

# **BULLYING, RACISM & THE LAW**

**A LEGAL EDUCATION FORUM**

**Forum Papers**

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**Victoria University,  
Footscray Park Campus**



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Introduction	.....	3
Safe Schools are effective Schools: Department of Education and Training anti-bullying strategy	.....	4
Bullying and its impact on young people	.....	6
The law surrounding bullying and the disciplinary proceedings	.....	9
Bullying of Students and Mandatory Reporting of Suspected Child Abuse	.....	12
Teachers have rights too	.....	16
Report on the 'Racism in Schools' Pilot Project	.....	17
Facilitating Student Advocacy	.....	19



# Introduction

*A boy in my class has been teasing me for over three years. I have reported this to my home teacher and recently my dad has been speaking to the school too. Just before the school holidays we were at camp and an incident occurred and the other boy punched me in the mouth and cut my lip and gum. I am worried that when I go back to school that the other boy will continue the bullying.*

*I am 14 years old and in Year Nine. Last Wednesday another girl at school took a swing at me but I ducked so she did not hit me. She got two days suspension for it. But there are 15-20 other kids wanting to do the same. A lot of them are boys. The Principal of the High School said he is not going to be able to stop them and told me to stay at home because it is safer for me. I really love school. I did not miss a single day last year and got an award for it. The bullying only started this year. I really miss my friends as I am not at school. The school said they would give me some work to do at home. It has been one week since the girl tried to hit me and I still have not been given any work to do. I am really upset and hurt that the school would treat me like they have. I feel like they think it is easier to get rid of me rather than do something about the bullying.*

*I am being bullied at school and, my parents have spoken to the principal a lot and there has been no real action to this problem my teacher just keeps saying ignore them but it just won't stop. Please tell me what my options are as I can't keep going on like this. Thank you.*

These are a few of the emails Youthlaw has received from young people about bullying. The young people are distressed and feel no action has been taken to stop the bullying. We also know from our discussions with teachers that many schools are struggling to respond to this issue and want more advice and support about how to make schools a safe place.

This forum was organised by Youthlaw, Wyndham Legal Service, and the Federation of Community Legal Centres to provide an opportunity for teachers and welfare coordinators to come together to discuss this issue. The forum aimed to provide professional development for teachers in relation to legal rights and responsibilities and best practice in dealing with bullying and racism. The forum brought together a range of speakers to discuss current law, schools' responsibilities, the psychological impact of bullying, and to provide examples of some innovative projects to addressing racism and bullying in schools.

# Safe Schools are effective Schools: Department of Education and Training anti-bullying strategy

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## Review of Anti-Bullying Policy

Research methodology:

- A literature review
- Intensive interviews and focus group discussions with 11 schools with successful wellbeing outcomes.
- Surveys regarding bullying completed by 11,536 respondents including 9,362 students, 1037 teachers, 302 members of leadership teams and 835 parents.
- Interviews with key regional personnel

Key Findings of the Literature Review

- Anti-bullying programs have mixed results
  - Girls appear more responsive to these programs
  - Programs in primary schools appear more effective.

Bullying appears to have significant effects

- Increased reports of depression, self-harm and suicide
- School avoidance
- Anxiety
- Replicating bullying behaviour towards others.

## Key Findings of the Review

How common is bullying?

- Approximately 10% of Victorian Government school students have been bullied in the previous ten weeks.
- Bullying appears to be more problematic in secondary schools, especially in Years 7 to 10 (see table below).
- Lack of understanding throughout school communities regarding bullying.
- Common forms of bullying in Victoria include:
  - Name calling, teasing and put-downs
  - Deliberately spreading rumours and lies
  - Deliberate social exclusion
  - Damaging or hiding property
  - Humiliation or nasty tricks
  - Physical bullying
  - Nasty emails or texts

## Key Success Factors in Case Studies

Two key success factors in the case study schools:

- An effective leadership team that empowers and works effectively with key members of staff
- An effective behaviour management plan that works well across the whole school, i.e. student code of conduct

Frequently identified success factors:

- Student wellbeing as a school priority
- A consistent whole-school approach to bullying
- Effective collaboration between teachers and a focus on staff wellbeing.
- Use of anti-bullying programs, such as bystander training.
- Positive involvement of parent community.
- Well developed extracurricular programs.
- Effective transition programs.

Other significant factors:

- Chaplain at the school
- Community service opportunities
- Fun and humour
- School pride and high expectations

PRIMARY		SECONDARY		
Years 2-4	Years 5-6	Years 7-8	Years 9-10	Years 11-12
5%	9%	13%	12%	7%

## Safe Schools are Effective Schools

<http://www.eduweb.vic.gov.au/edulibrary/public/stuman/wellbeing/SafeSchoolsStrategy.pdf>

<http://www.sofweb.vic.edu.au/wellbeing/safeschools/bullying/strategies.htm>

*Safe Schools Are Effective Schools* comprises five sections:

- A definition of bullying
- An anti-bullying policy
- Strategies for schools, outlining the key characteristics of safe and effective schools, a summary of the themes from good practice schools, and suggestions around the best ways to intervene in bullying incidents

- Strategies for parents, about the best way to manage bullying incidents when their child is being bullied, bullying others, or observing bullying behaviour
- Case studies of six schools that have been deemed to have good practice in relation to student safety and wellbeing.

### Effective Schools Model

To effectively prevent bullying, schools need to take a whole-school approach that focuses on safety and wellbeing throughout all school practices.



# Bullying and its impact on young people

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## What is our goal in examining Bullying and Racism in our schools?

Hopefully, it is because we are all committed to creating a society that is characterised by respect for individuals. By encouraging respect and socially appropriate behaviours we are investing in less violence and trauma in our society. If we respect people and treat them decently we will engage in co-operative behaviours which will enable individual and collective goals to be achieved. Idealistic as it may seem, we should strive for a peaceful, healthy and productive democratic society.

As an introduction to today's forum, let's spend a few moments reflecting on the nature of bullying and racism and its effects on people.

Bullying is certainly receiving much more attention than it did a decade ago. We are now more aware as a society that bullying occurs both within our schools and workplaces. It is not just children who engage in bullying behaviours. We are also much more prepared to formally say that bullying and racist behaviours have no place in Australia this century. The behaviours are destructive and serve no common good.

Focussing on bullying and our schools, let's be aware that bullying encompasses a range of behaviours and means of execution. The Australian Oxford Dictionary defines bullying as: "persecuting or oppressing by force or threats" Interestingly, a bully is defined as: "a person who uses power to coerce others by fear".

