

Bullying, the Law and You Challenges for the Future

(the current landscape with particular reference to schools)

Presentation By

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Outline of Today's Discussion

- ▶ Today I am going to discuss:
 - What is bullying?
 - Prevalence of bullying in Australia;
 - Common effects of bullying upon individuals;
- ▶ Much of this will be well known to this audience, so I will deal with these matters very briefly.

- ▶ I will outline Federal and State law that affects bullying and current proposals for change, both in Australia and elsewhere;
- ▶ I will discuss the duties of teachers, schools and employers, who become aware of bullying between students or employees;
- ▶ I will then discuss the civil law as it affects bullying and the duty of employers, teachers and in the case of children, parents or carers;
- ▶ Finally, I will talk about methods of dealing with bullying and some developments in Australia in that regard.

My Personal Involvement

- ▶ Before doing that I will tell you something about my own involvement in the area of bullying and why I am interested in the area;
- ▶ I will also talk about my association with the Alannah & Madeline Foundation and the National Centre against Bullying;
- ▶ A particular area that concerns me is the connection between family violence and bullying, which I saw so often at the Family Court.
- ▶ For these reasons, in 2002, when I was still Chief Justice of the Family Court, I accepted the position of chair of the NCAB, which was in the course of being set up by AMF and have chaired it ever since

Alannah & Madeline Foundation (AMF) <http://www.amf.org.au/>

- ▶ AMF was set up to prevent violence against children following the Port Arthur tragedy in 1996 at the instance of Walter Mikac, the father of Alannah and Madeline, two young schoolgirls who were murdered at Port Arthur.
- ▶ Its many activities include an active role in bullying prevention, which I will discuss at the end of this presentation

The National Centre against Bullying (NCAB)

<http://www.ncab.org.au/>

- ▶ NCAB is a group of experts from all over Australia advising and informing on the issues of bullying and the creation of safe schools and communities.
- ▶ NCAB works closely with school communities, governments and industry in addressing bullying issues.
- ▶ NCAB's Biennial Conference will be held in Melbourne on 6-7 August. The conference will feature presentations and workshops from speakers from Australia and overseas.

What is Bullying

(AMF and NCAB definition)

- ▶ *“Bullying is when someone or a group of people with more power repeatedly and intentionally causes hurt or harm to another person or group of people who feel helpless to respond. Bullying can continue over time, is often hidden from adults and will probably continue if no action is taken”*

- ▶ This is not a legal definition because bullying has not been defined by the law in Australia except in a recent amendment to the Fair Work Act in relation to workplace bullying;
- ▶ However where it has been legally defined in other countries, the definition closely follows this one;
- ▶ It is also generally accepted within the education community and relevant academic publications in Australia;

Prevalence of Bullying in Australia

- ▶ 27 per cent of young people report they are bullied every two weeks or more often.
- ▶ Cyber-bullying happens to about 1 in 10 Australian young people every few weeks or more often.

Common Effects of Bullying on Individuals

- ▶ Bullying can seriously damage physical, social and emotional health, often on a permanent basis and blight people's lives.
- ▶ There is strong evidence of a connection between bullying and suicide.

A Generational Problem

- ▶ Bullying is an intra and inter-generational phenomenon, with children who bully others at the age of 14 years likely to still engage in aggression at the age of 32 years and to have children who themselves engage in bullying and aggression

Connection between Bullying and later criminal behaviour

- ▶ Not all children who bully are on the trajectory that leads to violence and criminality later in life. But of all children, these are the ones most at risk for eventually committing violent crimes.

- ▶ A Swedish study found 60 per cent of the boys labelled as 'bullies' in Years 6-9 (aged 13 to 16) had at least one criminal conviction by the age of 24. Former school bullies were four times more likely than other students to engage in relatively serious crime.

Types of Bullying

- ▶ Physical bullying, either involving an assault or threat of it
- ▶ Verbal bullying, including name calling, insults, teasing, intimidation, homophobic or racist remarks, or verbal abuse.
- ▶ Covert bullying, designed to harm someone's social reputation and/or cause humiliation.
- ▶ Cyberbullying is overt or covert bullying behaviour using digital technologies;

Bullying and the Law

- ▶ It is important to understand that bullying is not a criminal offence or a civil wrong in Australia
- ▶ This is important because it means that the criminal law only provides a limited or no response to certain types of bullying and the civil law has to be adapted to do so.
- ▶ However many types of bullying can be criminal offences depending on the circumstances and may also attract civil liability for damages.

