

## ANZELA Conference Blog. Thursday 2 and Friday 3 October 2014

Notes taken by Susan Hyde, SASSLA Board Member.

The conference opens with Kurna Elder, Dr Alitja Rigney PSM with **welcome to country**, she got us singing again.

*Nina marni, nina marni, Marniai marniai, Wantininna, wantininna, Wardliarnna wardliarnna*

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### Keynote address, The Hon. Dr Robyn Layton, AO, QC

Dr Robyn Layton addresses us about the heightened climate of security in our society, related to the so called threat from terrorism. She speaks to us about the effect on society and its potential to increase racism. She reflects on the effective community reaction to the proposed change to the racial discrimination act regarding the right to protection from hate speech. She points out that racial hatred can have deleterious effect on individuals and the public statements regarding the terror threat is already creating racist comments and actions towards Muslims. Using the Adam Goods incident, she points out that the surveys showed that despite the national anti-racism statement and the number of citizens born outside of the country, there is still a considerable % of citizens that are not concerned about racism. She quotes the level of people to who have reported racism as 1 in 4 (in one survey) and the consequential effects that it has, particularly on indigenous people and explains the longer term deleterious effects on these people and particularly the children. Eg in 2013 90% of students surveyed said they had experienced or seen racism, and 40% said that they had seen or experienced it at school. Many of these students reported that the teachers did not or could not intervene. The resistance towards dealing with racism infers that the advantaged are be challenged and this is difficult for some people to deal with. She reflects on the long term effects of being constantly being told that you are different and inferior.

What are the constraints of dealing with racism; the complexity of teachers' work is exacerbated by needing to deal with racism and other forms of discrimination. She points out that these issues could be built into the curriculum. She quotes the "Classroom of Difference" program from the USA which includes anti-bias training for teachers. Worth a

look because some teachers may not be able to identify bias in the classroom behaviour let alone their own biases.

Dr Layton explains some themes from the law that could be used to help students understand the way that racism plays out in the law, such as who gets arrested and incarcerated and how the immigration laws plays out for different cultures. Using forum theatre processes can help young people challenge ideas and procedures in their schools. Dr Layton showed us some role plays undertaken at workshops held at Marion and discussed the process used at that workshop. The focus was to help people think about strategies to intervene in racist acts and speech.

You can explore the resources at <http://www.reconciliationsa.org.au/reconciliation2014>

Dr Layton points out that the diversity of our nation can now be seen in our schools, isn't that so true.

### **School Policies: Risk management Strategies and practical tips.**

Peter Campbell, Partner, HWL Ebsworth Lawyers, Adelaide.

#### Implications of the Australian Privacy Principles.

Because schools collect and manage a lot of private information, the privacy laws and state based regulations require attention. Some of those developed are relevant to what happens in schools, eg degrading filming, managing students who have protection orders, family law implications.

Privacy permissions can be included in enrolment procedures and consent forms. Opt out provisions are useful to reduce the need for consent forms.

Keep in mind that students do have rights about privacy, the test being "do they have the maturity" . Eg, students can ask that parents not be sent information and if they can pass the maturity test they can opt out of the permissions about information agreed to by parents. Most students don't realise this. Best to manage these events as they arise.

- Social media issues are requiring schools to collect information to enable them to access social media accounts.
- There may be obligations that need attention regarding information that counsellors keep.
- Information in newsletters etc needs to be carefully managed.
- Medical records need special consideration.
- Students / parents can have access to their files.

Recommended that information is purged from files when the student leaves. Schools have to decide what they will keep. (DECD has recommendations about this)

Schools are advised to have a privacy policy and risk management procedures in place.

Make sure staff are educated about these issues.

Update consent forms, consider comprehensive consent.

### Protection of IP

EG Trade marks, domain names, rights of employees and contractors, photos, school history, joint projects, workshops eg participants using materials, names etc, student work, teachers programs ... Who owns all that .... (the Minister does in government schools.)

### Defamation

If the school is the publisher it can be liable.

People, that is staff and students, can be responsible for what they say.

A Code of conduct is advised.

Small claims court can claim up to \$25,000

### Dealing with the media

REPUTATION!!!!!! Is the main issue here.

Dealing with the media .....

If it is bad news, think about it carefully, consider the audience, demonstrate you understand the issue, express regret, work out how you will avoid it again, ask what the topics are, decide who will comment, (not always the principal or someone directly involved), get the facts together, have a test audience. Keep it short and brief, only say what you want reported, repeat what you say, admit mistakes.