Now look at those words: persecuting, oppressing, force, threats, fear and power.

And that is what bullying is all about: Inappropriate use of power to create fear in someone with the result that the recipient of the bullying will be marginalised. It is a way of someone, who holds power within a group, of creating a situation of degrading someone

and excluding them from the normal social interactions within that group.

Imagine that you are someone who has been bullied. What is the impact going to be on you? You would expect to get short-term and long term effects.

The short-term negative effects may encompass such things as:

- Distress...feeling highly anxious, unsafe and inadequate as a person. At a time when a child or young person is forming their identity, you can imagine the damaging and stifling impact upon the individual.
- Eating and sleeping disorders. Some people eat less because they report having an upset stomach. Others over-eat as compensation. Sleep disorders can range from fear of the dark, restless sleep patterns to nightmares that are disturbing to a sense of wellbeing and normal daily functioning.
- Fear and stress can lead to headaches, skin rashes etc.
- Avoidance behaviour: "I'm not going back to school or a particular activity again". Children can be very creative in making excuses. Sometimes they will inappropriately blame teachers or the school particularly if they have not disclosed the true nature of what has been occurring for them. Children can also be fearful of a

parent's response and additionally fear that if their parents approach the school or the bullies directly that their lives will be made worse.

- Withdrawal socially. The victim may show less engagement in the classroom as a result of a desire to go un-noticed or in response to the fear that they will be punished if they say or do anything.
  - Smashing or breaking of property as a means of releasing their tension and anger. This usually results in them getting into trouble from parents or other adults and can worsen their situation if it is not properly investigated as to the cause of the destructive outbursts.
  - A desire to seek revenge. Sometimes those who are bullied become so inwardly angry and frustrated that they "hit back" in an inappropriate manner. If the revenge involves other children or young people, a gang mentality and confrontation can emerge. Taking the situation into their own hands, these children can worsen the problem. These episodes do, however, often provide the first indication to school staff that there is an underlying problem.
  - Self-harming as a result of anxiety and loss of esteem. The thing that most self-harmers will tell you is that the physical pain resulting from self-harm masks the emotional or psychological pain. Not a very useful coping mechanism.
- The long term negative effects will vary with the age of the person who was bullied and the effectiveness of interventions when the bullying occurred.
- They can include:
- Long term resentment, particularly if there has been a racist aspect to the bullying. For some, this may impact upon political thinking. This can be very positive if the person is motivated to use socially available opportunities to make a difference. It can be destructive if the person, through anger and resentment, is drawn to less

positive ways at striking back at the society that they see as being the cause of their woes.

- Loss of self-esteem and sense of worthiness and this can lead to difficulties in adult relationships. When the human mind experiences a trauma, the emotion attached to that trauma can be buried in the subconscious mind and unbeknown to the person drive a lot of their behaviours. Courage is often affected and the person, even in adulthood will, to use the colloquial expression: "sell themselves short" and not strive for social relationships or career opportunities that they could have reasonably aspired to.
- Choosing to discontinue education. This is a sad consequence and some people who have been victims may take years before they develop the confidence in themselves to resume learning. I remember one of my clients, a few years ago, who was the youngest of three children. She was 54 years of age when she came to see me. She had been the victim of sibling and school-based bullying and did very poorly at school. She couldn't cope and left school, choosing to get a job in a factory whilst her two siblings went on to tertiary education. She was overweight and described herself as having been the dumb one in her family. On testing her, her IQ was in the top 15% of the population. After a period of therapy, she gained entry to a tertiary institution and went on to top the faculty in her chosen subject area. This is a dramatic but real example of the price that people can pay.
- Loss of development of assertiveness skills. These skills enable us to express our needs and rights. You see this effect mostly in the workplace where the adult encounters a supervisor or manager who is aggressive, insensitive to employee needs and bullying in their style. Often, the adult will be unable to express what they think is fair and put up

with the treatment they receive until they can find another job.

- Depression and use of alcohol and drugs to self-medicate to take away the pain. This can lead to additional physical and mental health problems.
- Aggressive and acting out behaviours: "No-one is ever going to push me around again". One 29 year old man that I saw, who has a childhood history of being physically abused by adults and was bullied and teased in upper primary school, learnt karate as a teenager and also developed a drug problem. The mixture of unresolved anger, karate skills and lack of clear thinking due to drugs, recently caused him to have an altercation with a taxi driver because he took exception to how the driver spoke to him. He is about to face court on charges.
- Long-term hostility to parents because they failed to protect them when they were younger." Family relationships can change.
- Development of social phobias. Discomfort and feeling insecure and inadequate around others can drive some people into an acutely isolated lifestyle. This can lead to meeting their needs through "fantasy" and involvement with the use of pornography is not uncommon.
- Loss of hope that compounds into a decision that life isn't worth living and suicidal ideation occurs. This is the ultimate price that a person can pay.

When you look at the negative outcomes from bullying, it makes you realise how important it is to get professional support for the parents and child who has been bullied.

There is still a prevailing attitude in our community that after a few days and a bit of attention that the child will: "get over it and get on with life".

Oh, if it was so simple and true, life would be easier for the victims of bullying. Generally, this is not the case.

We do know that appropriate and early intervention helps to minimise the long term negative effects from being the victim of bullying or racist behaviours. Hence, the value of this forum.

Let us briefly look at the ways in which people are bullied within our schools:

### Emotional bullying.

This occurs when a student is deliberately excluded for a group. One case that we dealt with recently was a Year 8 female who was excluded from sitting in certain seats in the classroom because the power group in the class determined which cool people sat next to whom. This all occurred at the change of period, usually before a staff member arrived in the classroom so it went unnoticed until the student disclosed what was occurring to her Mother. The school was ineffective in dealing with the dynamics within the year group, which resulted in this student changing school.

### Physical bullying

This form of bullying occurs with both males and females. It can range from significant physical contact to more discreet hitting, slapping and prodding behaviours that can occur behind a staff member or other student's backs. One student that we saw in our practice, reported that because she would not agree to participate in certain activities at weekend parties, she was excluded from the group and became the target of a "slap-fest". Six class members had arranged to silently slap her as she moved from class to class and went to her locker at lunchtime and recess time. Disclosure by the student to her Mother and with our assistance, the school was approached and very effectively dealt with the issue. The student remains happily at the same school.

