

AN INITIAL COMPARISON OF TRUANCY LAWS ACROSS AUSTRALIA AND NEW ZEALAND

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ABSTRACT

Governments across Australia and New Zealand, and indeed many other counties in the world, establish a system of formal education for all children. Educating children is important for achieving particular social aims – so when children are not being provided with that education, a problem can exist. Laws in every Australian state or territory, and in New Zealand, provide for the compulsory enrolment and attendance on every school day of children between certain ages. While enforcement of these laws is usually not required or kept as a 'last-resort', it remains the case that a parent has a legal obligation to enrol their child and to cause the child to attend – an obligation which has criminal consequences attached. There is some similarity between the eight Australian jurisdictions, and that of New Zealand, in particular aspects of these truancy laws; however other areas diverge considerably. This article will first provide background on truancy, including an attempt to describe different types, before moving on to compare the law in these nine jurisdictions. The topics of focus are: what ages apply for compulsory education, what are the maximum penalties imposed, and what excuses can apply? Where a jurisdiction has an unusual or unclear provision, it will be a particular topic of discussion. The article concludes by posing some questions for further research.

I INTRODUCTION: WHAT IS TRUANCY?

Legislation exists in every Australian state and territory, and in New Zealand, which requires a parent to enrol their child in, and to cause their child to attend, school. Where such non-enrolment or non-attendance occurs, it may be convenient to use the term 'truancy' (despite that not having a 'legal' meaning and potentially having a pejorative usage). Truancy is an issue for educational systems in Australia¹ and New Zealand,² as well as other similar countries including the United States,³ and the United Kingdom.⁴ However, there is no one definition of 'truancy'. Nevertheless, it can broadly be

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¹ House of Representatives Standing Committee on Employment, Education and Training, Parliament of Australia, *Truancy and Exclusion from School* (1996); Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [10.49]–[10.56].

² Sullivan, above n 5.

³ Annette Pelletier and Amy Russell, 'Truancy Reduction and Prevention: the Impact of Provider Contact in Intervention Efficacy' (2015) 4(2) *Journal of Juvenile Justice* 123.

⁴ Jane Donoghue, 'Truancy and the Prosecution of Parents: An Unfair Burden on Mothers?' (2011) 74(2) *Modern Law Review* 216; G.R. Sullivan, 'Parents and Their Truanting Children: an English Lesson in Liability without Responsibility' (2010) 12(2) *Otago Law Review* 285; Anwar N. Khan, 'Compulsory School Attendance in Britain' (1995) 24 *Journal of Law and Education* 91.

described as a *child's unauthorised absence from school*. This is the definition that this article will employ, subject to further clarification below.

Some authors would also include that a child's absence be 'persistent' and/or 'habitual'.⁵ However, because these are not criteria directly imposed by any of the relevant pieces of legislation in Australia or New Zealand (although in reality, they are likely requirements for the exercise of prosecutorial discretion), they do not form part of the definition used in this article. Parental knowledge of the child's absence is also not an element, although there are a range of legislative excuses which may be applicable, and like above, would form part of the decision to escalate the proceedings to court or not. Because of the breadth of this definition, truancy could potentially occur in a variety of situations – some of these are described in Part II below.

It should be noted that while this article often speaks of the obligation to enrol in and attend 'school', the relevant laws often allow for other types of education or training to be provided after certain ages, or for parents to 'home school' their child.⁶ Where such an option is undertaken in compliance with legislative requirements, no truancy occurs, and references throughout this article to situations where a child does not attend 'school', should be taken to also include such other options.

The aim of this article is to compare and analyse the laws related to truancy in each jurisdiction across Australia and New Zealand. It will do so first in Part II by proposing a model to classify different types of truancy. Part III then outlines and compares the legal obligations on parents, by focussing on a selection of variables from the relevant legislation: the *timeframe* which the obligation applies, the *maximum penalties* that can be imposed, and the *range of excuses, defences and exemptions* that are carved out of the obligation. It will be shown that although the basic doctrinal principles related to truancy share a degree of consistency across the jurisdictions, there are also considerable differences. The article concludes by proposing some possible directions for further research.

II CLASSIFYING TRUANCY?

Truancy can create problems for both the student concerned (in achieving educational outcomes), and for wider society.⁷ Society expects that children will attain a certain minimum level of education in order to be functional adults, and therefore 'attending' school can be understood as a threshold requirement necessary in achieving an education. Beyond the potential harm to a child's education, truancy has been linked to

⁵ Jan Gray, *The Framing of Truancy: A Study of Non-Attendance Policy as a Form of Social Exclusion within Western Australia* (PhD Thesis, Edith Cowan University, 2000) 25; Faye Nitschke, Lorraine Mazerolle and Sarah Bennett, 'Third Party Policing and School Truancy' in Gerben Bruinsma and David Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 5211, 5213.

⁶ See, eg, *Education (General Provisions) Act 2006* (Qld) pt 5. The legislation that applies for each jurisdiction is listed in Part III.

⁷ Kathryn Santelmann Richtman, 'The Truancy Intervention Program of the Ramsey County Attorney's Office: a Collaborative Approach to School Success' (2007) 45(3) *Family Court Review* 421, 422.

other negative outcomes such as under- or unemployment,⁸ substance abuse,⁹ risky sexual behaviour¹⁰ and crime.¹¹

However, truancy can be seen to exist in many forms. A preliminary model has been developed to explain the broad ways in which truancy can manifest, described below as Type A, B, C, or D; although these are not categories with rigid boundaries.

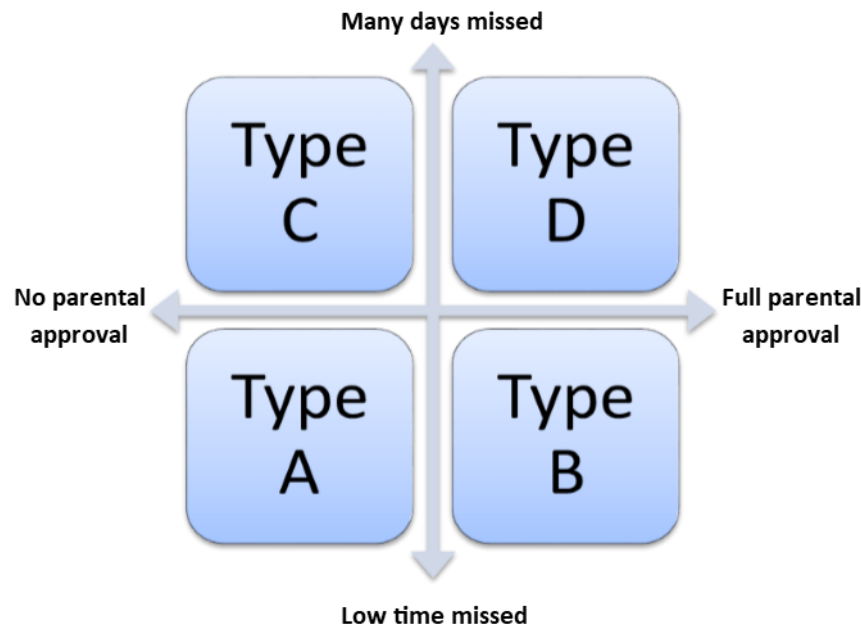


Figure 1: Different classifications of truancy along continuums of time missed and parental consent

A 'Type A' absence

As an example of truancy at the lower end of the scale, a child might attend school, but absent themselves from a particular class (potentially remaining on school premises) or leave school prior to the scheduled conclusion of the day. This could be described colloquially in Australia as 'wagging'.¹²

Distinctive characteristics of such behaviour could be that: the absence occurs without parental knowledge or consent; the child might potentially be remaining on the school campus (in which case, this would avoid higher risks to their safety or potential involvement in delinquent behaviour than would leaving campus); the child might generally be older and looking to assert their independence or be acting with a peer

⁸ Angela Hibbett, Ken Fogelman and Orly Manor, 'Occupational Outcomes of Truancy' (1990) 60 *British Journal of Educational Psychology* 23, 26.

⁹ Denise Hallfors et al, 'Truancy, Grade Point Average & Sexual Activity: A Meta-analysis of Risk Indicators for Youth Substance Abuse' (2002) 72 *Journal of School Health* 205, 210.

¹⁰ Denise Hallfors et al, 'Truancy, Grade Point Average & Sexual Activity: A Meta-analysis of Risk Indicators for Youth Substance Abuse' (2002) 72 *Journal of School Health* 205, 210.

¹¹ Coordinating Council on Juvenile Justice and Delinquency Prevention, *Combating Violence and Delinquency: the National Juvenile Justice Action Plan* (1996) <<https://www.ncjrs.gov/pdffiles/jjplansm.pdf>>.

