



# FAQs on **dealing with violent behaviour**

**These frequently asked questions utilise information from various departmental policies, procedures or information regarding behavioural risks. The answers to the questions include excerpts from these documents that are particularly relevant to work health and safety. Members should refer to the complete document in relation to other matters.**

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Is abusive, aggressive and/or violent behaviour a work, health and safety issue?

The answer is yes.

Safe Work NSW (formerly NSW WorkCover) defines workplace violence in the *Violence in the Workplace Guide 2002* as follows:

“Violence and aggression include: Verbal and emotional abuse of threats and physical attack to an individual or to property by another individual or group. The impact of violence on a victim depends on the severity of the violence, his or her own experiences, skills and personality.

Violent acts include:

- verbal abuse, in person or over the telephone
- written abuse
- harassment
- threats
- ganging up, bullying and intimidation
- physical or sexual assault
- armed robbery
- malicious damage to the property of staff, customers or the business.

“Workplace violence may not always be a critical or extreme situation from the outset. It sometimes follows a pattern of escalating behaviour — from agitation, expressed anger or frustration and intimidating body language, to verbal/written abuse and threats, physical threats, or assault.” (pg 2)

Safe Work NSW notes that workplace violence can occur between employees, from external sources and/or from clients or customers of a service. (pg 3)

In terms of client or customer violence, Safe Work NSW notes this is where “Clients or customers of a service, their relatives or friends may take violent or aggressive action against workers who are trying to help them” (pg 4).

The Department of Education defines violence in *Legal Issues Bulletin No. 40* (16 May 2006) as:

“‘Violence’ has a wide meaning and is not restricted to physical acts. It will include any behaviour that seriously interferes with the physical or psychological safety and wellbeing of staff and students. Examples include threats to commit violence, aggressive behaviour which is non-contact in nature and may also include offensive, aggressive or abusive language directed to staff or students.” (pg 1)

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What are the duties under the Work, Health and Safety Act in relation to this behaviour?

### Employer duties

The Work, Health and Safety Act 2011 (WHS Act) imposes the primary duty of care on a person conducting a business or undertaking (PCBU). The Department of Education is a PCBU and “must ensure, so far as is reasonably practicable, the health and safety of workers and other people at the workplace. [Division 2, 19(2)]. The Act also requires that “officers”, the Senior Executive of the Department, “must exercise due diligence to ensure” the PCBU complies with its primary duty of care. This includes ensuring the PCBU “has available for use, and uses appropriate resources and processes to eliminate or minimise risks to health and safety from work” carried out by the PCBU Division 4, 27 (5e).

### Worker duties

Workers have a duty under the WHS Act to take reasonable care for their own health and safety and to make sure their actions or omissions do not adversely affect the health and safety of others. Workers have to comply with any *reasonable* instruction and cooperate with any *reasonable* policy or procedure relating to health and safety at the workplace.

[See WHS Bulletin for more detail.](#)

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Who should be consulted about risks and ways to identify, assess and minimise these risks?

In order to eliminate or minimise the risks associated with violent behaviour, there must be consultation with workers to identify the risks or hazards, assess the likelihood of various forms of violence occurring, the type and severity of injury that might occur and how many employees or others are likely to be exposed to, or affected by, the behaviour. Consultation must occur on how these risks might be eliminated or minimised. Then action must be taken to eliminate or minimise the risk, so far as is reasonably practicable.

Safe Work NSW *Violence in the Workplace Guide 2002* (the Guide) discusses the ways to identify workplace violence, including:

- ensure you have an effective consultation process in place
- consult your employees, who can use their own experiences to highlight problem areas or procedures. Encourage them to express their feelings and concerns regarding workplace violence. Consult with local police about what is happening in your area
- survey staff (in confidence if necessary). Ask about incidents that may have occurred or other matters that had the potential to become violent.” (pg 8)

The Department’s Work, Health and Safety Directorate has fact sheets about student behaviour. The Overview (pg1) states “consult with all stakeholders at each stage of the process and concerning the process as a whole”. This means consult when identifying, assessing and controlling the risks.

An “Employee consultation survey for student behaviour” is included in the Fact Sheets. Federation cannot provide a link to this document because it is on the Department’s intranet.

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How are risks assessed?

