

SUBMISSION

TO

**SENATE COMMUNITY AFFAIRS COMMITTEE INQUIRY INTO THE
SOCIAL SECURITY AND VETERANS' ENTITLEMENTS LEGISLATION
AMENDMENT (SCHOOLING REQUIREMENTS) BILL 2008**

BY

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This submission is directed towards clauses 124K and 124L of the Bill as drafted. My concern is that these provisions are likely to cause some particular difficulties in their application for the reasons outlined below. My overarching comment is that the provisions in the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Bill 2008* are examples of an approach based on expansive notions of parental responsibility and the role of the state, while the State and Territory laws are fashioned on older views about school attendance and the obligations of parents which stem from a more simple and less intrusive role for the state. The manner in which these laws will interact is for those reasons problematic, particularly as the Bill links to the State and Territory laws in a very central manner.

Clause 124K

This clause is a key part of the scheme established in the Bill as it empowers the Secretary to give an attendance notice to a schooling requirement person to take reasonable steps to ensure that their child attends school. This provision is triggered when a person responsible for the operation of a school notifies the Department that a child is failing to attend school. Such notice from the school is itself initiated under clause 124K(1)(b).

Clause 124K(1)(b) in effect authorises the person responsible for the operation of a school to inform the Department when:

- the child is failing to attend school
- as required by the law of the State or Territory
- to the satisfaction of the person responsible; and
- the schooling requirement person is failing to take reasonable steps to ensure that the child attends school;
- as required by the law of the State or Territory
- to the satisfaction of the person responsible.

Thus for the school to notify the Department a number of elements must be present:

- (1) a failure to attend school
- (2) a judgment about what the applicable State or Territory law requires with respect to attendance

- (3) that the child is failing to attend in accordance with the law to the satisfaction of the person responsible
- (4) that the schooling requirement person is failing to take reasonable steps to ensure attendance
- (5) a judgment as to the applicable laws' requirements with respect to taking reasonable steps to ensure attendance
- (6) that the schooling requirement person is failing to take reasonable steps to ensure attendance in accordance with the law to the satisfaction of the person responsible.

The clause thus requires a number of judgments to be made at various points. In particular there must be decisions made about whether the schooling requirement person (who will often be the parent of the child) has complied with State and Territory law. While this appears to be superficially a simple matter, an analysis of State and Territory laws with respect to school attendance discloses a much more complex state of affairs.

Applicable law in the States and Territories

While each State and Territory has a legal provision requiring school attendance, the various jurisdictions vary as to the reasons which excuse non-attendance. I will only focus on those reasons which relate to what is broadly within the 'parent's ambit' as opposed to such matters as being enrolled elsewhere or being suspended from attendance which have much less to do with the role of the parent.

Thus in New South Wales it is a defence to a prosecution for failing to send a child to school if the child was prevented from attending school because of 'sickness, risk of infection or temporary or permanent incapacity' or because of 'some accident or unforeseen event' and the parent notifies the school within 7 days.¹ It is also a defence to a prosecution for not sending a child to school that 'the absence from school was because of the child's disobedience, and was not due to any default of the defendant.'²

¹ Education Act 1990 (NSW), s. 23(3)(b).

² Education Act 1990 (NSW), s.23(3)(e).

In Victoria it is a reasonable excuse for non-attendance if ‘the child has been prevented from attending school or receiving instruction because of illness, accident, an unforeseen event or an unavoidable cause’³, ‘the absence from school or instruction was because of the child's disobedience and was not due to any fault of the parent’⁴ or ‘the child is attending or observing a religious event or obligation as a result of a genuinely held belief of the child or a parent of the child.’⁵ Notification of the reason for non-attendance is to be advised by the parent if requested by the Principal or a teacher.⁶

In Queensland it is a defence for a parent prosecuted for a failure to ensure that their child attends school that they had ‘a reasonable excuse’⁷ which is not defined. Sub-section 176(2) of the Act specifies that without limiting its meaning in sub-section (1) a reasonable excuse will include where ‘in all the circumstances, the relevant parent is not reasonably able to control the child's behaviour to the extent necessary to comply with [the requirement that the child attends school].’⁸

In South Australia the requirement that the child attend school is not applicable where the parent presents within a reasonable time a prescribed reason for the non-attendance of the child.⁹ The prescribed reasons are that the child was prevented from attending due to ‘sickness, danger of being affected by an infectious or contagious disease, or temporary or permanent infirmity or by any other unavoidable and sufficient cause.’¹⁰

In Tasmania a child is excused from attendance if the child is prevented from attending school due to sickness, temporary, physical or mental incapacity, or any other reasonable cause **and** the parent has notified the school’s Principal within the period specified by the Secretary of the Department.¹¹

³ Education and Training Reform Act 2006 (Vic), s.2.1.3(a).