¹² Australian Explorer, *Australian Slang* (1 May 2018)

<<https://www.australianexplorer.com/slang/behaviour.htm>>. My apologies to New Zealand readers for not knowing of any equivalent slang term.

group; or that there may be a legitimate reason (or at least the perception of such a reason to the child) for why the child wants to avoid a particular class (for instance, avoiding punishment for a failure to have completed required work).

B ‘Type B’ absence

In what might be described as a ‘middle’ category, the non-attendance might occur *with* parental consent, either for a short period (e.g. one or two days in order for the child to complete assessment items or study for exams), or for longer periods (e.g. ‘term-time holidays’).

The important difference to note in this type from the first, is that the child’s parents allow the absence – on the basis of perceived benefit to the child or the family. This can pose some difficult issues, because the school authority may have a differing view to a parent on, for example, the educational validity of a holiday during the school term – a parent may (rightly or wrongly) feel that, because they have the primary responsibility for their child’s best interests, and that to travel during school holiday periods can be far more expensive, a term-time holiday can be justified. Truancy in this classification is rife with subjectivity and shades of grey, where individuals may differ in their bona fide beliefs about the respective benefits of school education vis-à-vis private study or travelling, or indeed paid employment or working in a family enterprise. However, under the legislative framework (discussed below in Part III), absences for these reasons could still be determined to be truancy.

C ‘Type C’ absence

This type of absence is characterised by regular or prolonged absences, but without parents consenting to the absence. The child’s absences would not likely go unnoticed by the school, and hence parents would likely also know – but they may not, however, be able to change the child’s behaviour. Sometimes this behaviour manifests as ‘school refusal’, where despite efforts of parents (and often other professionals), the child is unwilling to attend school. The issues with non-attendance in this category are quite different from the others, and to include it in a discussion about ‘truancy’ is, quite possibly, misleading. The legislation dealing with truancy may contain excuses for parents in such situations, which is discussed in Part III below.

D ‘Type D’ absence

At the more extreme end of the continuum is persistent truancy with parental consent or neglect. This could take the form of not enrolling the child at a school, or not taking steps to allow or ensure that the child attends school. Whereas Type B truancy involves non-attendance for a short period, often due to a parental perception of benefit to the child, Type D can be characterised by the absence of any such benefit. It could occur for a range of reasons, for instance, due to a parent’s lack of parenting skills, lack of appreciation of the benefits of education, lack of interest in the child, lack of sobriety or lack of resources.

III LEGAL OBLIGATIONS ON PARENTS

A Overview

All Australian states and territories, and New Zealand, have legislation governing school enrolment and attendance for children between certain ages.¹³ While there is a degree of similarity between the various acts, they are not uniform. All acts ultimately create a *criminal offence for parents* (or guardians) who fail to enrol their child in, or ensure the child attends, school (or another training provider).¹⁴ Some jurisdictions transfer the legal duty onto the child themselves, where the child is living independently.¹⁵ New Zealand also creates obligations for local school boards to take all reasonable steps to ensure a child attends school.¹⁶

While such offences exist, the prosecution of parents appears to be relatively rare – for instance, it was reported that in 2017, 21 Queensland parents were charged.¹⁷ It is difficult to access the reasons that exist, both for the parents in failing their legal obligations, or in the State's decision to prosecute. In some instances, prosecutions are reported in local news media. Queensland's *The Courier Mail* reported in 2017 on the prosecution of a mother whose 15-year-old daughter had been absent from school for a two-month period. It also mentioned a similar case in 2014 where a child missed six months of school.¹⁸ A spokesperson from the Department of Education stated that '[p]rosecution is seen as a last resort and would only occur after substantial effort has been made to engage with the parents regarding their child's attendance'.¹⁹

As prosecution usually occurs at the inferior court level (eg a Magistrates Court), obtaining such judgments is not always possible, and to attempt such a task for every jurisdiction under consideration in this article is beyond its scope. There are a small number of available cases dealing with truancy. One is addressed in sub-part D below in the context of sickness as a reasonable excuse. Another is *Clair v Gall*,²⁰ where a Federal Magistrate was hearing a family law matter from Victoria. An issue was raised

¹³ *Education and Training Act 2020* (NZ) Pt 3; *Education Act 2004* (ACT) Ch 2; *Education Act 1990* (NSW) Pt 5; *Education Act* (NT) Pt 4; *Education (General Provisions) Act 2006* (Qld) Chs 9, 10; *Education and Children's Services Act 2019* (SA) Pt 7; *Education Act 2016* (Tas) Pt 3; *Education and Training Reform Act 2006* (Vic) Pt 2.1; *School Education Act 1999* (WA) Pt 2.

¹⁴ This shifting of liability to parents is not the usual case when compared to other areas of legal liability. See Terry Hutchinson, Elizabeth Dickson and Duncan Chappell, 'Juvenile Justice and Truancy Legislation: The Move Towards Parental Responsibility in Queensland' (2011) 36(2) *Alternative Law Journal* 104; also *McHale v Watson* (1964) 111 CLR 384, 386 where Windeyer J refused to extend vicarious liability to a parent of a child tortfeasor unless the parent had 'participated in, directed or ratified the wrongdoing of the child'. His Honour also noted though that a parent could be liable in their own right, for negligently failing to supervise their child or exercise reasonable control over them – for instance, by 'arming the child with an instrument which it could reasonably be thought might be used by the child in a [dangerous] manner'.

¹⁵ See *Education Act 1990* (NSW) s 22D(3); *Education Act 2015* (NT) ss 39(2), 40(3), 70(3);

¹⁶ *New Zealand Act* s 36(2).

¹⁷ Lauren Martyn-Jones, 'Truants' Parents on Notice', *The Courier Mail* (online), 21 October 2018 <<http://www.couriermail.com.au>>.

¹⁸ Kate McKenna, 'Truant's Mother Ends Up in Court', *The Courier Mail* (Brisbane), 14 January 2017, 3.

¹⁹ Kate McKenna, 'Truant's Mother Ends Up in Court', *The Courier Mail* (Brisbane), 14 January 2017, 3.

²⁰ [2011] FMCAfam 294 (25 January 2011).

about ‘term-time holidays’ – ‘Type B’ truancy as described above. In that case, the parents of the child had separated, and shared parenting of the child in question. The father wished to take the child on a one-week holiday during the school term, as it was cheaper at such time, whereas the mother opposed this. Riethmuller FM chose to focus on the substantive issue: the ‘reasonableness’ of term-time holidays as an excuse (rather than addressing perhaps a more pertinent question of whether that Court had jurisdiction to interpret the Victorian education legislation) by stating that such an absence from school would not be in the child’s best interests (and presumably, not ‘reasonable’), and therefore denied the father’s request.²¹ Interestingly, His Honour opined that there could be situations where such travel could, at least theoretically, be a reasonable excuse for non-attendance, such as where it had educational value or involved the child being the recipient of ‘a gift or prize that involve[d] travelling to a foreign country’.²² However, it was clear that there was no such compelling reason in this case, even if, in the words of his Honour, ‘the strictures of this law are not rigidly imposed’.²³ It can be inferred from such a statement that enforcement of compulsory schooling laws is not often performed through the legal system, and that this is an accepted practice.

However, the fact remains that all the jurisdictions’ Acts require compulsory attendance or participation on every day the particular course of study is offered – subject to a variety of excuses or justifications. What follows in the sections below is an analysis of different variables in these statutory provisions. It aims to compare and contrast the differences, and to highlight any unusual or unique provisions – as far as is possible with 9 jurisdictions to consider. Like any area of law, changes may occur, so reliance should be placed on the legislation itself where necessary. Each of the variables under consideration will be initially summarised in tabular form, and then followed by further elaboration.

The relevant parts of legislation are listed below, as are the short-hand names which this article will then use for ease of comprehension:

- *Education and Training Act 2020* (NZ) Pt 3 (‘*New Zealand Act*’) – note that this only commenced on 1 August 2020 (although some sections are yet to commence), and it repealed and replaced the former *Education Act 1989* (NZ) Pt 3);
- *Education Act 2004* (ACT) Ch 2 (‘*Australian Capital Territory Act*’);
- *Education Act 1990* (NSW) Pt 5 (‘*New South Wales Act*’);
- *Education Act 2015* (NT) Pt 4 (‘*Northern Territory Act*’);
- *Education (General Provisions) Act 2006* (Qld) Chs 9, 10 (‘*Queensland Act*’);
- *Education and Children’s Services Act 2019* (SA) Pt 7 (‘*South Australia Act*’) – note that this only commenced on 1 July 2020, and it repealed and replaced the former *Education Act 1972* (SA) Pt 6);

²¹ *Clair v Gall* [2011] FMCAfam 294 (25 January 2011) [17].