### Cyber bullying

Availability of msn chat, email and sms opens up a new means to

threaten or create fear in students. Messages like this one that one of our client's received: "We r gonna get u bitch" created a very disturbed night's sleep for the recipient. Monitoring this type of bullying heavily relies on the victim alerting parents or staff to such messages so that they can be kept and traced.

Remember that not all bullying is visible or reported. Educating our school communities to what constitutes bullying is essential and being approachable and having processes that are "non-threatening" to those who have been the victims of bullying is essential.

The goal of bullying is to create fear in the victim. So when a child or young person has been bullied they are going to transact with teachers and parents in a state of "fear". Fear is an emotion and when human beings are driven by a major emotion, they don't think clearly. The fear becomes enlarged by the possibility that an intervention strategy is going to make their situation even more untenable.

This is one of the primary reasons why bullying goes unreported and the effects just fester away inside the individual. The other reason, which thankfully is becoming less common now, is ignorance as to what constitutes bullying.

Victims of bullying need empathy from adults who speak to them and sensitive and patient handling. Fear shuts down the language centre in the brain, so be prepared for a victim to have enormous difficulty in articulating what has happened to them. Too many questions too soon can further freeze a person's ability to tell you what has happened and they may "disengage" from fear and anxiety even further. There is no shortcut to time.

Look after the immediate needs of a victim and give them a day or two before you question them in depth about an incident. Staff can benefit from a one hour PD session in how to speak to and assist a child who has been bullied so that the trauma for the child is reduced.

I was delighted to see that such publications as Dolly magazine in its March 2006 edition had a good article on bullying couched in language that young people can relate to. The more channels of awareness in our society about the destructive nature of bullying and racism, the better.

### Strategies to combat bullying

There has been much written on this area and there are a number of useful resources available. You are probably familiar with these and during this forum some of the other speakers will provide information on resources.

It is not the primary purpose of this paper to explore strategies in any depth. Let me just highlight a couple of things that are worth having in our mind as we undertake this forum today.

- Teachers set the pace. Teaching and administration staff who smile, look happy and speak to their students in a respectful tone of voice are setting an example of positive and respectful social interactions.
- Being sensitive to the impact of decisions can minimise problems. In June 2006, the Ashley Down Infant School in Bristol, UK put on an end of term play. The school faces an investigation into racism after casting two black children as monkeys. The boys were the only two black children in the school's 60 strong Year 2 group. Interestingly, the school which has 180 students aged 4-7years has a quarter of its students from ethnic minorities. Other such mishaps that have occurred include one school that cast a number of Asian children to play the role of Japanese students in an Anzac Day pageant. There was no sinister intention, but as a piece of communication, the audience received a different message to that which was intended. I don't think I would have enjoyed being one of the Asian students returning to class after that pageant.

- Reducing tension within the school environment reduces violent behaviours. Lunchtime rock concerts, yoga, meditation, music groups playing at lunchtime. Giving thought to creating a positive atmosphere in the school can foster good mood states. One small school of 50 students in Reservoir, Melbourne reports that engaging students in meditation exercises has reduced stress levels that are conducive to reducing violence and promoting more positive enthusiasm for learning.
- Advancing the status of students from other countries and cultures changes their minority status and the perception of other students. Food festivals and dance celebrations which are led by minority groups but engage all students are worth considering.
- Promote positive parenting behaviours. A recent Bureau of Crime Statistics and Research study of 2616 students found that poorly supervised boys from sole parent families or whose mothers were less than 35 years of age were more likely to attack someone at school. Also, the study found that children whose parents use corporal punishment and children who come from homes where there are family problems are more at risk of behaving violently towards others. Schools that invest in parent education forums and promote positive parenting strategies are making a contribution to the reduction of violent behaviours.

**These strategies are in addition to the more formal processes and sanctions for directly dealing with the issue of bullying and racism. We have a challenge. Let us embrace it.**

# The law surrounding bullying and the disciplinary proceedings

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## Part One: Privacy and Confidentiality

### General Right to Privacy and Confidentiality

- Young people have a right to privacy and confidentiality.
- Teachers work with young people who are sometimes vulnerable and exposed. They trust staff to treat them, and their personal information, with care and respect.
- Serious harm can result if this trust is betrayed.
- The right to privacy and confidentiality is embedded in:
  - codes of practice or ethics;
  - “common law” about contracts, duty of care, equity and defamation;
  - statutes made by states and the Commonwealth, e.g. *Information Privacy Act 2000* (Vic), *Health Records Act 2001* (Vic), *Privacy Act 1988* (Cth); and
  - funding and services agreements with the government

### What is Personal Information?

Personal information:

- information about an individual whose identity is clear or can reasonably be worked out from that information
- can include opinions and does not need to be true
- typical personal information includes your name, address, age, financial status (eg eligibility for concessions / benefits) and family information (eg who lives with you)

### Collecting Personal Information

As a general rule, services should not collect, keep or use personal information unless:

- the information is relevant and necessary to the work they are doing;
- they can identify the main or primary purpose for which they are collecting the information; and
- they have taken reasonable steps to make an individual aware of the primary purpose for which the information is collected and to whom it is likely to be disclosed.
- If reasonable and practicable to do so, services must collect personal information only from the relevant individual.
- Information must be collected without unnecessary intrusion.

### What is Sensitive Information?

Sensitive information is information (includes opinions) about:

- ethnic or racial origin;
- philosophical or religious beliefs or affiliations;
- political opinions;
- membership of a political association, professional or trade association or union;
- sexual preference or practices; or
- criminal record.

### Collecting Sensitive Information

As a general rule, services should not collect, keep or use sensitive information unless:

- the individual has consented;
- the collection is required by law;
- the collection is necessary to prevent or lessen serious or imminent threat to life, health or safety of any individual, where the individual whom the information concerns is physically or legally incapable of giving consent to the collection or physically cannot communicate to consent to the collection; or
- the collection is necessary for the establishment of a legal or equitable claim.

### Using Personal Information

Personal information must not be used or passed on to another person or organisation unless:

- the individual has consented to the use or disclosure;
- it is being used or disclosed for the primary purpose for which it was collected;
- it is being used or disclosed for a secondary purpose which is related to the primary purpose, and the individual would reasonably expect the organisation to use or disclose the information for that purpose (needs to be directly related in the case of sensitive information);
- disclosure is necessary to prevent a serious or imminent threat to an individual's life, health, safety or welfare; or
- the use is required or authorised by law, e.g. subpoena to bring a file to court, search warrant, mandatory report to Child Protection.