⁴ Education and Training Reform Act 2006 (Vic), s.2.1.3(e).

⁵ Education and Training Reform Act 2006 (Vic), s.2.1.3(f).

⁶ Education and Training Reform Act 2006 (Vic), s.2.1.4(1).

⁷ Education (General Provisions) Act 2006 (Qld), s.176(1).

⁸ Education (General Provisions) Act 2006 (Qld), s.176(2).

⁹ Education Act 1972 (SA), s.76.

¹⁰ Education Regulations (SA) 1997, reg. 60.

¹¹ Education Act 1994 (Tas), s.10.

In Western Australia a student is excused from attending school if they are prevented from so doing due to sickness, temporary physical or mental incapacity or any other reasonable cause **and** a responsible person has notified the Principal of the school as soon as is practicable and in any case within three days of the non-attendance.¹²

In the Northern Territory the requirement to attend school does not apply where the parent provides to the head teacher ‘a reason acceptable to the head teacher of the school for the absence.’¹³ If the day is of significance to the ethnic group of the child the attendance requirement does not apply if the parent provides the reason to the school teacher.¹⁴ It is also a defence to a prosecution for the failure of a child to attend school that the failure ‘did not result from any failure of the parent to exercise proper care and control of the child.’¹⁵

In the Australian Capital Territory the relevant legislation states the requirement to ensure a child attends school does not apply if the parents have a reasonable excuse for the contravention.¹⁶

Summary of State and Territory Law

While the laws across the jurisdictions do vary the following broad summary of some common characteristics can be made:

- (1) In all jurisdictions there is no breach of the law for failing to ensure a child’s attendance at school if the child is ill, incapacitated or there is some other reasonable excuse, unforeseen event or unavoidable cause.
- (2) In New South Wales, Victoria, Queensland, and the Northern Territory it is also a defence that the failure to attend was due to the child’s behaviour and not the parent’s.
- (3) In most jurisdictions the reason for non-attendance is reported by the parent. Only in the Northern Territory is it stated that the reason is to be acceptable to the head teacher.

¹² School Education Act 1999, s.25(2)(a) and (b).

¹³ Education Act (NT), s.22(2)(c).

¹⁴ Education Act (NT), s.22(2)(d).

¹⁵ Education Act (NT), s.22(5).

¹⁶ Education Act 2004 (ACT), s.11(4).

The consequence of (1) and (3) for most jurisdictions is that the final arbiter of what constitutes a reasonable excuse will be the courts where it is thought that the reason provided does not fall within that definition and so excuses the non-attendance. This is because in effect the penalty for failure to ensure a child's attendance is ultimately enforced by way of a prosecution for an offence.

Under the proposed *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Bill 2008*, clause 124K, as outlined above, requires, as the first step towards notifying the Department of a failure of a child to attend school by the person responsible for the operation of a school, a determination that the child is failing to attend school as required by the law of the State or Territory **to the satisfaction of the person responsible for the operation of the school**. It is difficult to understand what those words (here in bold) add to the clause. They may suggest that the person responsible for the operation of the school must pre-empt what a court might regard as a reasonable excuse for non-attendance and form their own view. The difficulty with this is that where there is a reasonable excuse it is clear that under State and Territory law there is no requirement to attend. The person responsible for the operation of the school must turn their mind to these issues to decide that there has been a failure to attend as required by the State or Territory law. But this area of law is at times complex and by removing it from the courts, in effect, there is the strong possibility that different school Principals may form different views about what constitutes a reasonable excuse, or alternatively may fail to take into account the variation in grounds that justify non-attendance which exist in the States and Territories. This would be a process that is not always transparent, as compared with the current position where the consequences of non-attendance – at least in terms of financially penalising parents – occur in open court.