²² *Clair v Gall* [2011] FMCAfam 294 (25 January 2011) [10]–[11]. However, despite this opinion, schools have not always agreed. Sydney Grammar School expelled two children who took 10 days’ unauthorised leave to compete in the World Youth Chess Championships held in Brazil: Andrew Stevenson, ‘Checkmate: school tells champion boys to leave’, *Sydney Morning Herald* (online), 3 December 2011 <<https://www.smh.com.au/education/checkmate-school-tells-champion-boys-to-leave-20111202-1obhb.html>>.

²³ *Clair v Gall* [2011] FMCAfam 294 (25 January 2011) [11].

- *Education Act 2016* (Tas) Pt 3 ('*Tasmania Act*');
- *Education and Training Reform Act 2006* (Vic) Pt 2.1 ('*Victoria Act*'); and
- *School Education Act 1999* (WA) Pt 2 ('*Western Australia Act*');

B Timeframe which the obligation applies

	NZ	ACT	NSW	NT	Qld
Begins	Child is 6	Child is 6	Child is 6	Year child is 6 by 30 June	Child is 6½
Ends	Child is 16	Child is 17 or gains qual.	Child is 17	Child finishes Yr 10 and partic. in further options; or is 17	Child is 17; or gains qual.; or partic. for 2 years
	SA		Tas	Vic	WA
Begins	Child is 6 <i>(can be changed by Regn.)</i>		Year child is 5 on 1 Jan	Child is 6	Year child will be 5½
Ends	Child is 17 or gains qual.		Child is 18 or gains qual. <i>(but must finish Grade 10)</i>	Child is 17	End of year child turns 17½; or child turns 18; or finishes Grade 12.

Table 1: Commencement and End of Parental Obligations

1 Commencement

Whilst similar, the jurisdictions do not provide a uniform age at which compulsory school enrolment and attendance commences. In New Zealand,²⁴ Australian Capital Territory,²⁵ New South Wales,²⁶ South Australia,²⁷ and Victoria,²⁸ the obligation on parents begins when the child turns six years of age. Typically, a child would be in the first year of primary school when they turn six – so a parent does not necessarily need to have their child begin the school year, but rather ensure compliance by their child's sixth birthday.

Western Australia begins their obligation in the *year* that the child turns five-and-a-half.²⁹ Therefore, a parent of a child whose fifth birthday falls between January to June would need to enrol them for that school year, because the child would be 'turning five-and-a-half' in the second half of the year. A child born in July to December would not be required at school until the calendar year after their fifth birthday.

²⁴ *New Zealand Act* s 35. Note that the obligation does not begin until the child turns 7 if they live more than 3km walking distance from a school.

²⁵ *Australian Capital Territory Act* s 9. Note that there is a 10-school-day grace period in which enrolment may occur: s 10(3)(a).

²⁶ *New South Wales Act* s 21B.

²⁷ *South Australia Act* s 3 (definition of 'child of compulsory school age' para (a)(ii)).

²⁸ *Victoria Act* s 2.1.1.

²⁹ *Western Australia Act* s 6(1)(c). Note that until 2013, the minimum age was the beginning of the year in which the child the child turned 6½.

Northern Territory has a similar regime, but describes the commencement of compulsory schooling as the *year* in which a child is six years old by June 30.³⁰ So, a child born in the first half of the year would start school as a five-year-old and turn six before June 30. A child born in the second half of a calendar year could commence school the year after turning six.

Tasmania imposes an obligation on parents if a child is 5 years old by January 1 of that year.³¹ This jurisdiction, along with potentially Western Australia, has the earliest commencement to compulsory schooling.

Queensland has the latest compulsory schooling age: when the child is six-and-a-half years old.³² However, there is arguably an indirect requirement to begin earlier. In September of 2016, the Queensland legislation was amended to insert new ss 156(1A) and 175M, which specify that school principals (state, and non-state, respectively) must not accept enrolments into Year 1 of their school unless the child in question has completed a year of 'Prep'. While principals are given discretion to waive this requirement should they decide, when considering the child's attributes, that the child is ready for school,³³ these inserted sections have a likely practical effect of extending compulsory schooling age to begin a year earlier.³⁴ Interestingly, the Minister for Education stated at the time the Act was amended that '[i]mportantly, this does not lower the compulsory school age',³⁵ presumably because there are no criminal offences for a failure to comply. However, should a parent choose not to provide their child with a Prep year, it is unclear how a principal's duty to refuse school enrolment would then interact with a parent's obligation to enrol their child at school.³⁶

2 Completion

The obligation on parents ends in different ways throughout the jurisdictions under consideration. For instance, some are purely age-based. New Zealand has the earliest completion, which is when the child turns 16 years old.³⁷ New South Wales continues the obligation until the child is 17,³⁸ as does Victoria.³⁹ In these jurisdictions, the child may cease attending school (or another option) upon reaching that age, regardless of whether they have completed the course of study or training, and their parent/s will not face any liability.

Other jurisdictions combine criteria of age or qualification in order to determine the end of compulsory schooling. A qualification will often be the relevant senior school

³⁰ *Northern Territory Act* s 38.

³¹ *Tasmania Act* s 11(1).

³² *Queensland Act* s 9.

³³ *Queensland Act* ss 156(1A), 175M.

³⁴ *Education (General Provisions) Regulation 2017* (Qld) s 17.

³⁵ Annastacia Palaszczuk (Premier) and Kate Jones (Minister for Education) 'Prep year now compulsory in Queensland' (Joint Statement, 1 September 2016)

<<http://statements.qld.gov.au/Statement/2016/9/1/prep-year-now-compulsory-in-queensland>>.

³⁶ One (hypothetical) possibility is that the principal might enrol the 6.5-year-old child into Prep.

³⁷ *New Zealand Act* s 35.

³⁸ *New South Wales Act* s 21B.

³⁹ *Victoria Act* s 2.1.1.

certificate or an Australian Qualifications Framework certificate, or some other approved qualification (the definitions vary across jurisdictions). Some jurisdictions' Acts split the obligation on parents into a compulsory 'schooling' phase and a compulsory 'post-schooling' phase. Generally, the schooling phase ends at the earlier of child completing Year 10 or turning 16; the parent/s then must ensure that their child participates in further options. The relevant legislation may distinguish between these two phases by referring to 'attendance' at school (until Year 10) and then 'participation' in the post-school option.

In the Australian Capital Territory,⁴⁰ the obligations continue until the child 'completes Year 12' or turns 17. In the Northern Territory, it is until the age of 17, or the completion of Year 10 plus further participation in eligible options (presumably participation can end if the option is completed, though this is not explicit).⁴¹ In Queensland, and South Australia, the parental obligations continue until the earlier of when the child turns 17, or gains a relevant qualification⁴² – Queensland also adds an option of 'two years' participation' (for those that neither qualify for their award nor have turned 17 when the provider's course finishes).⁴³ In Western Australia, it is until the child finishes 'secondary school', or the end of the calendar year in which the child turns 17-and-a-half, or the child turns 18 – whichever happens first.⁴⁴

Finally, Tasmania has a slightly-more complicated system to describe. A 'school aged child' must be enrolled at school until they attain a 'transition statement' (equivalent to a Year 10 certificate) – this obligation endures even if the child was to turn 18 years old during Year 10, or, apparently, even if they did so before they commenced Year 10.⁴⁵ This does seem to conflict with the definition of a 'child' in the *Tasmania Act*, being 'a person who has not attained the age of 18 years'.⁴⁶ A 'school aged child' is defined as 'a child who is required to be enrolled under section 11',⁴⁷ but as stated above, section 11 potentially apply to 18 year-olds. Once a child gains a transition statement, they become a 'youth' under the Act, which requires participation until they obtain a Year 12 certificate, an AQF certificate III or turn 18 years old.⁴⁸

It is also worth noting that in most of the jurisdictions, participating in a post-school option can also include working in paid employment (usually for an average of 25 hours per week). New Zealand and South Australia do not provide for this option explicitly (although it could be achieved via means other than education legislation).⁴⁹ But for

⁴⁰ *Australian Capital Territory Act* ss 9, 9C. Note though that 'completes Year 12' has an expanded statutory meaning in s 9C.

⁴¹ *Northern Territory Act* ss 38(2), 70(2). Note that the period may also end when the child 'completes year 10, and then participates in further eligible options, for instance year 11 and 12 – which theoretically might end before the child turned 17.

⁴² *Queensland Act* s 231; *South Australia Act* ss 3 (definition of 'child of compulsory education age'), 61(2).