## Part Two: Suspension and Expulsion

### Suspension from State schools

- Exclusion from school for a short period of time.
- No more than 10 school days at a time and no more than 20 school days in one school year. Exception if principal is deciding to expel student.
- Kinds of behaviour include violence, danger to other students, disruption, discrimination, bullying, property damage
- Right to be heard and nature of allegations
- School should allow student to explain actions and meet with the parents.
- Consider other options and penalties before suspension.
- Can bring another person to the meeting, eg a lawyer but must not be paid to be there.
- Suspension can be immediate and without conference

### Power to discipline students

- Authority to discipline students for breach of school rules is contained in s2.2.19 of the Education and Training Reform Act 2006 (reforms the Education Act 1958 and others).
- The Principal of a Government school may in accordance with the Education Department's Guidelines for Developing Student Code of Conduct 1994 and Ministerial Order No. 2 Discipline of Pupils suspend or expel a student

### Grounds for suspension

Students while attending school or travelling to and from school or taking part in any school organised activity away from school (including camps) can be suspended if:

- Creates a danger to health and safety of staff, students or others

- Commits serious violence or damage to property
- Steals school property or helps others to do so
- Brings or sells drugs or prohibited substances
- Disobeys clear and reasonable instructions from teacher
- Disturbs others in the school, or prevents others from learning etc
- Discriminates against or harasses others

### Notice to parents/guardians

Written notice must be given within 24 hours, and it must state:

- reasons for suspension;
- school day when suspension should occur; and
- opportunity for them to participate in a suspension conference.

### What If I don't agree with the suspension?

- Student and/parent/s to write to the President of School Council, Regional Director of School Education and then the Victorian Ombudsman.
- Ombudsman can investigate and recommend actions.

### Expulsion from State Schools

- Similar grounds to suspension
- Only the principal can expel a student
- Must be serious behaviour such that suspension is not enough
- The rules of Natural Justice (procedural fairness) apply
- Must give student and parents an opportunity to be heard, ie, a right to explain why not to expel
- Within 24 hours principal must give written notice of expulsion stating reasons why and appeal information

### What if I don't agree with the expulsion?

- 5 days to respond in writing to the school seeking a review of the decision to expel and include reasons for seeking review
- Application forwarded to Expulsion Review Panel. Members are from within and outside the school.
- Panel will hold a hearing within 5 school days after sending the letter. Parents and child can give explanations. A lawyer can be present but must not be paid to be there.
- Panel can confirm expulsion or recommend to Principal to reinstate student at school.
- Appeal by parents or student, if living independently, to Director (or General Manager) of School Education to investigate and determine.
- Director may confirm, uphold or vary the decision.
- Appeal of Director's decision seek legal advice re court.

### Private schools

- Have greater freedom in excluding students as they are not regulated by the government
- Contractual obligations – need to look at terms of contract signed by parents
- Challenges to suspension and expulsion see the school's disciplinary procedures/ code of conduct for any grounds to challenge the decision
- Right to challenge in court? The law is still unclear in this area.
- Principles of administrative law apply re right to a fair hearing and rule against bias
- Complaint to Equal Opportunity Commission in some cases eg racism as a contributing factor



## Part Three: Bullying

### What is bullying?

Defined as a repeated attack, psychological or physical, social or verbal by those in a position of power.

- Direct physical bullying – hitting, tripping
- Direct verbal bullying – name calling, taunting, ostracism
- Indirect bullying – rumors, nasty jokes, stalking, cyber bullying

Bullying is not mutual conflict, social rejection or dislike, or a single act of nastiness

### What can you do?

- Disciplinary action taken by the school eg suspension/expulsion
- Student/Parent can apply for an Intervention Order
- If under 17 years heard in the Melbourne Children's Court
- If over 17 years heard in the local Magistrates' Court
- If physical assault or threat report crime to police
- Civil action for assault and battery (for serious cases only)
- Equal Opportunity Complaint
- Potential complaint against the school – Ombudsman

### Further Information

[www.bullyonline.org](http://www.bullyonline.org)

[www.sofweb.vic.edu.au/wellbeing/safeschools](http://www.sofweb.vic.edu.au/wellbeing/safeschools)

The Student Code of Conduct  
– Directorate of School Education, Victoria

Community Legal Centres  
[www.communitylaw.org.au](http://www.communitylaw.org.au)

Equal Opportunity Commission Victoria  
[www.eoc.vic.gov.au](http://www.eoc.vic.gov.au)

The Ombudsman  
[www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au)

Department of Education, Employment  
and Training,  
[www.sofweb.vic.edu.au](http://www.sofweb.vic.edu.au)

Victorian Institute of Teaching  
[www.vit.vic.edu.au](http://www.vit.vic.edu.au)

Parents Victoria  
[www.parentsvictoria.asn.au](http://www.parentsvictoria.asn.au)

Vic Council of School Organisation  
[www.viccs.org.au](http://www.viccs.org.au)

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# Bullying of Students and Mandatory Reporting of Suspected Child Abuse

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## Duty of Care

Teachers have a 'duty of care' to protect their students from reasonably foreseeable injuries. This does not mean that schools are liable for all injuries that a student suffers at school. As the courts have said, the school does not have to insure against any injuring occurring. The school will only be liable if an injury was **reasonably foreseeable**, and the school has not taken **sufficient care** to prevent it from happening. In other words, when a student suffers injury, there has to be **carelessness** before a teacher or school is found to be in breach of the duty of care.

Where a student alleges a breach of the duty of care, he or she will bring a legal action in **negligence**, and if this is proved, the court can order the school authority to pay monetary compensation to the injured student.

Three cases illustrate this concept of negligence:

In *Crouch v Essex County Council* (1966) 64 LGR 240 A science teacher explained to the class that the experiment they were about to undertake involved using caustic soda and that it is dangerous. Two students who had not been listening squirted that chemical at a 15 year old in the class. The court found that this behaviour was not reasonably foreseeable as "this conduct was little short of lunatic ... the general atmosphere and standard of the class was not such as to make that kind of conduct foreseeable." Accordingly, the school was found **not** to have been negligent.

Contrast this with *NSW v Moss* 2000 NSWCA. A year 10 girl was injured in a dangerous science laboratory experiment which involved extracting

fat from a sausage. The sausage was put into a beaker and heated over a tripod. Methylated spirits was poured into the beaker and then there was an explosion. The student suffered extensive burning to the whole of the face and much of her body. The State of New South Wales admitted liability – i.e. it did not contest the allegation that there had been carelessness in the conduct of the class, and she was awarded \$799,580 damages.