New Commonwealth Workplace Bullying Legislation

- ▶ One exception to the lack of legal definition of bullying is that from 1 January 2014 anti-bullying amendments to the Fair Work Act came into effect.
- ▶ These allow a worker to apply to the Fair Work Commission for an order to stop the bullying.
- ▶ Applications must be dealt with within 14 days and if successful and orders are made, breach can lead to penalties of up to \$10,000 for individuals and \$50,000 for corporations.
- ▶ This has particular relevance to teachers who may be targets of bullying, but also to workers generally.

Applicability

- ▶ The Fair Work Act does not cover State public sector employees or local government employees in NSW, Queensland WA and SA.
- ▶ State public sector employees in Tasmania.
- ▶ It does cover all employees in Victoria, NT and ACT.
- ▶ All private sector employment in NSW, Queensland and SA.
- ▶ All private sector and local government employment in Tasmania.

State and Territory Laws

These consist of :

- ▶ Laws against assault and like offences cover serious physical bullying and death threats and threats of violence, although in practice they do not operate effectively unless the police consider the offences serious enough to warrant action.
- ▶ Provisions tacked on to stalking laws cover most forms of bullying and harassment involving following and besetting type offences. Some of these offences can be difficult to prove.

Brodie's Law

Victoria only

- ▶ *Brodie's Law* makes serious bullying, in Victoria a criminal offence by extending the application of the stalking provisions in the Crimes Act 1958 to include a range of behaviour that involves serious bullying. The offence carries a maximum penalty of 10 years imprisonment.
- ▶ Although desirable legislation, it has limited value on its own, because police are reluctant to use it for other than serious offences.

Commonwealth Law

- ▶ This is Australia wide law that is important in the areas of sexting and cyber-bullying and any bullying activity that involves use of communication services;
- ▶ It is an offence to use a carriage service, which includes internet and phone services "In a way that reasonable persons would regard as being menacing harassing or offensive" and carries a penalty of up to three years imprisonment;

Threats, including threats to kill using carriage services under Commonwealth Law

- ▶ Threats to do serious harm carry up to seven years imprisonment and to kill, ten years if made over a carriage service.
- ▶ Importantly these offences can only be established if it can be proved that the perpetrator intended the victim to fear that they would be carried out, which is quite difficult to prove.

Age Limitations on prosecuting offences under Commonwealth, State and Territory Law

- ▶ A child under 10 cannot be prosecuted for any criminal offence.
- ▶ A child between 10 and 14 can only be prosecuted if it can be proved beyond reasonable doubt that they understood the nature of the offence that they were committing and knew that it was wrong.

Laws against bullying overseas

- ▶ Proposed New Zealand legislation will introduce an offence of up to three months imprisonment for cyber-bullying covering adults and children.
- ▶ The legislation also provides for an offence of inciting a person to suicide, **whether or not the suicide takes place.**
- ▶ Five Canadian Provinces and many US States have introduced laws against cyber-bullying.

Future Developments in Australia

- ▶ The Federal Government has recently rejected a proposal to create cyber-bullying a criminal offence, saying that the existing law is sufficient.
- ▶ This is a surprising conclusion considering that the existing law is largely unknown and unintelligible to most people, including children.
- ▶ This is particularly dangerous since they frequently break the law without knowing it.

New Federal Government proposals

- ▶ It has agreed to appoint an e-commissioner with powers to make immediate take down orders of offensive material on the internet relating to children **but not adults**.
- ▶ It proposes a regime where fines will be paid if takedown orders are not complied with but no criminal penalties will apply

- ▶ In 2013, AMF and NCAB held a Symposium in Melbourne for over 100 people which included leading legal and academic experts on bullying.
- ▶ It unanimously recommended that a lower range offence of bullying should be created to make it clear that bullying is unacceptable conduct in a modern society.
- ▶ This recommendation has been largely rejected by Governments.
- ▶ Meanwhile, bullying continues unchecked and unabated with limited effective legal sanctions.