⁴³ *Queensland Act* s 231.

⁴⁴ *Western Australia Act* ss 6(1)(c), 6(2).

⁴⁵ *Tasmania Act* s 11(1)(a).

⁴⁶ *Tasmania Act* s 5 (definition of 'child').

⁴⁷ *Tasmania Act* s 5 (definition of 'school aged child').

⁴⁸ *Tasmania Act* s 24(1).

⁴⁹ See, eg, *New Zealand Act* s 39, which allows the Minister to grant exemptions for 15-year-old students by considering the student's educational problems, conduct or benefit from attending another school. The *South Australia Act* s 74 provides an offence for employing school-aged children, but

New South Wales, the Northern Territory, and Queensland (as of right); and for the Australian Capital Territory (by application to the Director-General), Victoria (a reasonable excuse if made by Ministerial Order), Tasmania (by application for exemption to the Minister), and Western Australia (by application to the Minister), a child could still leave formal schooling after Year 10 and enter the workforce without exposing their parents to liability.⁵⁰

C Maximum Penalties

	NZ	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
First offence	\$3000 (E) / \$30 per day (A) up to \$300.	\$800 / \$1600	\$2750	\$2355	\$827	\$5000	\$1730 (E) / \$2595+ (A)	\$909	\$2500 (E) / \$1000 (A)
Subsequent offences	\$3000 (E) / \$30 per day (A) up to \$3000.	\$800 / \$1600	\$5500 / \$11,000 (CSO)	\$3140	\$1654	\$5000	\$2595 (E) / \$2595+ (A)	\$909	\$2500 (E) / \$1000 (A)

Table 2: Maximum penalties as at 1 July 2021.

E = failure to enrol, A = failure to cause attendance/participation

A parent's failure to comply with the enrolment, attendance or participation requirements of compulsory education ultimately exposes them to prosecution and subsequent fine. Each parent is potentially liable individually. However, it should be noted that before prosecution can occur, there are often a number of specified procedural steps (e.g. meeting with the parent/s) which must first take place – these are beyond the scope of this particular article. There is significant variance across jurisdictions in the maximum penalty a court may impose. All figures quoted are correct for the 2020/21 financial year, however many will automatically increase in subsequent years.

Some jurisdictions' offences are based on failures to comply with the procedural notices, rather than on specific failures in the parental obligations. In the Australian Capital Territory, the fine is capped at \$800 for a failure to comply with an Information Notice, and \$1600 for failure to comply with a Compliance Notice.⁵¹ In Victoria, a failure to respond accurately to a School Enrolment Notice or School Attendance Notice

exempts from that employment that forms part of an approved learning program. However, the definition of an 'approved learning program' does not list full-time employment as an option, at s 3.

⁵⁰ *Australian Capital Territory Act* ss 10(6)(b), 13B, 13D; *New South Wales Act* s 21B(3); *Northern Territory Act* ss 38(2)(a)(ii), 38(10); *Queensland Act* s 240(2); *Victoria Act* s 2.1.3(c); *Tasmania Act* s 26(3); *Western Australia Act* ss 11B, 11G.

⁵¹ *Australian Capital Territory Act* s 17A establishes the offences and sets penalty units of 5 and 10 respectively; A 'penalty unit' is defined as \$160, see *Legislation Act 2001* (ACT) s 133.

subjects a parent to a court-imposed fine of up to \$909, or an on-the-spot fine from an authorised officer of \$91.⁵²

In the remaining jurisdictions, the offence is based on the parental duty itself. In New Zealand, a failure to enrol a child subjects a parent to a fine of up to \$3000.⁵³ The maximum for a failure to ensure attendance is calculated at \$30 per day missed, up to a maximum of \$300 for a first offence (or perhaps more accurately, a first prosecution), and up to \$3000 for subsequent offences.⁵⁴

In New South Wales, the maximum fine is \$2750 for a first offence or \$5500 for a subsequent offence.⁵⁵ A court can also impose a 'Compulsory Schooling Order', which, if breached, exposes a parent to a potential \$11,000 fine.⁵⁶ This is likely the largest amount which can be levied against a parent in the jurisdictions under consideration (although Tasmania has a potentially open-ended figure). A child who is at least 15 years old and who fails to comply with the Compulsory Schooling Order is also liable for a \$110 fine (without a conviction recorded).⁵⁷

In the Northern Territory, the fines are a maximum of \$2355 for a first offence, and \$3140 for subsequent offences.⁵⁸

In Queensland, a parent can be fined \$827 for a first offence, and \$1654 for subsequent offences – be they failures to enrol, or to cause attendance at school or participation in a post-school option.⁵⁹ This is a relatively low maximum fine when compared to others.

In South Australia, there is a maximum fine of \$5000 for parental failures to enrol or to ensure attendance, regardless of the stage of compulsory education.⁶⁰ This is a ten-fold increase from the previous Act, where the maximum was \$500 for a failure to enrol or cause attendance, and that only applied when the child was in the compulsory schooling phase.⁶¹ South Australia had the lowest, but now has the highest, maximum fine for a first offence.

⁵² *Victoria Act* s 2.1.21 (1), (2) set penalty units of 5 each, while s 2.1.23 sets an Infringement Notice to be capped at 0.5 penalty unit. A 'penalty unit' is defined as \$181.74, see *Monetary Units Act 2004* (Vic) ss 5, 7(4). See also Tim Pallas, 'Notice under section 6: Notification of values of fee and penalty units' in Victoria, *Victoria Government Gazette*, No S233, 20 May 2021, 1.

⁵³ *New Zealand Act* s 243.

⁵⁴ *New Zealand Act* s 244.

⁵⁵ *New South Wales Act* s 23 sets a maximum of 25 and 50 penalty units accordingly. A 'penalty unit' is defined as \$110, see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

⁵⁶ *New South Wales Act* s 23 sets a maximum 100 penalty units. A 'penalty unit' is defined as \$110, see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

⁵⁷ *New South Wales Act* s 22D(9) sets a maximum 1 penalty unit for a child in breach of a CSO. A 'penalty unit' is defined as \$110, see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

⁵⁸ *Northern Territory Act* ss 39(2), 40(2), 70(2) set a maximum of 15 and 20 penalty units respectively. A 'penalty unit' is defined as \$157, see *Penalty Units Act 2009* (NT) ss 5, 6; *Penalty Units Regulations 2010* (NT) s 2.

⁵⁹ *Queensland Act* ss 176, 239 set 6 penalty units for first offences and 12 for subsequent offences. A penalty unit is \$137.85, see *Penalties and Sentences Act 1992* (Qld) ss 5, 5A; *Penalties and Sentences Regulation 2015* (Qld) s 3.

⁶⁰ *South Australia Act* ss 60–1, 68–9.

⁶¹ A possible legislative drafting oversight had created a parental duty to ensure participation in further education or training options in the compulsory post-schooling phase, but had not created a corresponding offence. See *Education Act 1972* (SA) (repealed) ss 75(5), 76(3).

In Tasmania, the penalty for a first offence of failing to enrol is \$1730 and rises to \$2595 for subsequent offences.⁶² A failure to ensure attendance at school makes a parent liable to a fine of \$2595, plus an additional \$346 per day if the offence is continuing (but only in relation to a 'school-aged child', as opposed to a 'youth').⁶³ Finally, parents face a fine of \$1730, or \$2595 for subsequent offences, for failing to ensure that their youth (the term for a post-Year 10 student) both participates in, and attends, an 'approved learning program' (post-Year 10 option).⁶⁴ 'Participation' in Tasmania relates to being 'provided with education or training' (which perhaps aligns more with the concept of 'enrolment' from the schooling phase), whilst attendance presumably relates to being present at the education or training venue.⁶⁵ Interestingly, for only two of these four offences – a failure to ensure attendance of a school-aged child, and participation of a youth – a court may impose a community service order instead of (or in addition to) a fine.⁶⁶ It is not immediately clear why this option exists for some offences but not others.

In Western Australia, a failure to enrol subjects a parent to a fine of \$2500, whereas a failure to ensure attendance is \$1000.⁶⁷ Western Australia also provides for a potential fine for any non-attending child: a maximum of \$10.⁶⁸

It should be remembered that these figures discussed are all *maximum* fines, and that a court may decide to impose significantly less should a parent be convicted. Prosecution of parents would generally be considered a last resort, both for reasons of political perception (e.g. government overreach) and practical benefit (e.g. whether prosecution will actually achieve the desired parental behaviour). Because such offences are normally heard by inferior courts, data on the extent of such prosecutions is not always easy to obtain, and outside the scope of this article. It would make an interesting, albeit large, project for further research to compare the frequency of prosecutions, and the sanctions imposed, across these jurisdictions.