Contrast this with the following case: *The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Farrah Hadbah* [2005] HCA 3115, June 2005

Here the High Court found no breach of the school's duty of care where a Year 3 student was injured when two other students pulled her off a flying fox.

At the time there were four teachers supervising the 540 primary school students. The school had a "no touching" policy and the children had been instructed not to touch anyone on the flying fox, and there had been no misbehaviour on the flying fox in the past. An experienced teacher was supervising the activity, and the accident happened in the brief time when her back was turned.

All these factors suggested that the school had acted with due care. The probability of injury was slight and did not justify the expense and inconvenience of rostering more teachers on playground duty.

## Bullying

The duty of care with regard to bullying is the same as the duty to protect students from any other injuries. It is not a duty to insure against any injury from bullying,

but a duty to take reasonable steps to prevent reasonably foreseeable injury caused by bullying. The following cases, give an indication when the courts will view a school as having been careless. These cases involving one-off incidents of violence, rather than ongoing verbal bullying and harassment.

In the case of *Warren v Haines* (NSW Court of Appeal 1986) a boy who was well known as a bully and was known to operate in a particular part of the playground, injured another student during a break. There were teachers on playground duty, but they did not supervise that part of the playground. The school was found to have been negligent, and the appeal court judges commented that the school had failed to "discipline a troublesome child" and failed to provide adequate supervision of the playground.

## ACT v El-Sheik (2000) Full Fed Court

A "friendly" fight in play ground was stopped after a teacher intervened. After the teacher left the scene, the fight resumed (the play fight became serious) and the plaintiff student suffered a head injury (he was congenitally predisposed to bleeding and bruising.) The trial judge found that the Principal had not been negligent as there was one teacher on duty for every 50 students (i.e. a sufficient number of teachers in the circumstances), and that there was no failure on the part of the teachers to supervise the grounds. The facts suggested that there was no reason to suspect that the fight would resume. The student appealed the decision, but the appeal court concluded that there was no evidence that more supervision would have prevented the fight. As the school had no knowledge of this particular student's predisposition to bruising and bleeding, there was no requirement that the teachers should supervise that boy more carefully.

### Griffin v NSW (2002) NSWCA

Here a student was injured in a pre-arranged fight in a part of the school grounds where it was known that students congregated. As the appeal court commented "The principal's report gives clear impression of the excited expectation amongst the students at the school and their anticipation that the fight would take place. The belief that the fight would occur spread throughout the school and indeed a notice to that effect was placed on the class whiteboard." The court found that the school had been negligent in failing to provide adequate supervision in an area where it was known that students congregate.

Once it is established that it is foreseeable that students might suffer harm unless schools take care, the courts weigh up the following sorts of factors to decide whether sufficient care has, in fact, been taken:

- the probability that the harm would occur if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm – ie. it is too expensive to have most of the staff on duty in the playground, but it is reasonable to have some supervision;
- the age and capacity of the student(s) involved;
- what is known about the behaviour of a particular group or class.
- the common practice in such situations (although the courts can find that the common practice is unsafe)
- the educational worth of the activity that creates the risk of harm.

So whether a court finds that there has been a breach of the duty of care will depend on all the circumstances of the particular case, as the court weighs all these factors to determine whether the teachers' and school's actions have been reasonable.

### Systematic Bullying and the importance of an effective policy

If we consider these factors we can say that, these days, the courts would expect schools to have a bullying and harassment policy, and to ensure that the policy is implemented properly. (The English Court of Appeal has expressed this view in a UK bullying case mentioned below). Furthermore, if it is known that bullying is taking place, the courts would expect a school to be even more vigilant in implementing that policy. But how far does a school have to go? Bullying could be prevented if students were kept locked up under supervision during lunch time, but obviously this is impractical and educationally unsound. So a balance has to be reached to prevent bullying, whilst still allowing the school's programs to be carried out. In the case of *Hadba* mentioned above (injury on the flying fox) the High Court commented that it is not reasonable to observe children 'every single moment of time' as this retards the development of responsibility in children and is 'damaging to teacher-pupil relationships by removing even the slightest element of trust'.

However, the case of *Eskinazi v State of Victoria* (County Court Melbourne, No.06471 of 1999, unreported) provides an example of where there was insufficient action taken by a school to prevent bullying.

This student succeeded in her negligence claim against the State of Victoria in connection with bullying at a secondary school during years 7 and 8. The article on this case, by Doug Stewart, which has been included in your conference material sets out the details of the verbal and physical abuse she suffered before leaving school in August of her year 8. The article points out that, when the bullying began, the girl was reluctant to tell anyone about it – teachers or parents. Once she told her parents, the matter was taken up with the school welfare co-ordinator, the year 8 co-ordinator and the Principal, but none of these took adequate steps

to deal with the problem. All three were found by the court to have been in breach of their duty of care. (See pp. 81-82 for details of their failure to deal with the problem).

The school had a detailed and fine-sounding bullying policy, and Doug Stewart's article should be read carefully, as the case demonstrates how a policy is useless unless it is accompanied by a thorough program of implementation, which includes investigation of complaints and remedial action. Elements of the program should include:

- publicizing the policy
- working through relevant issues with students
- Staff development so that the policy can be implemented effectively;
- a confidential complaints system in which students have confidence;
- A process for dealing with bullying complaints including recording complaints and the responses made by staff, and monitoring the progress of the bullied student;
- Monitoring the success of the program.

If a school has an effective policy, it will be more difficult for a court to find that the duty of care has been breached, as a contrast between *Eskinazi* and the following English case demonstrates.

In *Bradford-Smart v West Sussex County Council* [2002] EWCA CIV 7 (23 January 2002), a female secondary student alleged psychiatric injury as a result of systematic bullying over a three year period whilst attending her local school. The court found that she had suffered psychiatric injury, but this was caused by bullying at home and outside the school, rather than while she was at school. The court found that the school had taken reasonable steps to safeguard the student while she was at school, most importantly by having an effective anti-bullying policy in place. The court also found that the girl's

teacher's defensive actions prevented bullying whilst she was at school.

There have a number of English cases involving on-going bullying. Some have been successful, while others have failed where it could not be shown that the school's failure to act was responsible for the student's injuries<sup>1</sup>.