TV interview, do not look at the camera, watch body language.

The press, cannot enter the premises without permission, that is trespass.

The wild card here is the parents. Suppression orders can be aimed at TV radio newspapers etc but not to a group of parents.

### Social Media monitoring

Cannot track SM accounts however you can get Google alerts about when the school is mentioned.

Needs to be dealt with policy. Eg what can be said about the school on private Social Media accounts. (And DECD has policy that protects teachers from being involved in students' FB and other social media accounts.)

Be careful about what reports you keep in the school about incidents, they can be requested for legal matters.

## **Balancing students and teachers right to privacy with the school's duty of care.**

Jason Newman. Partner, TressCox Lawyers, Melbourne.

Schools are collecting a lot of information. If Schools have purpose to collect information, this should be documented. Then they can and should use it for that purpose. People need to know why we are keeping records and why.

Many people think there is a growing privacy problem. Most people don't know what the privacy laws are about.

Schools are sometimes too scared to say anything because of the privacy laws, and this can complicate matters..

Eg. the school didn't advise the staff of student Xs propensity for violence after a serious assault on another student. A teacher heard about the assault but didn't realise that the assault was serious. A student Y said he was afraid of being assaulted by X and the teacher said it was ok because she didn't know that the level of risk of being assaulted. Y was assaulted by X. School did not advise staff because of "privacy"

Eg. A school coach told the local soccer club coach about a medical condition of a student, information that had been disclosed to the school but not the club. The student was then barred from the club team. This is unsolicited information however, still not appropriate to tell the soccer club.

The school can decide to disclose information if they have a purpose, that purpose needs to be documented.

School counsellors might think they have keep confidence however the school owns the information. The counsellor's records are the records of the employer and must be passed on to the school, and if necessary the parents or police. I think our counsellors know this.

Privacy policy needs to be accessible, especially to fill our duty of care to the students. The limits of privacy should go on the enrolment form. Privacy cannot overrule duty of care. The school's policy should say that sometimes the information will be given where there is a purpose or a requirement.

Some people want to record conversations, they can with permission. Permission does not have to be given. Minutes should do. Some states eg Victoria allow recording without permission.

### **Industrial Relations in Education – A topical discussion.**

Jarrad Parker. Senior Associate, Industrial Relations and Media, Minter Ellison Lawyers, Adelaide.

The high court has said that there is no such thing as mutual trust and confidence in an employment contract.

Is it in the contractual contract or policies? Or is it implied, in fact eg duty of cooperation, by custom or law?

Is there a duty not to destroy or damage the relationship of trust and confidence between the employee and employer? The high court said it does not exist however it was a minority judgement. If the employment contract does not include it, it is only implied. The law does not include the term. To deny it, focusses the issue on the details of the contract. They have as yet not closed off the plea of mutual good faith, fidelity and cooperation.

Are policies contractual? Binding? Onerous? Realistic?

Eg policies are not contractual however the employment contract might include that the employee must comply with policy. Oh dear, the splitting of hairs.....

The education unions try to get the employer to change the shoulds to musts. The unions tries to put policies in EB, or to put in agreements for policy change rather than consultation. The union raises the issue of the employer changing the policy and then consulting (sound familiar).

Policies are not written in contractual terms. The key question is what is the policy trying to do, is it lip service or actually achieving something.

The key focus at federal level at the moment is consultation, anti-bullying and right of entry.

## **Managing complaints – Walking the Tightrope between Ignorance and Knowledge.**

James Field. Managing Director, CompliSpace, Sydney.

James Field opens with the comment that we need to have a complaints resolution process to comply with industrial law. Impacts of poor complaints procedure can be catastrophic. He claims that complaints resolution is badly done.

Over half of schools don't keep a record of complaints. He says that many private sector schools don't make their complaints procedures clear..... and in his view this means they are not listening to the customer and they are contravening industrial law.

Do you keep a register of complaints? Is the process transparent, well yes because DECD requires its schools to put the complaints procedure on the front of the website and schools are required to keep a record of complaints. This turns out to be a good thing, read on.

He advises us to regard complaints as constructive feedback, and encourages is to regard criticism as a gift.

Keeping a record of complaints helps the school identify problems, allowing us to adjust procedures and solve problems before they get worse.