⁶² *Tasmania Act* s 11(2) set a maximum of 10 and 15 penalty units accordingly. A 'penalty unit' is defined as \$173 for the 2020/21 year, see *Penalty Units and Other Penalties Act 1987* (Tas) s 4A and Elise Archer, 'Notice under section 4A of the Penalty Units and Other Penalties Act 1987' in Tasmania, Tasmanian Government Gazette, No 22087, 28 May 2021, 479, 480.

⁶³ *Tasmania Act* s 16(1) set a maximum of 15 penalty units plus 2 penalty units per day. A 'penalty unit' is defined as \$173 for the 2020/21 year, see *Penalty Units and Other Penalties Act 1987* (Tas) s 4A and Elise Archer, 'Notice under section 4A of the Penalty Units and Other Penalties Act 1987' in Tasmania, Tasmanian Government Gazette, No 22087, 28 May 2021, 479, 480.

⁶⁴ *Tasmania Act* ss 24(2), 33(2) set a maximum of 10 and 15 penalty units accordingly. A 'penalty unit' is defined as \$173 for the 2020/21 year, see *Penalty Units and Other Penalties Act 1987* (Tas) s 4A and Elise Archer, 'Notice under section 4A of the Penalty Units and Other Penalties Act 1987' in Tasmania, Tasmanian Government Gazette, No 22087, 28 May 2021, 479, 480.

⁶⁵ For participation, see *Tasmania Act* s 23.

⁶⁶ *Tasmania Act* ss 16(2), 24(4).

⁶⁷ *Western Australia Act* ss 9(2), 38(1).

⁶⁸ *Western Australia Act* s 38(2).

D Excuses, defences and exemptions

	NZ	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
1. 'Reasonable' Excuse		✓		✓	✓	✓*	✓	✓	✓
Specific examples listed:									
2. Child lives with other parent		✓		✓*	✓	✓*	✓*		
3. Parent cannot control child		✓	✓	✓*	✓		✓*	✓	
4. Illness			✓		✓*	✓	✓	✓	✓
5. Public Health	✓		✓	✓	✓	✓*	✓		✓
6. Suspension or expulsion	✓	✓*	✓	✓	✓		✓	✓	✓*
7. Education elsewhere		✓	✓	✓					
8. Attempts or mistakes			✓			✓*	✓		
9. Religious or cultural reasons				✓				✓	✓
10. Unforeseen events			✓					✓	
11. Child living independently	✓			✓*					
12. Prior regular attendance			✓						
13. Caring responsibilities						✓			

Table 3: Defences / excuses

* Indicates that further steps apply or the excuse has a different element to it

While the obligation on parents is broadly framed in all of the legislation covering truancy, there exists a number of carve-outs which operate to remove liability. Like the obligation, these exemptions vary across the jurisdictions, both in terms of what is provided for, and who adjudicates their validity; variance in this aspect of compulsory schooling laws can be quite pronounced.

While not strictly accurate, as a clarification on terminology, it may be simpler to use the terms 'defence', 'excuse' and 'exemption' somewhat interchangeably. While they arguably have differences in meaning (particularly an exemption, which implies a proactive rather than reactive approach) the terms are not used consistently across jurisdictions. The terminology used below reflects the terminology used in the legislation in question.

This part of the article attempts to classify these carve-outs under particular headings, beginning with more-prevalent ones and moving onto more-unique ones.

1 *Reasonable Excuse*

All jurisdictions except for New South Wales and New Zealand allow parents to provide a ‘reasonable excuse’,⁶⁹ examples of which are provided by each piece of legislation but which are not intended to be exhaustive. Therefore, while some jurisdictions may not explicitly list an excuse (even where other jurisdictions do), *that excuse may nevertheless be considered ‘reasonable’*.

In New South Wales, a comprehensive list of explicit defences (including some of considerable width) is provided in the legislation, instead of referring to the concept of a ‘reasonable excuse’.⁷⁰ A similar situation occurs in New Zealand, which provides for a range of explicit excuses as well as wide powers of principals or public servants to grant exemptions upon application – presumably based on the reasonableness of the application.⁷¹ For example, a New Zealand principal may grant an exemption of up to five days, if it is ‘justified’ – however should the principal refuse this exemption, there is no provision for a court to accept the reasonableness of the excuse should a parent be prosecuted.⁷²

Note that in Tasmania, the option to provide a ‘reasonable excuse’ does not apply to a failure to ensure ‘attendance’ of a child (i.e. up to Year 10) – instead, this must be exempted or excused by one of the specific provisions of the legislation.⁷³ By contrast, in Western Australia, an unspecified ‘reasonable excuse’ only applies to attendance failures, and notice of the excuse must be provided to the principal as soon as reasonably practicable and at least within 3 school days of the absence starting. If a principal believes that the excuse provided has been persistently not genuine, or not a sufficient cause, the principal may refer the case to an Attendance Panel to make further inquiries.⁷⁴

The legislation in South Australia does not strictly provide for a ‘reasonable excuse’. Rather, it allows the parent to raise a defence that they took reasonably practicable steps to ensure their child was enrolled, attended, or participated.⁷⁵ While this is likely to have the same effect as a reasonable excuse, the language used here demonstrates a positive duty on the parent to attempt to avoid non-compliance, rather than raise an excuse.

⁶⁹ *Australian Capital Territory Act* ss 10(6), 10A(3), 10D(4), 17A(4); *Northern Territory Act* ss 39(4), 40(5), 70(5); *Queensland Act* ss 176, 239; *South Australia Act* ss 60(3), 61(4), 68(4), 69(4); *Tasmania Act* ss 11(2), 24(2), 33(2); *Victoria Act* ss 2.1.2, 2.1.3 (especially s 2.1.3(fa)); *Western Australia Act* s 25(a)(ii).

⁷⁰ *New South Wales Act* s 23(2),(3).

⁷¹ See *New Zealand Act* ss 35–6, which set up the parental obligation, and ss 243–4, which provide the offence (none of which refer to ‘reasonable excuse’). See also ss 38–9, 45 which are examples of exemption powers.

⁷² *New Zealand Act* s 45. It may be possible to seek judicial review of the principal’s decision to not grant an exemption, however this is outside the scope of this article.

⁷³ *Tasmania Act* s 16. Compare this to ss 11 (Enrolment of a child), 24 (Participation of a youth), and 33 (Attendance of a youth) which all allow for a (non-exhaustive) reasonable excuse.

⁷⁴ *Western Australia Act* ss 25(2)(b), 26.

⁷⁵ *South Australia Act* ss 60(3), 61(4), 68(4), 69(4).

While an ‘excuse’ (reasonable or otherwise) is retrospective in its operation, it is also possible to be ‘exempted’ from compliance in a future period – this is addressed at the end of this sub-part.

2 *Parents who do not reside together*

This is provided as an example of what is a reasonable excuse in the Australian Capital Territory, Queensland and Tasmania.⁷⁶ It requires a parent to hold a reasonable belief in the other parent’s compliance – that is, the child usually resides with another parent and the parent without the child believes on reasonable grounds that the other parent is ensuring enrolment, attendance or participation, as the case may be.

In the Northern Territory, the entire legal obligation for compulsory education is stated to only apply to a parent with ‘daily care and control’ of the child,⁷⁷ which effectively exempts a parent without such control, without the need for that parent to hold any reasonable belief.

In South Australia, it is a defence for a parent to show that they believed on reasonable grounds that their child was enrolled at school or a learning program – this could likely cover a situation of a parent who does not reside with the child, provided they had reasonable grounds for their belief.⁷⁸

3 *Inability to control the child*

Another example of a reasonable excuse in the legislation of the Australian Capital Territory and Queensland is that the parent *is not reasonably able to control the child’s behaviour to the necessary extent*⁷⁹ – a pragmatic recognition that imposing liability on to a parent will not always be appropriate. New South Wales and Victoria have a similar excuse with different wording: the absence was caused by the child’s disobedience and without fault of the parent.⁸⁰ South Australia provides the defence of taking ‘reasonably practicable steps’ (outlined in division 1 above), which could cover steps taken to control the child’s behaviour, albeit unsuccessfully.⁸¹

This excuse could particularly be useful for ‘Type C’ non-attendance (described earlier in Part II), such as ‘school refusal’. This form of legislative drafting could encompass both the behavioural tendencies of the particular child, and *possibly* the actual capacity of the parent in question: while ‘reasonable’ applies to limit the excuse, it may not necessarily construct a hypothetical ‘reasonable parent’ standard for which to judge the

⁷⁶ *Australian Capital Territory Act* s 17A(5)(a); *Queensland Act* ss 176(2)(a), 239(2)(a); *Tasmania Act* ss 11(3), 24(3)(a), 33(3)(a), but note that because the term ‘reasonable excuse’ is not applied to a failure to ensure attendance under s 16, this specific example of excuse is not provided for this type of failure.