The Victorian Department of Education Employment and Training guidelines on bullying *Safe Schools are Effective Schools* is a useful document to help develop a program ([www.sofweb.vic.edu.au/wellbeing/safeschools/bullying/index.htm](http://www.sofweb.vic.edu.au/wellbeing/safeschools/bullying/index.htm))

## Liability of Teachers

While teachers will sometimes be named in a negligence action, any award for compensation will be made against the school authority (the education department or the relevant independent or Catholic school). Injured students will normally pursue their case against the school authority, as it is known that they have the financial capacity to pay any compensation ordered by the courts. A large number of education cases are settled out of court. However, any teacher caught up in a bullying case should contact their union for legal assistance to ensure that their interest will be looked after. A teacher, along with the school authority, can still be named as one of the defendants in a case. More importantly, there are potential negative consequences for a teachers employment, mentioned below.

## Bullying beyond the school gate

What should schools do when they learn about a student being bullied outside school? Normally, the duty of care ends when students leave school. However, there have been several personal injuries cases where the courts have extend the duty of

care well beyond the school gate. In one case the court found that a primary school should have provided supervision of a bus stop which was 300 metres from the school.

In the NSW case *Graham v NSW* (2002) the Court Appeal found that the duty ends at school gate except in exceptional circumstances (Here the court found that the school's duty of care did not extend to escorting home a girl with poor eyesight. The girl had been injured on her way home). So the courts have indicated that the duty can extend beyond the school gate courts, but have declined to indicate just how far from the school gate the duty extends, and in what sort of circumstances. In the light of cases involving child abuse discussed below, it is possible that the courts could find that schools should act in response to known bullying, particularly where its own students are the instigators. For example, if a teacher heard that a group was planning to "get" a student on Saturday, it is easy to imagine a court finding that the teacher should warn the student and parents. The English Court of Appeal in the case mentioned above suggested that in exceptional circumstances the duty to prevent bullying will go beyond the school gate. Accordingly, schools should liaise with parents to deal with known bullying outside the school. If the parents are unwilling to deal with it, it may be a matter for mandatory reporting.

## Mandatory Reporting of Suspected Child Abuse

Teachers, like doctors and nurses, are required to report cases where, during the course of their work as a teacher, they have reasonable grounds for suspecting child physical or sexual abuse, and that the child's parents are unlikely to protect the child from the abuse. They do not have to provide proof of abuse, just reasonable grounds for suspecting abuse. This obligation is contained in the *Children and Young Person Act*, and from October 2006 will be contained in the *Children, Youth and Families*

*Act (Vic) 2005* (see sections 162 ( c), (d), s.184, s.186, s.189, s190, 191).

Each new suspected incident should be reported. A child for the purposes of mandatory reporting is someone under 17 years of age.

## What to do?

It is not your role to investigate the matter further, just to report it to the Department of Human Services. It will be helpful to discuss the matter with the staff member at your school who is responsible for dealing such matters. The school can then report the matter to the DHS.

If you are not satisfied that the school has taken the matter seriously, you should contact DHS yourself directly, as the duty has been imposed on the individual teacher who has reasonable grounds for suspecting abuse, rather than on the school. Failure to report where you have reasonable grounds could result in a fine. Reports should be made to the relevant regional office of DHS (e.g. the Western Region Office if you are in the western suburbs).

## Confidentiality

Your name will not be revealed as the person who has reported the suspected abuse, and you cannot be sued if your report was made in good faith and on reasonable grounds. If the matter goes to court, your name might be revealed, and you might be called as a witness. The DHS website, which has a lot of helpful information on this matter, advises that 'At the time of writing it is not general practice for the Children's Court to seek information regarding identification of the notifier' ([www.office-for-children.vic.gov.au](http://www.office-for-children.vic.gov.au)).

## Reporting and the Duty of care

*AB v Victoria* (2000) was an unreported decision of the Victorian Supreme Court in which the school was found to have been in breach of its duty of care when it failed to act where there was evidence that a child was being sexually abused. Here

<sup>1</sup> See Hay-Mackenzie, Frances, "Tackling the Bullies: In the Classroom and in the Staffroom" *Australia and New Zealand Journal of Law and Education* Vol 7. No.2, 2002 pp87-140.

the primary school child's behaviour, which included drawing sexually explicit pictures, suggested she was being sexually abused at home. The abuse occurred before the mandatory reporting provisions were introduced. The court ordered monetary compensation for the former student.

In the light of this case, and the English case mentioned earlier, it could also be part of the school's duty of care to take some action in regard to suspected cases of bullying, or emotional abuse, which occur outside the school. However, at the moment, there is no clear decision from a court indicating this.

## Duty as an employee

Where teachers have received training in mandatory reporting, or the obligation has been brought to their attention by the employer, a failure of a teacher to report suspected child abuse can also amount to a breach of the teacher's contract of employment<sup>2</sup>.

Similarly, very careless behaviour which breaches the duty of care can also amount to a breach of the contract of employment, with possible adverse effects on a teacher's employment. It is an implied term of the teacher's contract that they will act professionally and exercise reasonable care and skill in carrying out their duties.

## VIT Registration

If a teacher's conduct has been extremely careless, they could become the subject of a Victorian Institute of Teaching disciplinary enquiry into whether the teacher's behaviour amounts to serious misconduct, or serious incompetence, or whether the teacher is unfit to teach. In extreme cases, a finding against the teacher can result in de-registration.

<sup>2</sup> For a finding on this point see *EM v St Barbara's Parish School* South Australian Industrial relations Commission 1 (19 January 2006)

## Information and Useful Resources

Hopkins, Drew *Teachers Students and the Law* 2<sup>nd</sup> National edition, Victoria Law Foundation [www.victorialaw.org.au](http://www.victorialaw.org.au) (to order telephone 03 – 5625 3756)

Edwards, J., Knott, A. & Riley, D., *Australian Schools and the Law*, 1997, LBC Information Services, Sydney.

Ramsay, I. & Shorten, A., *Education and the Law*, 1996, Butterworths, Sydney.

*School Principals Legal Guide*, CCH Australia Ltd, Sydney. [www.cch.com.au](http://www.cch.com.au) (CCH publishes a OH & S guide also)

*Education Law Notes* published by Emil Ford & Co – Lawyers (Sydney) [www.emilford.com.au](http://www.emilford.com.au) This Sydney law firm publishes a useful newsletter on education law.

Stewart, D. & Knott, A., *Schools, Courts and the Law: Managing student welfare*, 2002, Prentice Hall, Sydney.

ANZELA (Australia and New Zealand Education Law Association)

ANZELA publishes the *Australia and New Zealand Journal of Law and Education* and holds an annual conference on law and education.

