocol for dealing with lawyers seeking information it is important to respect and abide the terms of that protocol. At the outset it may be both prudent and courteous for the lawyers to enquire as to the existence of any such protocol and to seek to ascertain its terms.

Point of Contact

8. Pursuant to the Education Act 1989 the Principal of a school is effectively the school's Chief Executive. Again as a matter of prudence and courtesy all enquiries of a school should be made, in the first instance, to the Principal rather than to individual teachers, guidance counsellors or administrative staff.

General Disclosure Principles

9. The statutory parameters within which a school operates in relation to the disclosure of information may be found in the Official Information Act 1982, Education Act 1989 and Privacy Act 1993.
10. The Privacy Act 1993 establishes principles including those relating to the disclosure of information about individuals. Principle 11 prescribes the limits on disclosure of personal information. It is commonly (but erroneously) summarised as having the effect that:
 - Information can only be disclosed with the consent of the individual involved (i.e. the child); or
 - Information can only be disclosed to the individual concerned (i.e. the child).

In fact Principle 11 (**annexed**) permits rather wider disclosure than that.

11. Of particular relevance are the provisions for disclosure of information as one of the purposes in connection with which the information was obtained or directly related to such purposes.
12. Schools may also be requested to make disclosure to a public sector agency acting under a specified statutory authority (e.g. Police, CYFS, WINZ)
13. Another important provision is the disclosure of information deemed as *necessary* for the conduct of proceedings before any Court.
14. The Privacy Act 1993 also sets out reasons for which a request for information may be refused. For example, a request may be refused where:

“In the case of an individual under the age of 16, the disclosure of that information would be contrary to that individual's interests”

15. Furthermore the Official Information Act 1982 has, as its underlying principle, that information should be made available unless there is good reason to withhold it.
16. Sometimes these statutory provisions can appear to be in conflict but with care, tact and diplomacy a route through the various provisions can usually be found.

OBTAINING INFORMATION FROM A SCHOOL

Parental Rights to Information

17. It is to be noted that parents also have a statutory right to certain information pursuant to Section 77 Education Act 1989 which provides that:

“The Principal of a State School should take all reasonable steps to ensure that a student’s parents are told of matters that, in the Principal’s opinion, are preventing or slowing the student’s progress through the school; or are harming the student’s relationship with the teachers or other students.”

There is therefore, upon the school, a duty to provide such information to parents (and, incidentally, to a lawyer with the authority of a parent) provided it falls within the parameters of Section 77.

Parental Consent

18. Parental consent for the disclosure of information by a school to a lawyer appointed to represent a child is not a legal pre-requisite.
19. However as a matter of practice counsel for the child should usually endeavour to obtain the consent of each parent and/or guardian of the child to the seeking and obtaining of information from the child’s school. It is also desirable that each parent and/or guardian be encouraged to notify the school that their consent has been sought and obtained. The parents and/or guardians should however not be under any misapprehension that their consent is a legal pre-requisite to the lawyers seeking and obtaining information from the school. Where consent is not forthcoming the lawyer may nevertheless pursue a request for disclosure of information from the school.

Child’s Consent

20. Consideration should also be given (having regard to the age and maturity of the child) to seeking the child’s formal consent to the seeking and obtaining of information from the school.

Contact with the School

21. It is recommended, in all circumstances, that initial contact by counsel for the child with a school should be by letter, fax or email and if possible should enclose a copy of a letter of appointment from the Family Court. Such contact should also provide information to enable the school to corroborate with the Court the fact of the appointment.
22. Where circumstances preclude initial contact by letter, fax or email, contact may be made directly by telephone. In all cases correspondence should be directed to the Principal and marked “Strictly Private and Confidential”. This practice should be followed even in cases where the school and the lawyer have had previous involvement with one another (in relation to the child in question or any other child).

23. At the first point of contact Counsel should be reticent in discussing any matter relating to the child with anyone other than the Principal or Deputy Principal.
24. Counsel should at all times be prepared to provide confirmation of their identify, their appointment and details of the information they are seeking.
25. Unannounced visits to a school are discouraged and should, in any event, rarely be appropriate.
26. It is inappropriate for counsel to require the school to keep the fact that contact has been made confidential.
27. Counsel should not assume that the school has even the most rudimentary understanding of legal processes. Counsel should therefore be prepared to explain and outline such legal concepts as guardianship, custody and access, to distinguish between private disputes being decided under the Guardianship Act 1968 and public disputes falling under the provisions of the Children, Young Persons and their Families Act 1989. Counsel should also be prepared to discuss with schools the appropriate approach to the reporting of suspected child abuse and neglect pursuant to Section 15 Children, Young Persons and their Families Act 1989. In particular it should be noted that schools will not be protected by the statutory immunity contained in Section 16 Children, Young Persons and their Families Act 1989 by *reporting* suspicions to counsel.
28. Counsel should also make clear to the school that no *legal privilege* will attach to any information supplied by the school that information supplied may become known to all those involved in the proceedings, that there is no *property in a witness* and that it is possible that members of the school staff may be required to give evidence in the event of a Court hearing ensuing. It is important not to offer 'confidentiality' where, in fact, that cannot be guaranteed.
29. In circumstances where counsel seeks to interview individual teachers and or guidance counsellors the opportunity for those persons to be accompanied by the Principal, a member of the Board of Trustees or the school's own lawyer should be afforded. Furthermore it is preferable that notes be taken during the interview and that the staff member being interviewed be asked to confirm that the notes accurately record the information given.
30. A school counsellor may feel constrained by the ethic of counsellor/client confidentiality and this view should be respected. Care should be taken not to unwittingly compromise any professional relationship that may exist between a child and a school counsellor. The lawyer should be prepared to discuss with a school counsellor the existence of, and limits upon, client confidentiality.
31. It is important to remain clear about the school's role where a child at the school is subject to legal dispute. The school's primary role is to provide education for the child or children. It is part and parcel of that role to provide a safe physical and emotional environment for the child. Whatever the eventual outcome it is likely that the school will have an ongoing relationship with both the child and the child's parents/guardians/caregivers. For those reasons the school should be encouraged to frame such information as it is willing to provide in non-judgmental and neutral terms. Whilst teachers do spend a considerable amount of time with children it is important to recognise that they are trained, primarily, as