A complaints system does discourage vexatious complaints. Keeping a record of who complains and when they complain gives us a list of vexatious complainers and data about what is happening. Then you can say .... Oh yes, we spoke about this on .... This got me thinking about the new DECD complaints system. What they have done by taking the regional directors out of the loop and allowing us to escalate the complaints to the Complaints Unit, has simplified the process for us. Nevertheless, a system to record and then analyse complaints needs to be put in place.

- Complaints are risk indicators for customer satisfaction.
- By dealing with each complaint will help to understand the issues.
- Analysis helps identify system and recurring problems and enables continuous improvement.
- Has the potential to empower staff because the complaints system can back them up.
- If you get it right, parent teacher student relationships improve.
- The data enhances school improvement.
- Protects school reputation.

Poor complaints process and analysis means that culture and reputation suffers through rumours creating more complaints. Social media issues are a risk and need prompt action.

The way that you manage the complaint can create the problem. Learn to recognise the difference between constructive feedback and complaints.

All schools need a complaint handling system.

- It needs to be visible, accessible, resourced, staff need training, nominate people to deal with complaints.
- Management = Keep records, complaints register, analysing data, report to management, continuous improvement.

### **Address by the Governor of South Australia His Excellency, Mr Hieu Van Le AO.**

The Governor welcomes the interstate and international visitors to the conference, and extols the delights of SA. He points out amongst other things, that our state has had the first woman Chief Justice, Aboriginal Governor and now the first refugee governor. He reflects on his childhood in the war torn Vietnam, the haunting sound of people suffering, the noise of war machines, the loss of relatives and the decision to leave his relatives behind for a dangerous journey to Australia. He spent some time in a Malaysian refugee camp before taking another boat to Australia. Turns out, that because of his education, he became the navigator. As the boat apprehensively approached Darwin Harbour they were welcomed by a couple of blokes in a tinny, complete with shorts, singlets and beer in hand. After that, he experienced the easy going laconic welcome of our country. This generosity has continued as he sought his education and brought up his family. He advises us that education offered so much and that our well-resourced education for all is the key to our prosperity. Australia is now the most culturally and linguistically developed county in the world where 1 in 3 people or one of their parents, are born overseas. Education is one of our most important export industries. He congratulates the conference and its theme.

### **The right to education, how that impacts on Koori Kids and their teachers in the classroom.**

Dr Mark McMillan. Senior Lecturer, School of Law, Melbourne University.  
(Representing Professor Peter Buckskin.)

He puts up the map of the Aboriginal nations across the continent. They existed when the country was invaded, they existed when they nullified those rights. Their country's, with a system of governance, was annulled. Yet they exist today with the salutation, Welcome to Country.

He speaks about the rights of Aboriginal children, and the fact that some Aboriginal students get more resources, yet all have the same rights.

This has implications for how we speak about the rights of Aboriginal children, they are not one of the many; they are different and have different rights and yet these rights are

specified. We do have anti-discrimination laws however we do not have a law about their rights.

His grandmother's life included being controlled under the flora and fauna act, indentured to a farming family, education was not allowed beyond year 7. She was literate. His mother was angry about this. He and his cousins spent lots of time at Nan's. Amongst that mob now there are 22 Bachelor degrees, several masters degrees and PhDs. Many of them are teachers.

The hope now is invested in education and we all contribute to that. The law provides to language to ensure that rights are enshrined in our actions and beliefs as we work together to educate the Aboriginal children.

The history of Aboriginal reconciliation; from the 1967 referendum to the Apology to the Stolen Generations is still developing. A process of Indigenous identity has been developed. Until 1987 when the matter was decided, there were 265 attempts to define aboriginality, which led to words such as half caste etc. Now there is a lawful test for Aboriginality, eg to demonstrated Aboriginal descent, identify as an Aborigine, show Aboriginal community acceptance; and is required for allocating certain rights and resources.

The International Human Rights for Indigenous Peoples has various influences on our common law and the way it is interpreted. It includes the elimination of discrimination and the right to education. He explains the difference between universal declarations and resolutions. Australia has adopted some but has not implemented them. Eg self determination of Indigenous rights compared with a universal right.

The right to education applies to all people and this has been ratified. It underpins the work and obligations of teachers. This brings up the question, when equal rights are not equal, that is, the right is deployed in a way that overcomes disadvantage. It is not a loss of funding to other children, it is an addition of resources for some children. Article 14 of the UN Declaration for the Right to Education was ratified by Australia in 2009. So what is the role of educators? They cannot make anyone take an opportunity but they can provide a space where each child can see that they have such opportunities. He pays homage to the educators who help the children take up these opportunities.