ANZELA Membership Administrator, Suite 154, 236 Hippodrome, Loganholme, Queensland 4129

Bullying *National Safe Schools Framework*, Student Learning and Support Services Taskforce. [www.mceetya.edu.au/pdf/natsafeschools.pdf](http://www.mceetya.edu.au/pdf/natsafeschools.pdf)

*Implementation Manual for the National Safe Schools Framework*, 2003, Australian Government Department of Education, Science and Training. [www.dest.gov.au/schools/publications/2004/NSSF/implementationmanual.pdf](http://www.dest.gov.au/schools/publications/2004/NSSF/implementationmanual.pdf)

*Resource Pack for the National Safe Schools Framework*, 2003, Australian Government Department of Education, Science and Training. [www.dest.gov.au/schools/publications/2004/NSSF/resourcepack.pdf](http://www.dest.gov.au/schools/publications/2004/NSSF/resourcepack.pdf)

*Safe Schools are Effective Schools* (Victorian Department of Education Employment and Training guidelines on bullying) [www.sofweb.vic.edu.au/wellbeing/safeschools/bullying/index.htm](http://www.sofweb.vic.edu.au/wellbeing/safeschools/bullying/index.htm)

# Teachers have rights too

Tim Wall  
Education Union Representative

'Workplace bullying is repeated, unreasonable behaviour directed towards an employee, or group of employees that creates a risk to health and safety'.

*WorkSafe Victoria*

'Outright racism of the past is now hidden behind less obvious work-based behaviour that constitutes bullying.'

*Duncan Lewis*

*5th International Bullying Conference, Dublin*

## Bullying should not be tolerated

- OH&S Act 2004 defines "Health" to include "psychological health"
- Prevention of Bullying and Violence at Work Guidance Note 2003 WorkSafe Victoria
- AEU "Your Rights to a Safe Workplace" Booklet 2006
- Department of Education and Training (DE'T) Organisational and Health Initiatives

## Prevention is the key

### 1. Policies:

Contemporary policies and procedures, including codes of behaviour covering:

#### Students

Parents and other members of community

#### Staff

A "no bullying" policy should be developed and regularly revised.

It is the principal's responsibility to ensure they are developed, implemented and enforced

### 2. Structures

- Elected and trained HSR/s
- OHS Committee
- Consultative Committee (VGSA)

### Reporting

*"Some will support bullies because the alternative is to risk being bullied"*

Schools should establish a working environment which encourages effective and supportive reporting mechanisms

This cannot occur without management support

Incident Report forms are available from the AEU

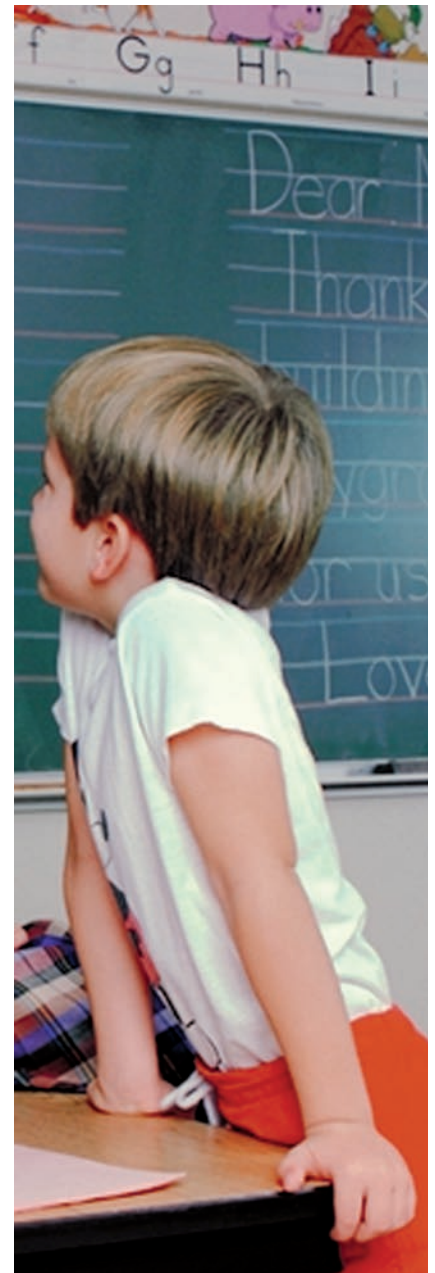
### Support for teachers

1. Schools should:

- Respond to bullying incidents effectively and appropriately.
- Plan for resolution at the earliest opportunity.
- Investigate incidents and modify prevention strategies accordingly

2. WorkCover provides an avenue for:

- Formal Complaint
- Compensation



## Further assistance

AEU membership Services Unit  
(03) 9417 2822  
1800 013 379 (toll free)

DE'T Employee Assistance Program  
1300 361 008

WorkCover Advisory Service  
(03) 9641 1444  
1800 136 089 (toll free)  
(Interpreters in all languages available)

The AEU continues to work closely with WorkSafe and DE'T primarily to ensure the employer is meeting its legal obligation to make certain that schools are as far as possible free of psychological risk.

# Report on the 'Racism in Schools' Pilot Project

Marika Dias  
Principal Lawyer, Western Suburbs Legal Service

In Term 4 of 2004 the Western Suburbs Legal Service (WSLS) conducted a 'Racism in Schools' Project as a pilot at a local secondary college. This project came about as a direct response to the experiences of our staff when conducting legal education sessions in secondary schools in the western suburbs of Melbourne. These experiences prompted serious concerns regarding the levels of racism overtly expressed by secondary aged students and the apparent lack of awareness amongst students of racial discrimination and social issues around racism.

Discussions with teaching staff during these sessions suggested that there was a lack of material on racial discrimination and racism in existing school curricula. It was therefore agreed that WSLS would include some material on racial discrimination within our legal education activities for secondary students. After that, we also had discussions with Year 10 students doing the Studies of Society and Environment (SOSE) subject at a particular secondary school. The students told us that they felt that they lacked knowledge about racism and the relevant law and that they were willing to be involved in a pilot project we were contemplating.

The project outline was designed after consultation with the teacher and students and incorporated relevant research. It was decided that there would be 4 sessions, reflecting what we could realistically hope to tackle, the interest levels of the students, other work to be covered in the subject etc.

The SOSE class was conducted for 2 double periods each week. The pilot project was allocated one double period each week, which left another session for the class teacher to do follow-up work or preparation.

