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UNLAWFUL BEHAVIOUR: Students & Teachers

What would you imagine a “safe” school environment to be like? This question might conjure up a fantasy world where no child falls off the monkey bars and breaks their arm, eats a peanut-ridden cake resulting in anaphylactic shock, tries some marijuana brought to school by one of the “cool” kids in class or becomes the target of a teacher’s fetish for indecent photos of children. A safe school environment would be bliss, but is it an unattainable fantasy?

The law recognises that school authorities and school teachers have a duty of care to ensure their students are not placed in risky situations that could cause them harm while at school. This article explores some of the unlawful behaviours that students and teachers might engage in which can place the school community at risk. Addressing these issues can bring our schools that little bit closer to being “safe”.

THE RIGHTS OF A CHILD

The United Nations General Assembly in 1959 adopted the *Declaration of the Rights of the Child*, which states: “the child by reason of his physical and

mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”. Australia has signed the *United Nations Convention on the Rights of the Child (Convention)* and although the Convention has not been incorporated in state or commonwealth law at present, Australia supports the rights of children stated within it.

In recognition of these fundamental rights and the obligation to exercise a duty of care, schools must avoid foreseeable risks and take practical measures to avoid any risks or dangers to staff, students and third parties.

A duty of care arises where two parties are in a relationship of “proximity” where the negligent acts or omissions of one party can have a detrimental effect on the other.

There are particular situations in which certain relationships give rise to higher levels of responsibility. The relationship between students and school authorities and teachers falls into this category of special relationship.



ARTICLE

The duty is for teachers and school authorities to take reasonable care to ensure that students are not placed at an unnecessary risk of injury. School authorities and teachers are characterised as being in a position of control and students as being in a position of vulnerability. The High Court in *Commonwealth v Introvigne* (1982) 150 CLR 258 held that this responsibility included a positive duty to act to ensure against risk of injury. *Justice Winneke in Richards v State of Victoria* (1969) VR 136 at 138-139 characterised the duty as follows:

[It is] the need of a child of immature age for protection against the conduct of others, or indeed himself, which may cause injury, coupled with the fact that, during school hours, the child is beyond the control and protection of his parent and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury.

A school is liable for breaches of duty of care by any of its teachers and employees (including independent contractors) that result in injury to

students.

Further, a school cannot delegate its duty of care to its employees. So if a school is responsible for the student's anaphylactic shock, the school cannot exonerate itself by passing blame to the individual teacher.

What should students be protected from?

A school can be negligent where it fails to guard against foreseeable risks that can cause harm to students. Exposure to alcohol, drugs and pornographic material can cause physical and psychological harm. It is imperative that schools have strategies in place to prevent risks, and be able to deal with them whenever they arise.

Schools must ensure that where any student is suspected of involvement with illicit drugs or pornographic material, they are treated legally, fairly and in a manner that is not degrading.

Drug abuse

The use of illicit drugs is illegal in all jurisdictions in Australia and schools should have rules and policies in place against the possession or use of drugs on school grounds.

Article 33 of the Convention requires governments to take appropriate measures to protect children from illicit drugs. School authorities and teachers have a duty of care to protect their students from foreseeable risks. Accordingly, where they become aware of students using drugs on school premises, they are obligated to address the issue.

Where a school suspects a student of using or being in possession of drugs, teachers must be careful in the action they take. Teachers are able to search school property such as students' desks, draws and lockers, and are able to confiscate any drugs found. Teachers must

be mindful that they do not have the rights of police and cannot search a student, their school bag or clothing without the student's consent. Teachers cannot detain a student or keep them in a locked room for any length of time nor test them for drugs. Unless a student's consent is freely given, teachers are not able to force a student to provide a sample of hair, blood, urine or saliva to be analysed.

The police, on the other hand, have broader powers to search for drugs if the school has a belief that a student is in possession of illegal substances. Reporting a student can have serious repercussions on the student's psychological state and the reputation of the school community, and a thorough internal investigation should be conducted before involving the authorities. In circumstances where the decision is made to call the police, the school should notify the student's parents to attend the school and provide support for their child.

Although schools are not obliged to report students to the police, where a school chooses to involve the authorities it must be aware that the student can be charged and brought before the Children's Court. Alternatively, schools may choose to handle the matter internally and discipline the student accordingly. Whatever action the school decides to take, it must ensure its duty of care to other students is maintained.

Regardless of the method schools choose for handling any drug-using students, it is advisable for schools to have in place a drug related incident plan. This is a plan of action to follow if there is an incident of drugs on school grounds. This could include an immediate response plan, a follow up response plan, and a plan for how to deal with groups involved such as students, parents and staff. An example of such a plan



can be found on the website of the Department of Education and Early Childhood Development Victoria at www.education.vic.gov.au under "drug education".