educators and should not, therefore, be encouraged to proffer views and opinions outside the range of their demonstrable expertise. Whilst teachers can be a valuable source of information counsel need to be careful not to invest in teaching staff (and their opinions) too much weight or significance. Whilst counsel and schools will probably agree that their mutual goal is *the welfare of the child* this may be viewed through slightly different perspectives.

32. Children faced with the turbulence of domestic upheaval may regard school as a place of relative security and stability. Counsel should be sensitive to this possibility and take care to ensure that no steps are taken which may compromise that situation.
33. In general terms it is desirable for schools to provide information to the Court about children through the lawyer appointed to represent the children. In the event that evidence is to be given by way of Affidavit or orally many schools prefer to do so under the formal compulsion of a Witness Summons even where informal discussion has already taken place. Once such a summons has been issued and served it is appropriate that the lawyer for the child then prepares the Affidavit and/or the Brief of Evidence. Notwithstanding the liberal provisions relating to evidence in the Family Court it remains preferable that such evidence be derived from its primary source (i.e. the class teacher rather than the Principal) and that it be limited to matters of fact or opinion where the deponent is suitably qualified as an expert to tender such an opinion. In some cases the Court (and the parties) may be prepared to accept a written statement being admitted into evidence by consent. However care needs to be taken to inform schools that any evidence proffered may be the subject of cross examination.
34. In the event that evidence has been filed it is important that counsel for the child take responsibility for adequately briefing and preparing the witness. It is both discourteous and inappropriate to assume that such witnesses will be comfortable attending Court without such a briefing. Steps should also be taken, so far as is practicable, to ensure that evidence is given at a time that is convenient to the school.
35. Before inviting a school to proffer evidence in any proceeding counsel should give careful and anxious consideration to whether or not such evidence is necessary and/or relevant.

MEETING CHILDREN AT SCHOOL

General

36. Counsel appointed to represent the child may want to meet with the child at school. The purpose of that meeting may be to provide the child with information about the Court process; it may also be to obtain information relevant to the assessment of the child's wishes.
37. The Practice Note "Counsel for the Child Code of Practice" issued by the Principal Family Court Judge with effect from 1 February 2001 provides:

"7. Interviewing the Child at School

- 7.1 *Counsel should exercise caution before deciding to interview children at school. The school's consent is required before any such interview is conducted.*

7.2 *If counsel is to interview the child at school it is desirable to obtain the prior consent of the parents and to notify the school of these consents. If consents are not forthcoming counsel may need to seek a direction from the Court. Counsel must also comply with any protocols or requirements of the school. If a formal Order or letter appointing counsel is available this should be shown to the school principal.”*

38. Counsel should be especially sensitive to the potential embarrassment which a child may experience as a result of any meeting which takes place at school.
39. If such a meeting does take place at school the lawyer appointed to represent the child may want a teacher or someone else with whom the child is comfortable present at least for the initial part of that meeting. The school too may have a requirement that a member of the school staff be present.
40. Any meetings with the school (whether involving the child or not) should be planned to minimise disruption for the child and the school.

Follow Up

41. As a courtesy counsel who has involved the school in interviews and the like should take responsibility for advising the school, so far as is practicable and desirable, of the outcome of any proceeding. This would include advice of any special conditions which might affect the right of one or other parent to information about their children, or to visit the school.
42. Counsel should advise the school that in the event of any dispute or the need for any clarification contact with counsel in the first instance would be appropriate.

Urgent Intervention

43. In the event of a warrant being issued to enforce custody and/or Access Orders or under the Children, Young Persons and their Families Act 1989 there may be (rare) occasions when the execution of that warrant needs to take place at school. In such circumstances counsel for the child should request to be involved in the execution of the warrant and should liaise closely with the school to ensure a minimum of disruption to the school and to the child.

This guide was introduced in June 2002 and has been endorsed by Principal Family Court Judge P D Mahony.

ANNEX

PRINCIPLE 11

Limits on disclosure of personal information

An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—

- (a) That the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
- (b) That the source of the information is a publicly available publication; or
- (c) That the disclosure is to the individual concerned; or
- (d) That the disclosure is authorised by the individual concerned; or
- (e) That non-compliance is necessary—
 - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) For the enforcement of a law imposing a pecuniary penalty; or
 - (iii) For the protection of the public revenue; or
 - (iv) For the conduct of proceedings before any court or [tribunal] (being proceedings that have been commenced or are reasonably in contemplation); or
- (f) That the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to—
 - (i) Public health or public safety; or
 - (ii) The life or health of the individual concerned or another individual; or
- (g) That the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
- (h) That the information—
 - (i) Is to be used in a form in which the individual concerned is not identified; or
 - (ii) Is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (i) That the disclosure of the information is in accordance with an authority granted under section 54 of this Act.