⁷⁷ *Northern Territory Act* ss 39(1), 40(2). ‘Daily care and control’ is defined in s 8 as being entitled to exercise all the powers and rights, and has all the responsibilities, in relation to the day-to-day care and control of the child, and includes examples such as the right to make decisions about the child’s personal appearance or who the child has contact with.

⁷⁸ *South Australia Act* ss 60(4), 61(5).

⁷⁹ *Australian Capital Territory Act* s 17A(5)(b); *Queensland Act* ss 176(2)(b), 239(2)(b).

⁸⁰ *New South Wales Act* s 23(3)(g); *Victoria Act* s 2.1.3(e).

⁸¹ *South Australia Act* ss 60(3), 61(4), 68(4), 69(4).

actual parent's ability to control the child; rather, this excuse could arguably be interpreted as describing the level of control that the *particular* parent is reasonably able to achieve, in their specific factual context, with their specific means and parenting skills. However, this is not certain.

In addition, this reasonable excuse would largely protect parents from situations described earlier as 'Type A' non-attendance, where the child 'wags' classes at some point after arriving at school. Presuming the parent has not instructed or acquiesced to the child doing this, it would seem unreasonable for the parent to have any further legal obligation, as the school would be better placed to ensure the child's attendance throughout the day.

Finally, the Northern Territory also provides this excuse but does so in quite a unique way. Here, the parental obligations are not nullified, but rather *transferred* onto a 'child living independently'. This term appears to mean *either*: a child aged 14 or older and not living with a parent; *or* any child whose behaviour cannot be controlled to the extent necessary.⁸² In such a case, the independent child bears the liability for enrolment, attendance or participation, although the maximum penalties are set at 10% of the adult amount.⁸³ Such a child also can exercise any of the rights to make particular applications under the Act.

4 *Illness*

In most jurisdictions, illness is an explicit justification for a failure to ensure attendance or participation, although as usual, the criteria differ – both between jurisdictions and sometimes within a jurisdiction depending on the stage of education,

For New Zealand, the Australian Capital Territory and the Northern Territory – where there is no explicit provision – illness-related absences would very likely fall under the broader reasonable excuse / exemption provisions described earlier. While not strictly an illness excuse, the recent *New Zealand Act* does provide for an application for exemption to be made to reduce a child's hours of attendance on well-being grounds based on medical or psychological reports. This exemption can be in force for up to 6 months (with a possibility of renewal for a further 6 months).⁸⁴

In New South Wales, a child's non-attendance due to a medical condition or accident is a defence.⁸⁵ A principal may require a medical certificate to be produced, provided they had previously notified a parent that, because of the number or duration of past absences, such certificate would be required in the future.⁸⁶ Similarly, in Victoria, illness or accident is an explicit reasonable excuse.⁸⁷

⁸² *Northern Territory Act* s 10.

⁸³ *Ibid* ss 39(2), 40(3), 70(3).

⁸⁴ *New Zealand Act* s 42.

⁸⁵ *New South Wales Act* s 23(3)(a)(i).

⁸⁶ *New South Wales Act* s 23(7).

⁸⁷ *Victorian Act* s 2.1.3(a)(i);

In Queensland, ‘illness’ for up to 10 consecutive days is a defence against a failure to ensure attendance⁸⁸ – beyond this amount, an exemption must be applied for (see below). The legislation also provides a power to make regulations that impose further conditions regarding the use of this defence,⁸⁹ however, the only regulation currently relevant is that a State school principal may ask a parent to provide a reason for an absence if the principal is not satisfied with the reason already provided.⁹⁰ Interestingly, illness is only explicitly provided for during the schooling phase – for the post-school stage, participation is deemed to continue if the child’s absence is ‘allowed under the requirements of the option’,⁹¹ with the Act providing an example: absence from a State school due to illness.⁹² It is unclear how a determination should be made about when illness is ‘allowed’ in any post-school option (including students in year 11 or 12 at state schools).

In the South Australian legislation, the obligation to ensure attendance doesn’t apply if the child is ‘sick or infirm’, and the parent informs the principal within 5 days of the absence.⁹³

In Western Australia, temporary physical or mental incapacity is an excuse, if the principal is notified within 3 days and if a medical certificate is provided should the principal request it.⁹⁴

Tasmania has provided an extensive regulatory regime regarding illness as an excuse. A child who is ‘sick’ or ‘has a temporary physical or mental incapacity’ sufficient to prevent the child attending, is excused from doing so if a parent notifies the principal of this as soon as practicable (and no later than 5 days after).⁹⁵ A child can miss 5 days of school per year through sickness before a principal may require a parent to produce a medical certificate. Tasmania is unique in expanding upon the meaning of ‘sickness’. The legislation states that if a child has a medical condition that results in them being *susceptible* to having a physical, emotional or mental reaction to an incident, situation or exposure to disease which is stronger than the reaction of school-aged children who do not have the condition, that is *not* itself ‘sickness’ (although experiencing or recovering from such a reaction is).⁹⁶ This legislative provision is in response to a particular interpretation given by the Supreme Court of Tasmania in the case of *Tabain v Director of Public Prosecutions*.⁹⁷

In that case, the parents of a child were seeking a review of their conviction by a Magistrate, and subsequent \$2010 fine, for refusing to send their son to school. The parents contended that there was a reasonable excuse on the grounds of ‘sickness or incapacity’, as provided by the relevant legislation.⁹⁸ It was an accepted fact that the son

⁸⁸ *Queensland Act* s 201

⁸⁹ *Queensland Act* s 201(2).

⁹⁰ *Education (General Provisions) Regulation 2017* (Qld) s 23.

⁹¹ *Queensland Act* s 236.

⁹² *Ibid.*

⁹³ *South Australia Act* ss 68(3), 69(3).

⁹⁴ *Western Australia Act* s 25(2).

⁹⁵ *Tasmania Act* s 19(1).

⁹⁶ *Tasmania Act* s 19(3).

⁹⁷ (2014) 23 Tas R 374.

⁹⁸ See *Education Act 1994* (Tas) [Repealed] s 10.

had a severe anaphylactic allergy to numerous nut and dairy products. There had been lengthy conflict between the parents and the school in question regarding the adequacy of the school's Medical Action Plan, and ultimately this led to the parents' refusal to send the child to school. The question in contention was whether anaphylaxis fell within the meaning of 'sickness' – the DPP argued that what the child suffered from was not a 'sickness', but rather, a possible 'reaction to contact with an allergen'.⁹⁹ However Estcourt J found that the child did in fact suffer from a 'sickness'¹⁰⁰ and the matter was ultimately re-heard by a Magistrate who found in favour of the parents.¹⁰¹ This interpretation given in this decision has subsequently been rendered void by the introduction of the current *Tasmania Act* in 2016, which excludes the heightened *potential* for an allergic reaction from the definition of being 'sick'.¹⁰² As stated earlier, actually suffering or recovering from such an allergic reaction would still be classed as sickness.

It is also noteworthy that Tasmania and Western Australia explicitly recognised *mental* health reasons for non-attendance. Whether the other jurisdictions' laws cover mental illnesses would be a question of statutory interpretation in each one; however this article posits that the broad terms used (such as 'sickness' or 'illness') could easily be construed in this way.

5 Public Health

In New Zealand, a principal who has reasonable grounds to suspect a student has a communicable disease, may preclude that student from attending; this operates as a defence for a charged parent.¹⁰³ In Australia, if a child is directed to not attend school in order to prevent the spread of a contagious disease, parents in New South Wales, Northern Territory, Queensland, Tasmania, and Western Australia are exempted from their duty to ensure attendance.¹⁰⁴ In some jurisdictions, such a direction is one made under other legislation, for example, by a chief health officer. In the Northern Territory, the law allows a principal (but only of a government school) to give the direction.¹⁰⁵

Victoria does not specifically mention public health grounds, although does provide a reasonable excuse where the child is required to 'comply with another law'.¹⁰⁶ The same applies in the Australian Capital Territory (only where the child is participating in an education course which is not school), although its legislation does provide as an example of complying with another law: 'a public health direction that could require a child to remain at home'.¹⁰⁷ For school-based education, the attendance requirement only applies where the school is open for attendance and requires a child to attend

⁹⁹ *Tabain v Director of Public Prosecutions* (2014) 23 Tas R 374, 382.

¹⁰⁰ *Tabain v Director of Public Prosecutions* (2014) 23 Tas R 374, 383.