Internet abuse – pornographic material

Cyberspace poses serious threats to children. Between sexual predators roaming the World Wide Web on the one hand and the ability to access pornographic material on the other, the internet is hazardous for children unaware of the potential dangers. At school, students use computers owned by their school and although generally accessing pornographic material of adults is not illegal, the ability for children to seek out or come across pornographic material could have negative effects on their development.

According to a government paper released by the Australian Institute of Criminology titled *Adolescence, Pornography and Harm* by Colleen Bryant, pornographic material can potentially interfere with children's sexual development, undermine physical, emotional and psychological wellbeing, undermine relationships and foster sexual violence and 'open' sexual lifestyles.

The risks to children are serious and as such school authorities have a duty of care to take precautions to filter out any pornographic sites and other offensive material that students could access while at school. Schools can install software such as Net Nanny for the purpose of blocking offensive material or use a specialist internet service provider that limits access to particular sites. Although it is not possible at this stage to filter out all offensive material from the internet (because new sites are created every day which are not yet blocked by protection software), it is nevertheless imperative to have measures in place to block as many sites as possible with the technology available.

There have been some recent developments on the issue of internet censorship by the Commonwealth. The Rudd Government has announced its plans to filter the internet at the Internet Service Provider level to block violent and/or pornographic sites that have been refused classification. However, until this scheme is put in place, schools should endeavour to block sites and install filtering programs to protect their students.

The same risks apply to students of some schools who are required to purchase laptops for their studies. Students may try to circumvent the school's filter system by downloading pornographic material onto their laptops from their internet service providers at home and bring the images to school. Falling short of conducting scans of students'

personal laptops, which is not permitted without the permission of the student, schools should have firm policies in place about the access of pornography at school on all computers including personal laptops. These safe internet access policies should be communicated to the whole school community – students, teachers and parents.

Disciplining students

Schools can discipline a student for drug use or accessing pornographic material at schools by suspension and/or expulsion. State schools have the power to suspend students for a limited period of time, but they do not have the power to expel. The decision to expel a student can only be made by the Department of School Education. Private schools have more authority and can suspend and expel students at their own discretion.

If a student is reported to the police for drug use, schools must keep in mind that the student can be charged and brought before the Children's Court for their offences. When schools punish children, they should note that Article 28.2 of the Convention states that school discipline must be administered in a manner consistent with the child's human dignity and in accordance with the rights detailed in the Convention.

Unlawful behaviour of school staff

School authorities and their teachers and employees have a duty of care to ensure that their students are protected from foreseeable risks, which may well be other teachers within the school.

Anybody suspected of being involved in unlawful behaviour should be reported to the school authority. The school authority should in turn inform the staff member of the allegations made against them and allow the staff member the opportunity to convey their version of events and/or, where appropriate, discuss a program for their personal development



and the improvement of their work performance. Where a school fails to inform a staff member of the allegations against them or does not allow them the opportunity to undertake an improvement program, this could lead to potential claims against the school.

In circumstances where the school authority or another employee of the school becomes aware that a teacher is abusing drugs, the teacher should be removed from the school for the risk they pose to the wellbeing of their students. Involving the police can be left to the school's discretion. It is important to ensure the school authority has conducted itself appropriately upon becoming aware of the staff member's drug abuse, which could involve providing referrals to support groups, medical groups and sick leave.

Repercussions should be in place, which can be tailored to the particular school's policies, for situations where staff access pornographic material on school computers. Further and more importantly, where teachers or staff are suspected of being in the possession of or producing child pornography, the police should be notified immediately and action must be taken to remove the teacher from access to students.

2009 has seen a variety of offences committed by teachers and these offences attract unwanted publicity for schools. For example, a male teacher in Victoria was charged with accessing and possessing child pornography, a 34-year-old female teacher from Broome was charged with seven sex offences against a student, and a 49-year-old high school teacher was charged with possessing child pornography on his computer. It is undeniable that schools must ensure their students are protected from the harm of such individuals.

CONCLUSION

Without a doubt, the unlawful behaviours of students and staff within a school can result in an unhealthy school environment. School authorities and teachers owe a duty of care to ensure that reasonable care is taken so that students are not exposed to unnecessary risk of injury. Schools should have action/risk management plans in place to deal with drug use and the access or possession of pornographic material by students and staff to make certain that our school environments are as safe as we want them to be. It is unlikely that unlawful behaviours can ever be eradicated but their early detection, as well as establishing preventative measures, will assist in improving the school environment.

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