Civil Law and Bullying

- ▶ So far I have discussed criminal law but civil law is also important.
- ▶ Civil law operates to give persons who have suffered injury or damage a right to seek damages and/or a right to obtain orders that the conduct complained of cease.
- ▶ In the case of bullying the most important category under which these rights arise is the law of negligence.

Negligence, Assault and Defamation

- ▶ Negligence is a failure to take reasonable care for the safety of persons to whom a duty of care is owed.
- ▶ If it is breached by a failure to take reasonable care and someone suffers personal injury or damage to property then they have a right to claim damages.
- ▶ Assaults can be physical or threatened and also gives rise to an action for damages as well as criminal remedies.
- ▶ The law of defamation may also be relevant in some cases.

Negligence in a school or workplace environment

- ▶ The most important aspect of the law of negligence in this regards is the duty of care owed by teachers and school authorities to pupils and management and proprietors to employees.
- ▶ The law is clear that teachers and schools owe a duty of care to their students and employers to their workers to take reasonable care for their safety.

The extent of the duty of care to control bullying

- ▶ In the case of schools and employers such a duty is clearly owed in respect of injury occurring on the premises and in relation to school or workplace activity outside the premises.
- ▶ Usually the duty ends at the school or workplace gates or immediately outside them.

The limits of the duty to control bullying

- ▶ However given the modern development of cyber-bullying it may well be that the school or employer has a duty to control it if perpetrated by students or employees at other times;
- ▶ This duty probably only arises if the perpetrators are fellow students or employees and the school, or employer is, or ought to have been, aware of the problem and takes no action;
- ▶ Employers may have a similar duty to protect employees from sexual harassment or assault from fellow employees away from the workplace in certain circumstances.

Teachers

- ▶ Teachers owe a personal duty of care to protect students from bullying and may be defendants in actions for damages brought by students. Arguably, this is a 24 hour obligation
- ▶ Teachers may themselves be victims of bullying by superiors, fellow teachers, parents and increasingly by students themselves, particularly by cyber-bullying and have similar remedies at law.
- ▶ The primary duty to take reasonable care to protect them lies with their employer in the same way as other employees, but the others mentioned may also be liable.

The duty of parents or carers

- ▶ Parents and carers owe a similar duty to take reasonable care to prevent their children causing injury to others;
- ▶ The law is not clear as to the extent of this duty and remains to be tested. However there can be little doubt that parents who either encourage their children to bully others or upon becoming aware of it do nothing to stop it, could be held liable in damages;
- ▶ At least one Canadian Province has legislated to make parents or carers directly responsible for bullying carried out by children under their care.

Deficiencies in Australian Law

- ▶ No specific law against bullying;
- ▶ Many forms of bullying such as verbal abuse, name calling and exclusion are unaffected by the law unless electronic means are used.
- ▶ Lack of uniformity in State and Territory law makes cross boundary prosecution for cyber offences difficult;
- ▶ Commonwealth law is deficient in many ways;
- ▶ Existing laws relating to bullying are largely unintelligible to young people and others;
- ▶ Civil remedies are slow and expensive;

What do you as professionals do to handle bullying?

- ▶ Recognise that the existing law provides very limited solutions except in cases of very serious bullying.
- ▶ Know the law and inform students and employees that may inadvertently commit serious offences when using electronic systems.
- ▶ Try to bring about attitudinal change to the school or workplace community in order to gain recognition for the problems caused by bullying.

- ▶ Take immediate steps to counter bullying when you become aware of it. Too many teachers and others in authority ignore genuine cries for help.
- ▶ Assuming that your schools all have anti-bullying policies, take steps to ensure that they are being implemented by means such as:
 - ▶ Appointing a standing committee consisting of staff and students meeting regularly to examine them and suggest ways in which they might be better implemented;
 - ▶ Enabling students who have been bullied to approach staff in confidence;
 - ▶ Developing programmes to give students an appreciation of differences such as race, colour, religious persuasion and sexual preference as part of normal society;

Possible Scenario's

- ▶ 1. A student complains that he is receiving offensive e-mails that he believes come from classmates. As his teacher:
 - (a) what are your obligations?
 - (b) what action should you take and how do you go about it?
- 2. As Principal you become aware that one of your students is distributing erotic videos of himself and a female fellow student to classmates and others. What should you do?
 - (a) Discipline the student concerned? Does the fact that she consented to the distribution or did not consent affect the matter?
 - (b) Inform the parents of both students?
 - (c) Call the police?