He explained that we cannot be guilty of past wrongs, but we can be responsible for helping Aboriginal children to take the opportunities, to be able to share and deserve a good quality of life, and realise that this is a shared responsibility. This is the hope of education.

### **Walking the tightrope of a conduct investigation involving technology based evidence.**

Mark Gare. Director, Forensic Technology. McGrathNicol, Adelaide.

Forensic technology explores issues such as fraud, staff conduct, social media, pornography, content, sharing e-commerce using computer forensics and social media data mining.

What can be found from the technology?

- Text messages are saved on the phone even if you delete them.
- Computers can be explored even past the last reimaging.
- Can't get things from the cloud if they have been deleted, however, quite often the information is still on the hard drive.
- Can search for types of data, log files, recently used files Eg what is the person actually working on, lists of who has done what and when, see what devices have been plugged in, location information eg where you were when you took the photo, sent the email, when you sent the text message or the email,
- The new phones are making it hard to get information, data is stored in many places and the speed at which data is being captured.
- Cloud credentials are easy to discover, secure wiping is now available however, private browsing will still leave metadata.
- The amount of information and transactions able to occur is over 100X the rate using the cloud vs web2.0

Schools need to work out whether the local IT staff can collect this data particularly in regard to the speed at which information can be connected. Data can be stored at both ends of the communication. Complicated by broadcast media (one to many) and social media (many to many) eg networking, gaming, publishing, sharing discussing, location, marketing.

BYOD can't be explored by private investigators unless the parents give them permission. Police can investigate. Parents are now going out and hiring investigators to manage the cyber bullying etc because the school cannot investigate the private computers.

Schools need to have a BLUE BOX so that student communication can be investigated and flagged by various words. Schools should also have an agreement that schools can confiscate and explore phones.

How well is the law keeping up with the issues in social media beyond email?

When he meets someone he can look them up their LinkedIn, Facebook, and Twitter, so he "has the upper hand". Therefore, lock down your data. Even with good security the friends and contacts may not have this deleted or locked out data, thus you can be found out.

Sentientia; a company can get everything. Investigators, police, companies and government can pay them to get everything you have ever done on the Internet, phone calls, where you have been ..... Etc they can explore groups and what they are up to.

Important to keep logging on records, and to change login details regularly.  
Schools can and do mine social media to investigate relationships between students.  
Schools often go over the top with privacy, as long as there is a clear purpose the data can be given or explored.

## **The need for legal literacy amidst a morass of contentious issues.**

Kim Teh. School of Law, Deakin University, Victoria.

School safety, teacher conduct, duty of care, child protection and custody issues, IT issues. Research shows that a background in education law minimises bad judgement, indiscretions, and honest mistakes.

In the UK there is a legal requirement to be up to date with law pertaining to education. Research in Victoria shows that from 1980 to the mid 1990s, many more cases of injuries at school were taken to court.

Teachers and principals have reported that there is an increasing need for teachers to know about some aspects of the law, eg child protection legislation.

Policies and mandates, if complied with, will provide defence against legal claim. Duty of Care does not necessarily cover a set of unrealistic circumstances, however if the school has a policy but does not follow it, then they can be found liable.

The key to policy development and enactment should refer to the actual legislation and the cases that contribute to the law to help people understand why the policy has been developed. The Victorian education department website has some interesting examples to explain why the policy has been developed.

DECD has recently updated the policy frameworks, are they developed directly from the legislation?

It turns out that some of our DECD policies are not grounded in law, and thus maybe not have the imperative of the law. Is the policy is then advisory?

Ignorance is not bliss, especially when it comes to the law.

## **PANEL DISCUSSION. Cyber issues.**

A lawyer, a policeman, three academics.

Heavens, someone in the audience is complaining that the children are bullying each other online, what to do..... Get used to it I say. Technology means that they can roam widely, a bit like we did on our bikes.

Students often swap passwords and go online, yes of course they do, however they are still responsible.

Good ideas from the panel,

- have the right policies in place,
- include students in the development of those policies,
- law society has an app unfortunately called the naked truth that explains the responsibilities of online behaviour,
- you can get software that tracks the school name or logo on social media,
- the definition of cyber bullying has not been resolved. Power relationships are important to work through and schools should apply their wellbeing policies to the cyber arena.

In the future

- Educating the children about their rights will become important.
- BotNet, a computer which controls another
- Google glass, ability to record people without them knowing
- Ransom wear, using your computer to intimidate you