¹⁰¹ *Tabain v Pettit* [2017] TASSC 11, [1].

¹⁰² *Tasmania Act* s 19(3).

¹⁰³ *New Zealand Act* s 77.

¹⁰⁴ *New South Wales Act* s 23(3)(c); *Northern Territory Act* s 41; *Queensland Act* s 202; *Tasmania Act* s 19(4); *Western Australia Act* s 27.

¹⁰⁵ *Northern Territory Act* s 41.

¹⁰⁶ *Victoria Act* s 2.1.3(a)(ii).

¹⁰⁷ *Australian Capital Territory Act* s 11.

particular activities¹⁰⁸ – this might also cover a school requesting a child to avoid school on health grounds.

The recent *South Australia Act* has a unique, and possibly *wider* public health defence. It applies if ‘there was a danger of the child being affected by an infectious or contagious disease’ (and provided that the principal is notified within 5 days).¹⁰⁹ This defence seems to allow the child’s parents to make the decision about whether such a ‘danger’ exists (or perhaps more correctly, to have the defence’s application tested in court), rather than acting in response to an official public health direction. Additionally, the language employed in the defence presents two competing interpretations.

The first such construction would be that it covers a child who is not ‘sick’, but who *could potentially be* – that is there is a ‘danger’ (risk) that the child is currently ‘affected’ by a contagious disease, but this is yet to be confirmed – and therefore should remain home on public health grounds. As a hypothetical example, a parent notices red spots on their child’s body, so keeps them home from school in case the child has chicken pox. The spots are later diagnosed as an allergic reaction rather than a contagious disease.

The second, broader, interpretation, which is arguably open on the plain meaning of the words, is to permit an *otherwise healthy child to stay away from school*, based on the ‘danger’ (risk) of the child contracting (‘being affected’ by) a contagious disease in the school community. Such an interpretative possibility may well have seemed far-fetched when this provision was enacted in August 2019.¹¹⁰ However, the recent occurrence of COVID-19 caused controversy in many jurisdictions when, initially, schools were to remain open – and some parents wished to keep their child at home.¹¹¹ Depending on which of the two interpretations is correct, it seems that South Australia may be the only jurisdiction which would provide protection to a parent who *chooses* to keep their healthy child home from school.¹¹²

Clearly, it would be beneficial for this provision to be redrafted to avoid ambiguity. Depending on which meaning was intended, possible solutions are: ‘there is a danger that the child is currently affected by a contagious disease’, or alternatively, ‘there is a danger that the child could contract a contagious disease’. The first approach seems the most-likely intended meaning, as the second could be open to absurd application and defeat the purpose of compulsory schooling.

¹⁰⁸ *Australian Capital Territory Act* s 10A(2).

¹⁰⁹ *South Australia Act* ss 68(3), 69(3).

¹¹⁰ The *Education and Children’s Services Act 2019* (SA) was assented to on 8 August 2019; however it was only proclaimed to commence from 1 July 2020.

¹¹¹ See, eg, John O’Brien, ‘My child is staying home from school because of coronavirus: is that illegal?’ (20 March 2020), <<https://theconversation.com/my-child-is-staying-home-from-school-because-of-coronavirus-is-that-illegal-134245>>.

¹¹² Note that the *South Australia Act* would not have applied during the initial stages of COVID-19, when debate was the strongest about whether or not schools should close, because the Act only commenced operation from 1 July 2020.

6 *Suspension or Expulsion*

As a matter of common sense, a parent is exempted from complying with their obligation should their child be suspended from school, or expelled (until a reasonable time to arrange enrolment at another school or option). This specifically is provided for in New Zealand,¹¹³ New South Wales (in the case of suspension from a government school, or expulsion from any school),¹¹⁴ Northern Territory,¹¹⁵ Queensland (in the case of suspension from any school, or expulsion from a State school),¹¹⁶ Tasmania,¹¹⁷ and Victoria (provided the child undertakes other educational programs during the time).¹¹⁸ In the Australian Capital Territory and Western Australia, the excuse applies only in the context of participating in a non-school option; however for school education, the attendance requirement itself only applies where the school or principal requires it.¹¹⁹

7 *Education elsewhere*

The legislation in the Australian Capital Territory, New South Wales and the Northern Territory provide explicit reference to situations where a child was enrolled in, and attended, school in another state, territory (or in some cases, country).¹²⁰ For example, a child who is a resident of the Australian Capital Territory may attend school over the border in New South Wales.

8 *Bona fide attempts or mistaken beliefs*

In New South Wales and Tasmania, it is a defence if a parent had enrolled and caused attendance at what they reasonably believed to be a government or registered non-government school¹²¹ (with the implication being that this belief turned out not to be true in fact).

In the recent *South Australia Act*, it is a defence if a parent took all reasonably practicable steps to enrol their child, despite no enrolment occurring. Similarly it is a defence if the parent honestly, but mistakenly, believed the child was enrolled.¹²²

¹¹³ *New Zealand Act* s 80(3). Note that this section is an excuse regarding suspensions only, however, should a child be excluded by a state school board, the principal must then try to find another school for the child. If the principal has been unsuccessful after 10 school days, the Education Secretary may direct a state school board to accept the enrolment – see ss 81, 82.

¹¹⁴ *New South Wales Act* ss 23(3)(e)–(f), 35(4)

¹¹⁵ *Northern Territory Act* s 40(6)(c).

¹¹⁶ *Queensland Act* s 200.

¹¹⁷ *Tasmania Act* s 18(1)(a)–(b).

¹¹⁸ *Victoria Act* s 2.1.3(d).

¹¹⁹ *Australian Capital Territory Act* ss 11A, 11B. However for school-based education, see s 10A(2)(b) which only imposes an attendance requirement for activities that the school requires the child to attend; *Western Australia Act* s 11J(4). However for school-based education, see s 23(1)(a) which only requires attendance on days as required by the principal.

¹²⁰ *Australian Capital Territory Act* s 9A, which defines ‘education course’; *New South Wales Act* s 23(2)(a); *Northern Territory Act* s 39(5)(c);

¹²¹ *New South Wales Act* s 23(2)(f); *Tasmania Act* s 18(1)(d).

¹²² *South Australia Act* ss 60(3),(4), 61(4),(5).

9 *Religious or cultural reasons*

In the Northern Territory, a parent's obligations to cause attendance do not apply where an absence is due to a day of cultural significance, and the parent informs the principal of that.¹²³

In Victoria, a reasonable excuse for absence is if 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.'¹²⁴

Western Australia makes provision for both religious or cultural absences.¹²⁵ Such days must either be prescribed under regulations or approved by the Minister at the request of a parent or student.¹²⁶ Advance notice of the absence must be provided by the parent to the principal (unless it is not reasonably practicable to do so, in which case notice must be as soon as reasonably practicable).¹²⁷

10 *Unforeseen events*

Both the New South Wales and Victorian legislation includes 'unforeseen events', and Victoria 'unavoidable causes', as excuses.¹²⁸ For the remaining jurisdictions, these would undoubtedly be implicit in the non-exhaustive scope of 'reasonable excuse'. It would seem that New South Wales and Victoria do not necessarily require the event or cause to be 'reasonably' unforeseeable or unavoidable; this would require judicial interpretation. Parents in New South Wales must give notice of the event within seven days.¹²⁹

11 *Child living independently*

New South Wales provides a defence for parents where their child is living independently.¹³⁰ This is in addition to that jurisdiction also excusing lack of parental control over behaviour of the child (see division 3 above). As stated earlier, the Northern Territory transfers the obligations from the parent to an independent child, but only if the child living away from their parent is 14 years of age or older.¹³¹

Whilst some of the other jurisdictions allow a child living independently, instead of a parent, to make certain applications or give notice of excuses, those jurisdictions do not explicitly absolve the parent from the legal obligations concerning their independent child. However, such situations would likely fall within the generic 'reasonable excuse'.

¹²³ *Northern Territory Act* s 40(6)(d).

¹²⁴ *Victoria Act* s 2.1.3(f).

¹²⁵ *Western Australia Act* s 30.

¹²⁶ *Western Australia Act* s 31.

¹²⁷ *Western Australia Act* s 30.

¹²⁸ *New South Wales Act* s 23(3)(a); *Victoria Act* s 2.1.3(a)(i).

¹²⁹ *New South Wales Act* s 23(3)(a).

¹³⁰ *New South Wales Act* s 23(3)(h).

¹³¹ *Northern Territory Act* s 10.

