

**Appeals and Complex Litigation Unit – Family Law**  
**Bulletin Number 16**  
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**Compulsory Schooling Orders under the *Education Act 1990***

Part 5 of the *Education Act 1990* (NSW) (“the Act”) requires parents to ensure that their children attend school. Where children do not have satisfactory attendance at school, the Act sets out what action the Secretary, NSW Department of Education (“the Secretary”) can take to ensure attendance, including making an application to the Children’s Court for a Compulsory Schooling Order (“CSO”).

This bulletin will provide a broad overview of the legal process to address unsatisfactory school attendance, and some tips for representing parents and children in proceedings for a CSO. A grant of aid is available to parents and children who are responding to an application for a CSO.

**When is a child of compulsory school-age?**

A parent has a duty to enrol and ensure that their child attends school, or is registered for home schooling, only if the child is of compulsory school-age: s 22 of the Act. A parent who fails to send their child to school (or register them for home schooling) is guilty of an offence under s 23 of the Act.

Pursuant to s 21B of the Act, a child is of **compulsory school-age** if they are of or above the age of 6 years and below the minimum school leaving age. The **minimum school leaving age** is either:

- a) the age at which the child completes Year 10 of secondary education (subject to participation required by subsection (3)), or
- b) the age of 17 years

whichever occurs first.

As set out in s 21B(3), if a young person completes Year 10, but has not yet turned 17, they will remain of compulsory school-age unless they participate in:

- Approved full-time education or training (as set out in s 21B(6) of the Act) or;
- Paid work on a full-time basis (provided they are at least 15 years old) or;
- A combination of both.

A child is participating in **paid work** if they are undertaking work as an employee or self-employed person, are being paid for that work and they meet the age requirements for that work. Importantly, a child who undertakes domestic or home maintenance work for one of their parents is not participating in paid work even if they are being paid for that work: s 5 of the *Education Regulation 2012* (NSW) (“the Regulations”). Full-time paid work is defined in s 7 of the Regulations as being 25 hours per week over a 4 week period.

A young person can cease work or training for up to three months in any twelve month period, without reverting back to compulsory school-age: s 21B(4) of the Act.

### **The provision of information about children who are not attending school**

There are some provisions in the Act which allow for 'relevant institutions' (which are defined to include a government or public authority, a school or registered vocational training organisation or non-government organisation in receipt of government funding) to provide information to the Secretary (with or without a request), solely for the purpose of allowing the Secretary to ascertain the age, identity or whereabouts of a child who is not attending school, and the reasons why: s 22A.

### **What happens when there is unsatisfactory school attendance?**

In most cases, schools will support parents by monitoring student attendance and helping to address attendance issues when they emerge. For example, the school might refer a child to the learning and support team, or other appropriate support networks. If these strategies don't work, the school can seek further support from the Home School Liaison Program to develop an Attendance Improvement Plan.

Prior to 2010, the only legal option available to enforce school attendance was a prosecution in the Local Court, which would result in a fine and/or a community service order. There are now a number of options available to try to ensure school attendance, such as a parent giving compulsory schooling undertakings, attending a conference to discuss the unsatisfactory attendance, commencing proceedings for a Compulsory Schooling Order, or prosecuting a parent in the Local Court. Each of these options is discussed further below. It is important to note that one process may not necessarily follow the other, and that some of these options may be pursued at the same time.

### **Compulsory schooling undertakings**

The Secretary may make schooling arrangements with one or more parents of a child that include a written undertaking by the parent or parents with respect to compulsory schooling for the child. This is called a **compulsory schooling undertaking**: s 22B.

The undertakings deal with specific issues that may be contributing to the child not attending school. Examples (provided by the Department of Education) include that:

- Transport will be provided to get the child to school.
- An alarm clock will be used and the child will be out of bed at a set time.
- The parent will attend drug and alcohol counselling sessions.

The arrangements may be made before, during or after a conference concerning the child (see below).

A compulsory schooling undertaking may, with the agreement of the Secretary, be varied or revoked at any time.

A compulsory school undertaking is admissible as evidence in any proceedings under Part 5 of the Act.

### **Arranging a conference to discuss unsatisfactory school attendance**

If a child is not attending school, a conference of relevant parties may be directed by the Children's Court (during proceedings for a compulsory schooling order), or by the Secretary at any time before or after any such proceedings: s 22C.

Conferences are chaired by a trained conference convenor. If the conference has been ordered by the Children's Court, the parties to the proceedings and any legal practitioner representing them are

entitled to attend. Otherwise, the conference will usually involve the child's parents, and any other people whom the convenor considers appropriate and who may be able to help resolve the attendance issues (for example the Home School Liaison Officer ("HSLO"), School Principal and/or the child's teacher). A legal practitioner advising a participant in a conference is entitled to attend (subject to such conditions or limitations as may be imposed by the convenor). Sometimes children attend the conference.

The aim of the conference is to reach an agreement under which the child will regularly attend school. In trying to achieve this aim, the convenor will encourage participants to identify and resolve issues in dispute, to identify any services for the child or their family which would assist the child to attend school, and to formulate undertakings and orders to be considered by the Children's Court. The Children's Court may include in a compulsory schooling order any undertaking or obligation formulated during a conference.

Any evidence of anything said or any admission made, or any document prepared, is admissible in care proceedings under Chapter 5 of the *Children and Young Persons (Care and Protection) Act 1998* ("the Care Act"), but not in any other proceedings: s 22C(8).

### **Compulsory Schooling Orders**

Pursuant to s 22D of the Act, the Secretary can apply to the Children's Court for a CSO in relation to a child of compulsory school-age who is not receiving compulsory schooling.