Thus what must be to the satisfaction of the person responsible for the operation of the school is whether the parent of the child has failed to send their child to school as required by the applicable State or Territory law. As many parents may claim a reasonable excuse (or equivalent) and that term is not usually defined in the relevant laws, then its meaning must be interpreted by the person responsible for the operation of the school. In my view this grants too much discretion to the person responsible for the operation of a school and could result in the absurd result where a prosecution

might fail or not even be pursued under the State or Territory law because there is thought to be a reasonable excuse, yet because at a school level the view is formed that the parent does not have a reasonable excuse the matter proceeds to the next stage for the purposes of the Federal law. In addition, as the State and Territory provisions are enforced by prosecution, this will entail some opportunity for parents to state their case. This is not a necessary part of the process in this Bill prior to the decision being made.

The manner in which the person responsible for the operation of a school becomes satisfied as to whether a child is failing to attend school as required by State or Territory laws should be clarified in the Act to take account of the above, in particular specifying the matters they should take into consideration, and requiring that they should provide an opportunity for the parent to state the reason for non-attendance.

Point (2) in the summary above appears to have particular relevance for the next step in the process where the person responsible for the operation of the school must also decide that the parent is ‘failing to take reasonable steps to ensure that the child attends school’ as required by the State or Territory law, again **to the satisfaction of the person responsible.**

Similar objections could be made to this provision as above. On one interpretation of the section this again requires the person responsible for the operation of the school to interpret the relevant State or Territory law with respect to what steps parents must take to ensure attendance. The various laws on school attendance are relatively silent as to what positive steps parents must take to ensure attendance as the scheme of the laws tends to simply require parents to send their children to school on pain of prosecution for an offence. In part this may have a lot to do with these laws being drafted in a different era when state intervention in family life was much more cautious. Thus the State and Territory laws provide little guidance as to what might constitute reasonable steps to ensure attendance, it being left - in a practical sense arguably - to parents to determine in most cases. There are perhaps some exceptions, for example, the New South Wales Act requires parents to attend a conciliation conference where their child is not attending regularly and the Minister requires that

they attend such a conference.¹⁷ It could be argued that other general child protection statutes might form the basis for parental obligation on this regard. But if that body of law is relied upon to ground views about what reasonable steps parents are bound to undertake, then this also underscores the complexity of the decision making being undertaken at the school level.

At least in terms of the approach taken by State and Territory education laws, the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Bill 2008* seems to attempt to go beyond those laws by adding a requirement that parents (to avoid a school attendance notice) must also take reasonable steps to ensure their child attends school. Thus, this on its own would not be answered by claiming that there was a reasonable excuse for non-attendance. In such a case it could be asked what steps the parent has taken to ensure that that excuse was not operative. For example, in a case where the excuse is illness, it could be asked whether the parent took steps to ensure the child did not become unwell. And in relation to the defence provided under some State laws that the failure to attend was caused by the child's disobedience (or as in Queensland the parent claims that they are not able reasonably to control the child's behaviour) it is not too difficult to see how this might be turned against the parent and it argued that such failure to control (or the child's disobedience) is itself evidence of some failing on the part of the parent to take reasonable steps to ensure the child attends school. As this is to be determined to the satisfaction of the person responsible for the operation of the school, it is likely that this may be interpreted at that level quite arbitrarily in this manner.

Of course, if the requirement that the taking of reasonable steps to ensure the child's attendance is qualified by what is required under State and Territory laws, and it is the case that those laws say little about the taking of such steps then this step in the process could have little effect in any event. But if this is not a correct interpretation, or even if it is but it is misinterpreted then what is possibly more likely to happen here is that the person responsible for the operation of the school will apply whatever administrative policies and practices exist for parental guidance and support to ensure children attend school as some sort of test to see whether parents are taking

¹⁷ Education Act 1990 (NSW), s.23(5).

reasonable steps, **without regard to whether those services have any legal compulsion attached to them at the State or Territory level.** Whether or not such parents would be acting reasonably in a moral sense, I doubt that applying that approach would be consistent with the Bill if it requires a failure to comply with State or Territory law.