12 *Prior regular attendance*

New South Wales provides a unique defence for where a child has not missed more than 3 days (excluding absences for medical conditions, accidents or unforeseen events) in the 3 months prior to the absence now complained of.¹³² This could potentially cover Type B non-attendance described in Part I above; that is, where a child misses a short period of time with parental knowledge/consent, for example, a ‘term-time holiday’. This would be an unusual outcome, but, as there is no reported case interpreting the provision, it is open on the plain meaning of the words used. Where ambiguity arises is in the phrase ‘absence complained of’ – is an unauthorised holiday for four weeks considered to be one continuous absence, or twenty individual absences? If the first interpretation is correct, then a parent who had ensured a high level of attendance for a 3-month period would be legally protected should they then not comply for an extended period. However, it seems more likely that the second interpretation would be preferred,¹³³ and that by the fifth (at most) consecutive day absent, the obligation would be breached.

13 *Caring responsibilities*

The South Australian law now contains a unique defence for the non-attendance of a child in the ‘compulsory education’ phase (i.e. after the ‘compulsory schooling’ phase, which in South Australia is once the child is 16 years old). It is a defence if the child is reasonably required to care for a member of the child’s family (for example, a sick parent, or the child might themselves be a parent of a child).¹³⁴ No further detail is provided about the length of time for which the caring responsibilities may continue for, although perhaps that is addressed in whether the child is ‘reasonably’ required to do so. On one hand, this defence might be criticised as allowing a child to miss important education or training opportunities. However, it arguably also reflects the practical reality for some households, and that familial obligations might legitimately trump education in some cases. It also, fairly in the author’s view, removes such situations from a penal approach where imposing sanctions on a parent is only likely to add to the family’s problems and not improve school attendance. Such a situation might be best addressed through the health care and social work systems, rather than as an education issue.

14 *Application for Exemption*

Beyond the concept of a ‘reasonable excuse’, a parent may apply for an exemption from their obligations. There is some variance as to who considers such an application, and what, if any grounds are relevant.

In the Australian Capital Territory, the Director-General may grant this exemption, which can be operative for the entire period of compulsory education.¹³⁵ The child may

¹³² *New South Wales Act* s 23(3)(b).

¹³³ This is argued to be more correct, in that it avoids an ‘absurd’ interpretation.

¹³⁴ *South Australia Act* s 69(3).

¹³⁵ *Australian Capital Territory Act* s 11H.

also apply themselves if the Director-General considers it appropriate. The Director-General may consider, without limit, issues such as the child's health, education, development and sense of racial, ethnic, religious or cultural identity, as well as if exemption would benefit the child.¹³⁶

In New South Wales, the Minister may grant an exemption, where in their opinion, it is 'necessary or desirable' to do so.¹³⁷

In New Zealand, a designated officer of the Secretary¹³⁸ may exempt from *enrolment*, although only to allow the child to attend alternative education.¹³⁹ The Secretary themselves may grant an exemption from enrolment if it is sensible to do so when considering the child's educational problems, conduct and likely benefit received from attending a school. The child in this situation must be at least 15 years old and have made sufficient progress in the Year 8 curriculum and be enrolled for a higher year.¹⁴⁰ The Secretary may also give an exemption from *attendance* if the school is more than a 3km walk (for children under 10) or 5km walk (for others) from the residence, or for another sensible reason.¹⁴¹ Finally, a school principal can grant a short-term exemption of up to 5 days if satisfied that the absence is justified.¹⁴²

In the Northern Territory, the CEO of the Department may grant an exemption if they are satisfied that special circumstances exist, but only from attendance (not enrolment). The example provided by the legislation of such a circumstance is if the student is seriously ill. Illness is not otherwise explicitly provided for in this jurisdiction, although the meaning of 'reasonable excuse' is left open.¹⁴³

In Queensland, a parent may apply¹⁴⁴ for an exemption from their obligations, for either a definite or indefinite period.¹⁴⁵ The Chief Executive of the Department of Education may grant an exemption from enrolment and attendance of a child, if they are reasonably satisfied that the child cannot attend a school and that it would be unreasonable to require the child to do so.¹⁴⁶ A similar process applies for participating in eligible options in the compulsory participation phase.¹⁴⁷ A principal of a non-state school has the power, upon application, to grant an exemption from attendance, or participation in an option they provide, for the same reasons as the Chief Executive.¹⁴⁸ However, they can only approve this if the total period of exemptions for the child would remain under 110 school days in a year;¹⁴⁹ beyond that, the Chief Executive must make the

¹³⁶ *Australian Capital Territory Act* s 12A(2).

¹³⁷ *New South Wales Act* s 25.

¹³⁸ The Secretary of Education is akin to a CEO of the department.

¹³⁹ *New Zealand Act* s 38.

¹⁴⁰ *New Zealand Act* s 39.

¹⁴¹ *New Zealand Act* s 44.

¹⁴² *New Zealand Act* s 45.

¹⁴³ *Northern Territory Act* s 44.

¹⁴⁴ *Queensland Act* s 186.

¹⁴⁵ *Queensland Act* ss 185, 185A, 244, 244A.

¹⁴⁶ *Queensland Act* s 185.

¹⁴⁷ *Queensland Act* s 244.

¹⁴⁸ *Queensland Act* ss 185A, 244A.

¹⁴⁹ *Queensland Act* ss 185A, 244A.

decision.¹⁵⁰ In either case, a parent is granted a temporary exemption from compliance until 14 days after they have been notified of the outcome of their application.¹⁵¹

In Tasmania, a parent (or an independent child) may apply to the Minister for an exemption, which can be granted if it is in the best interests of the child.¹⁵² The same applies in Western Australia, although the Minister may delegate their powers to the CEO in respect of exemptions for children at non-government schools.¹⁵³

In South Australia and Victoria, a child can be exempted from enrolling or attending by the Minister, without further elaboration on the criteria to be applied in determining the outcome.¹⁵⁴

IV CONCLUSIONS

From this initial examination of legal frameworks dealing with truancy laws in Australia and New Zealand, it is clear that while a number of similarities are present, there are also considerable differences. What is not readily apparent is the extent to which differences in legislative drafting result in differences of interpretation and application of the legislation when compared to other jurisdictions.

It can be seen that all these jurisdictions under consideration regulate truancy by initially imposing a high obligation on parents: enrolment, and attendance on every school day. Each jurisdiction provides for the issuing of fines for non-compliance; and although there is considerable discrepancy between the jurisdictions, they are nevertheless a potentially significant amount to a parent.

However, it can also be clearly seen that this high obligation and its associated penalties are potentially tempered considerably by a range of explicit excuses or defences, and often the possibility of raising other excuses too. As described above though, there are considerable differences between jurisdictions when it comes to the explicit excuses provided for. This might particularly raise issues for families who move from one jurisdiction to another.

Finally, a number of avenues for further research present themselves. First, there is a lack of reported case law in Australia and New Zealand. This means that many of the terms used in relevant legislation may not have been judicially interpreted.

Second, further empirical investigation regarding the frequency of prosecutions brought before inferior courts, and the outcomes of such cases, would assist in explaining the extent to which truancy laws are enforced (at least through the legal system).

Third, there are often legislative (and potentially non-legislative) procedural steps which must or may be undertaken prior to commencing prosecution. Discovering and comparing these across the nine jurisdictions is a project in itself.

¹⁵⁰ *Queensland Act* s 185(3).

¹⁵¹ *Queensland Act* s 189.

¹⁵² *Tasmania Act* s 13.

¹⁵³ *Western Australia Act* s 11.

¹⁵⁴ *South Australia Act* s 133; *Victoria Act* ss 2.1.3(g), 2.1.5.

Prosecution of parents is often expressed to be a last-resort. If there are only limited prosecutions, as is suspected, this does raise the important question of why this is so. It could be that implementing preliminary procedural steps required by the legislation brings about the desired change of parental behaviour (i.e. the regulatory tools used are working); or perhaps instead, prosecution is merely seen as an impotent mechanism to stop truancy. This issue can be further examined through empirical socio-legal research, and the author intends to pursue this further in the future.

Ultimately the goal of any compulsory school attendance regime should be to encourage the education of children. Different regulatory tools are likely to be required to address the difference in context – not the least of which would be the 4 types of truancy identified in Part II above. For instance, some non-attendance is ‘caused’ by the child refusing school, in which case, punishing the parent may not be appropriate. At the other end of a spectrum, the child may wish to attend school, but a lack of responsible parenting is preventing this. And in between are a variety of other reasons why school attendance doesn’t occur. This also presupposes that ‘attendance’ of itself leads to education; while it is probably an important threshold step for the majority of children, the regulatory regimes need to be flexible enough to consider other perspectives. Ultimately, further research from the fields of education, law and regulation will always be important in order to optimise the social benefit of an educated population.

Keywords:

truancy, compulsory school attendance, parent, offence, reasonable excuse.