A CSO may require:

- a parent of the child to cause the child to receive compulsory schooling, or
- the child to engage in compulsory schooling in accordance with the order, if they are over the age of 12 years and are living independently of the parent or the parent is unable to cause the child to receive schooling due to their disobedience.

An application for a CSO can relate to any number of children of the same parent and can be made on an interim or final basis.

Many Children's Courts in NSW have dedicated list days for education matters. If the HSLO attends Court, it is a good opportunity to discuss with them the reasons why the child might not be attending school, and what further supports could be put in place. If there is agreement to put further supports or strategies in place, you might consider adjourning the matter, or seeking interim orders only, to see whether those supports help improve school attendance.

The Children's Court may vary or revoke a CSO on the application of the Secretary, or of a person subject to the order. Unless it is revoked by the Children's Court, a CSO ceases to have effect when the child is no longer of compulsory school-age or at the end of the period specified in the order, whichever occurs first.

When making a CSO, dismissing an application, or revoking an order, the Children's Court may:

- accept written undertakings from a parent, and from any other participant in a conference under s 22C, or
- recommend that a relevant institution provide services to the child, or to the child's family, in order to assist the child to receive compulsory schooling.

A party who is dissatisfied with an order made under s 22D of the Act, has a right of appeal (pursuant to s 91 of the Care Act: s 22D(11)). In addition, Chapter 6 of the Care Act, which sets out the procedures to be followed in the Children’s Court, applies to and in respect of proceedings relating to an application for a CSO.

A CSO will not have effect to the extent that it is inconsistent with a direction or an order made in relation to the child:

- (a) by the Secretary under s 26H (which provides for a child to be issued with a certificate of exemption from attending particular classes), or
- (b) by the Supreme Court in the exercise of its jurisdiction with respect to the custody and guardianship of children.

An action for breach of a CSO issued by the Children’s Court against a parent must be undertaken in the Local Court. If the Secretary decides to commence criminal proceedings in the Local Court, and a CSO has been made, the penalties that can be imposed by the Court are significantly higher (see below).

An action for a breach of a CSO issued against a child must be dealt with by the Children’s Court. If a child of or above the age of 15 years is found guilty of an offence, they can be liable to a penalty not exceeding 1 penalty unit (but without the court proceeding to a conviction), unless the child had a reasonable excuse for not complying with the order: s 22D (9).

#### **Prosecution in the Local Court**

With the written consent of the Secretary, the Department can commence criminal proceedings in the Local Court if a parent fails to send their child to school, or enrol them in home schooling: s 23. Proceedings in the Local Court can commence before or after action in the Children’s Court.

#### **Penalties**

Under the Act, the following penalties apply:

- If a parent is found guilty of an offence under s 23, the Court can impose a maximum penalty of 25 penalty units for a first offence, and a maximum penalty of 50 penalty units for a second or subsequent offence. However, if there is a CSO in force, the maximum penalty that can be imposed is 100 penalty units: s 23(1), s 22D(9).
- The Court can make a community service order instead of imposing a fine: s 23(5).

Alternatively,

- The Secretary may enrol the child in a government school if the compulsory schooling order authorises the Secretary to do so.

Note: NSW Acts and Regulations refer to “penalty units” to describe the amount payable for a fine. Penalty units are used instead of dollar amounts because the rate for penalty units is indexed for inflation and is subject to change. One penalty unit is currently equal to \$110: s 17 of the *Crimes (Sentencing Procedure) Act 1999*.

#### **Defences to prosecution**

Section 23 of the Act sets out a number of defences available to parents. These include (but are not limited to):

- That the child was enrolled at, or attended school in another State, Territory or country, or was participating in distance education.
- That the child was participating in an alternative education program for children unable, for social, cultural or other reasons, to participate in formal education.
- That the child was participating in a program to adjust more successfully to school life or improve behaviour.
- A certificate of exemption was in force which meant that the child was not required to attend school or particular classes because a parent conscientiously objected on religious grounds to the child attending a particular part of a course of study.
- The child was attending a school that the parent reasonably believed to be a government or registered non-government school.
- The child was given permission to and was enrolled in a year 10 equivalent TAFE course.
- The child was prevented from attending school because of a medical condition, an accident or unforeseen event, and within 7 days after that condition became apparent, or the accident or event occurred, notice of the fact and a medical certificate were given to the school.
- The child had not been absent for more than 3 days during the preceding 3 months immediately preceding the absence complained of.
- The child was suspended from a government school.
- The child could not gain admission to any available school in the State because of the child's expulsion from a school.
- The child's absence from school was either because of their disobedience, the failure of someone to adhere to an undertaking (other than the parent) or they were living independently of their parents.

If a parent contends that the child's absence from school is due to a **medical condition**, the court may (on the application of the Secretary) order that the child submit to a medical examination by a medical practitioner nominated by the Secretary. If that happens:

- a. the costs of the medical examination are borne by the Secretary, and
- b. the medical practitioner is not subject to any liability arising from them conducting a medical examination on the child without the consent of the parent or child.

If the child does have an underlying medical condition, it is useful to ask parents to provide copies of any reports from their GP, specialist, psychologist or psychiatrist, which detail the history of the condition, current treatment and any suggested supports that could be put in place to assist the child to attend school.

#### Further reading

- [Children's Court of New South Wales - Practice Note No. 7](#) – Legal Representation for Children and Young Persons in proceedings for Compulsory Schooling orders
- [Children's Court of New South Wales – Compulsory Schooling Orders](#)
- [NSW Department of Education School Attendance Policy](#)
- [Compulsory School Attendance – information for parents](#)
- [Compulsory School attendance – Information for government and non-government agencies and organisations](#)
- LMS Staff Training- [Conducting Matters under the Education Act with Simon Handebo](#)