Scenarios (cont)

- ▶ 3. As a teacher you discover that some of your students have set up a Facebook page falsely accusing you of sexual molestation of your students, bullying and other offensive conduct. What do you do?
 - (a) request Facebook to take it down.
 - (b) report the matter to your principal and/or the police.
 - (c) Take any and what legal action?
- ▶ 4. You are the subject of continual unfair criticism, insulting comments and reflections on your religion by your immediate superior. What do you do?
 - (a) Complain to your union/professional association
 - (b) Consult your solicitors and instruct them to take up the matter with your employer.
 - (c) Make an application to the Fair Work Commission

Scenarios (Cont)

You as principal (manager) receive a complaint from parents that they have made repeated complaints to teachers (middle management) and nothing has been done. They indicate that they propose to sue you personally and the organisation for negligence.

What do you do?

- (a) **Make inquiries of teachers (managers) and staff as to why the complaints were not dealt with.**
- (b) **Notify the insurers.**
- (c) **Talk to your solicitor**
- (d) **Conduct a roundtable discussion with relevant participants in an attempt to resolve the matter.**
- (e) **Other suggestions?**

Anti Bullying Programmes

- ▶ These can provide considerable assistance in dealing with bullying if carefully chosen and applied;
- ▶ There are many programmes available but not all are appropriate to or designed for Australian conditions;
- ▶ Anti-bullying policies are only useful if actively pursued and understood by all in the school or organisation;

eSmart - an initiative of the Alannah and Madeline Foundation and NCAB

- ▶ For some years we have been working on a method to bring about attitudinal change to bullying;
- ▶ We eventually devised a programme which is not intended to be an anti-bullying programme as such, but which is intended to help schools, parents and other organisations select or develop their own anti-bullying programmes;

What is eSmart in schools?

eSmart is a system to help schools reduce bullying and cyber-bullying and to promote cyber-safety.

Once registered with eSmart, schools are supported to:

- ▶ create their own plans, policies and procedures;
- ▶ access the latest resources, tools and information;
- ▶ and record, track and report on their progress in becoming eSmart.

Evaluation of eSmart Schools

- Conducted by a consortium led by the Foundation for Young Australians
- Data collected over two years, consisting qualitative and quantitative data
- In the first wave of data, over 4,000 surveys were completed: students (2,313), teachers (1,485), eSmart coordinators (345) and principals (175)

Reason for Participating, according to principals

- Over 95% needed a whole schools approach to cyber-safety
- Almost 90% wanted to help teachers understand the way young people are using ICT
- Over 85% needed a structure to address issues of cyber-safety, cyber-bullying and bullying
- Over 80% hoped to better manage cyber-safety incidents

Evaluation of eSmart schools

▶ Satisfaction with eSmart

- 90% principals are satisfied with the eSmart Schools online system and framework
- 80% principals believe that eSmart Schools is effective in changing school culture in relation to cyber-safety, technology use and bullying

Benefits of eSmart

- 90% of principals surveyed agree that eSmart assists schools to:
 - Embed smart, safe and responsible online behaviours across the curriculum,
 - Improve teacher, student and parent understanding of expected online behaviours,
 - Develop better cyber-safety policies and procedures, and
 - Improve awareness and management of online incidents

Availability of eSmart

eSmart is available to all Australian schools. The Queensland and Victorian State governments have committed to rolling out eSmart in all Queensland and Victorian state schools over the next three years at no cost to those schools.

Cost of eSmart

eSmart Schools

- \$3,850 per school total over 4 years
- Covers the framework, plus all training, support, resources etc;
- Cost borne by the school, not parents;
- Victorian Government invested \$10M to roll out smart in every Government school in Victoria plus 300 Catholic and independent schools in low SES areas.

eSmart Libraries

- Funded by \$8M investment over 8 years by Telstra;
- Commenced July 2013 and already in one in three libraries in Australia at no cost to libraries or consumers;

Creating an eSmart Australia

eSmart Schools	➔	In over 1800 schools across Australia
eSmart Libraries	➔	110 pilot libraries and funding for all 1500 public libraries in Australia
eSmart Homes	➔	In development
eSmart Workplaces	➔	In development

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