Three sessions covered issues around racism and the legal framework, via the presentation of materials and group activities. The final session was focussed on an overall evaluation of the pilot project. WSLS tried to develop activities that were suited to

students aged 14-15 years old, using relevant music, films, scenarios etc.

As a result of the pilot project, in 2005 WSLS produced a training kit that may be used to replicate the project in other schools. We are currently exploring the possibility of conducting the project in more schools in our local area.

The project was run approximately half-way through Term 4 in 2004 over four consecutive weeks. Our original plan had been to have a week's break after two sessions to give the students greater time to prepare their role plays. This was prevented by time constraints relating to impending exams and the end of the school year. On the other hand, it was beneficial to run the project later in the year as the class teacher had worked with the students all year and was able to give the presenters detailed information about topics the class had already covered and the types of activities that particular group of students would respond well to.

## Outline of the project

### Week 1 – Consciousness Raising

Introduction of the project

Definition of racism

- Hypothetical situations addressing racial stereotypes. 10-20 different scenarios to be answered by small groups. Scenarios to be based on sport, music, movies, schoolyard etc

- Discussion regarding what cultural and social factors shape what we define as racist behaviour
- Use of comics, music, song lyrics, movie clip etc to highlight racist comment
- Discussion of various song lyrics

Why does racism happen?

- Hierarchy exercise – putting people in a social hierarchy based on personal characteristics eg occupation, age, gender, race etc and watching the hierarchy change
- Stereotyping – discuss the treatment of individuals and groups according to specific characteristics

Shaping the mock trial/role plays

Students to think of fact scenarios

Students to choose whether to role play an incident and/or mock trial to determine whether racial discrimination had occurred

### Week 2 – Legal Framework

Review of previous week

- How did students feel in the hierarchy exercise last week?
- How did students feel about the music lyrics?

Sharing experiences

- Small group discussions about own experiences of racism (being racist towards others and having experienced racism towards self)
- Discussing expectations of the laws that exists – sharing this with the larger group
- Identifying the difference between racial discrimination and racial vilification

Perceptions

- Students are asked to write down the first word that comes to mind when looking at a range of objects – the activity is designed to highlight variations in perception

Definitions

- Defining terms such as race, discrimination, direct discrimination and indirect discrimination

#### Relevant Law

- Australian Law
    - Equal Opportunity Act (Vic) definitions of racial discrimination, direct and indirect discrimination
    - Racial and Religious Tolerance Act (Vic)
    - Racial Discrimination Act (Commonwealth)
  - International obligations
- Whole group discussion of the law
- Compare expectations with the actual law
  - What can be done to change this? Suggestions for change, community campaigns etc
  - Making a complaint
    - legal processes

#### Exemptions within the Law

- Look at exemptions which allow discrimination in some cases eg provision of charitable benefits, pensions, women-only fitness centres, clubs, schools etc

#### Discussions about mock trial/role plays

- Students to volunteer to take roles

#### Racial discrimination in film

- Looking at excerpt from film showing segregation and racism. Discuss with respect to attitudes and whether racial discrimination has occurred according to the legislation

### **Week 3 – Role Play and Mock Hearing**

#### Role plays

- Students to present role plays to the class in small groups of 4-6 students
- Class to discuss whether racial discrimination has occurred. Would it amount to discrimination in a legal sense? Would any exceptions apply?

#### Debriefing

- General and/or small group discussion regarding outcomes and desirability of outcomes

Short discussion of project evaluation to be carried out in final session

### **Week 4 – Evaluation**

#### Labelling

- Students to move to different areas in the room according to nominated physical characteristics such as eye colour, hair colour etc
- Discussion around the ease of labelling based on first appearance

#### Role of Media

- Looking at newspaper articles around racism

#### Evaluation

- The students completed two evaluation forms. The first was a multiple choice questionnaire containing questions on the material that had been presented and their understanding of that material. The second form related to the project and its presentation.
- Final discussion and comments.

The students provided important feedback on the project that will be incorporated into the program outline for future use. The school and teacher have indicated a willingness to be involved in further sessions in the future. In discussions with staff, issues were raised around the importance of having outside presenters who were conversant with legal processes to ensure that the material was delivered reliably.

Generally speaking the project was very successful. The students engaged with the topic in a very mature manner, more so than had been expected. This was particularly evident in their presentations and role plays. At the outset students expressed that they had little understanding and experiences of racism. Their role plays, however, indicated the opposite. Students developed very realistic scenarios and engaged in serious discussion around the limitations of the law in dealing with the issues raised in each role play.

### **What next?**

Having conducted the pilot project, in 2005 the WSLS received funding to produce a training kit based on the project content and outcomes. Now that the training kit has been developed, WSLS is eager to expand the project to include many more schools. To this end we are currently liaising with local schools and we are hopeful that this will lead to the project be taken up on a much wider basis.

# Facilitating Student Advocacy

David Mould  
Director, Second Strike

**This presentation looks at the challenge of just how do you make students work for an anti-bullying or anti-discrimination campaign instead of against it?**

It is of course a trick question because the answer is, '*you don't!*'

You *ask* students to *lead* an anti-bullying or anti-discrimination campaign.

The most successful influences on students are either the assertion of control from above or the cultivation of an attitude between people who have a mutual respect. The first works in the short term but not the long term, the second works in the long term but not always the short. Individual students and individual teachers often have the ability to create this attitude easily, but as a united group the student body easily has the greater potential than the teaching staff.

Ultimately we want students to believe that any kind of discrimination is something they simply choose not to do rather than something they feel they must not because others consider it unacceptable.

Through case examples of student bodies' attempts at tackling a culture of aggressive domination and exclusion in their school, in a variety of different socio-economic and cultural backgrounds, this presentation will seek to leave the participants with a list of practical ideas to encourage and support students to deal with the issues at hand.

Several schools have already left the challenge in the hands of students. Whilst not all have risen

to the challenge some very creative solutions have been brokered with some incredible results as well as some pretty decent failures.

Two things become immediately apparent. The first is that changing the culture of a school takes time. A long time. Not just months but years. The second is that many ideas will fail, because students are not paid professional experts. But so what? Teachers' efforts frequently fail too and they *are* paid professionals. The project must be one of patience as well as commitment.

Also intended for discussion are the questions:

- What role does the teacher play in this then?
- Is the Student Representative Council (or equivalent body) the best suited to tackle this project?
- What makes a genuine difference and what will just get sneered at?
- How can we make sure this reaches all students in the school, especially the ones who really need it?





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