Clearly, there must be clarification of how this provision sits with State and Territory laws. The types of actions that might constitute reasonable steps should also be specified, and how the person responsible for the operation of the school should inform themselves of this matter. In particular, there should be some provision for the parent to present their case.

Clause 124K(2) then also requires a person served with an attendance notice by the Secretary (as a consequence of the school's notification) to take 'reasonable steps' to ensure that the child attends school. This again is undefined and there appears to be no consideration as to how this provision interacts with the State and Territory laws and the reasons for non-attendance discussed above. In particular it has the potential to require a parent to take reasonable steps to remove a reason for non-attendance under State or Territory law. While this could be justified as the goal of the legislation, as this notice is qualified once again with the aim that the steps taken are to ensure attendance as required by State and Territory law it again runs foul for the same reasons as mapped out above in relation to the decisions taken at school level. **If a parent does not have to ensure attendance under those laws where a reasonable excuse exists, then it would not be reasonable to expect a parent to take steps to do something that is not required of them.** But additionally, even if there is no reasonable excuse, it may be asked what reasonable steps State and Territory laws require towards ensuring school attendance in any event.

It could be argued that clause 124K(2) imports a different requirement to that contained in clause 124K(1)(b)(ii) in that in the former the taking of reasonable steps is 'to ensure that the child attends school as required by the law of that State or Territory law', whereas in the latter provision the school must determine whether a parent is taking reasonable steps to ensure attendance 'as required by the law of the State or Territory'. That is, in the former the taking of reasonable steps is to ensure

attendance, while in the latter case the taking of the reasonable steps relates to those required by State or Territory law, which has already been discussed above as being limited in application potentially.

This indicates a possible disjuncture between what the school is to determine and what the Secretary must decide which is confusing. **The intended scheme seems to be to impose additional obligations on parents which may go beyond State and Territory laws, but whether that has been achieved is not clear.**

At the very least, the Act should specify the matters the Secretary should take into account in determining whether a person is failing to take reasonable steps to ensure their child attends school consistent with what occurs at School level. Without this, it seems almost impossible to call to account the decisions taken by the relevant decision makers.

Clause 124L

This clause in effect removes the consequence of failing to comply with an attendance notice where the Secretary is satisfied that the person has a reasonable excuse for failing to comply.

It is not clear what this might refer to. It cannot relate to the reasonable excuses under State and Territory laws because as submitted above if they operate then there would be no basis for issuing the notice in the first place. The explanatory memorandum states a legislative instrument determination will be determined to specify what constitutes a reasonable excuse. This further confuses the relationship between the Federal and State laws, as it is not clear here whether such reasonable excuses will be consistent with State and Territory laws.

Moreover, as State and Territory laws provide for reasonable excuses as a means of relieving parents from ensuring their child attend school, this provision seems to add another layer of reasonable excuses on top of the State and Territory laws. Given the manner that clause 124K ties the obligations of parents to compliance with State and Territory laws, it is difficult to understand how the ‘reasonable excuses’ under clause 124L and apparently to be determined by the legislative instrument determination can

differ logically or sensibly from what is already present in State and Territory law. For that reason this clause seems cumbersome to say the least.

But if these matters relate to reasonable excuses which are distinct from those contained in State and Territory laws, then it should be possible to specify in the Act the types of excuses which are envisaged here. The use of the same terminology as appears in the State and Territory laws is also confusing. Perhaps different terminology could be adopted.

Conclusion

There appear to be important areas of difficulty related to the relationship between this Bill and State and Territory laws. The general problem is to do with the indeterminate nature of some of the terms in the State and Territory laws that justify non-attendance, as well as an overall approach in those laws that appears to take a fairly 'stand-offish' approach to state regulation of family life. Arguably, that might be a background that motivates this Bill. Thus this Bill adopts quite a different approach, but when combined with significant decisions being made at a school level which are then tied back to the obligations (or lack thereof) imposed on parents under State and Territory laws there seems to be an even greater need for more specific processes than appear in the Bill. In addition, that approach also carries with it a tendency to forgo due process in seeking to achieve its outcome. For that reason too the Bill needs greater clarity.