The Safe Work NSW Guide states:

“Once you have completed the hazard identification, the next step is to assess risk associated with each hazard. The purpose is to determine:

- which of the identified hazards is most likely to occur;
- what are the likely injuries that may result;
- how severe the injuries are likely to be; and
- how many employees and others are likely to be exposed or affected.

By focusing on all the issues in this manner, you should be able to determine priorities. If a risk means violence is likely to occur and injure many employees, controlling the risk should be given a high priority. On the other hand, if a risk has been identified and then assessed as unlikely to occur or will not expose employees to an injury, it should be given a lower priority and dealt with at a later time.” (pg 9)

The Department's "Student Behaviour Support Plan Proforma" provides a process for considering the risks the behaviours may pose to the student exhibiting the behaviour, other students and staff. It asks for the behaviour to be assessed in terms of the level of risk posed.

The Department's "Guidance in Completing the Student Behaviour Management Plan" sets out an assessment process including considering the likelihood of the behaviour occurring and the severity of harm which might be caused. This indicates the level of risk as High (deal with immediately), Medium (deal with as soon as possible) and Low (deal with when able to do so).

Some elimination or control measures are suggested for consideration in the "Sample Student Behaviour Support Plan". It is important to focus not only on the individual student's behaviours, but also on preventing physical or psychological injury that the behaviours may cause others.

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What does "reasonably practicable" mean in terms of eliminating or minimising risks?

Section 18 of the WHS Act states:

"In this Act, 'reasonably practicable', in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- a) the likelihood of the hazard or the risk concerned occurring, and
- b) the degree of harm that might result from the hazard or the risk, and
- c) what the person concerned knows, or ought reasonably to know, about:
  - i. the hazard or the risk, and
  - ii. ways of eliminating or minimising the risk, and
- d) the availability and suitability of ways to eliminate or minimise the risk, and
- e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

The Department's WHS consultation procedures state: "what is 'reasonably practicable' depends on such matters as the likelihood of the hazard or risk occurring, the degree of harm that might result, the availability and suitability of ways to eliminate or minimise the risk and whether the cost involved is grossly disproportionate to the risk. Where the cost of eliminating the risk is grossly disproportionate to the risk of harm, there is still an obligation to minimise the risk as far as possible." (pg8)

Federation prosecuted the Department under the previous Occupational Health and Safety Act for its failure to ensure the safety of teachers in relation to violent student behaviour. Justice Kavanagh, in *Barry Johnson (General Secretary, NSWTF) V State of New South Wales (Department of Education and Training) 2006*, explained: "There were reasonable steps available to avoid the identified risk and it was reasonably practical to implement such steps. A minimisation strategy such as suspension was cost-free. While the alternative placements including the placement of a special Support Teacher/Behaviour may have been an added cost to the defendant, it does not argue, nor could it, that such cost was prohibitive."

<http://www.austlii.edu.au/au/cases/nsw/NSWIRComm/2006/109.html>

Justice Kavanagh's decision provides an example of how the concept of determining what is "reasonably practicable" can be applied at a workplace level.

## Suspension and Expulsion of School Students Procedures

The Department's "Suspension and Expulsion of School Students Procedures—2011" from the Learning and Engagement Directorate provides processes to deal with risks associated with violent behaviour. The quotes are excerpts that are particularly relevant to minimising or controlling risks. The procedures also set out requirements about procedural fairness, discrimination and other matters. You should refer to the complete document if there are any concerns regarding these matters in relation to the behaviour, or action taken in relation to the behaviour.

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Is suspension or expulsion an option in dealing with unacceptable behaviour?

Yes.

4.2 states: “There will be cases of unacceptable behaviour where it will be in the best interests of the school community and/or the student involved, for the student to be removed from the school for a period of time or completely. Suspension and expulsion are the options available to the principal in these situations.” (pg 2)

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Is it acceptable to ask a parent to keep a child at home after a violent incident to avoid the need for suspension?

In general terms, no.

4.2 states: “In such cases of unacceptable behaviour, parents should not be asked to keep students at home without the formal imposition of a suspension, unless this is for the remainder of a school day as part of an approved program for personalised learning and support.” (pg 2)

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How do you consider whether or not the suspension or expulsion might be discriminatory?

4.4. states:

“In implementing these procedures, the principal must ensure that no student is discriminated against on any of the following grounds.

- Race, including colour, nationality, descent, and ethnic, ethno-religious or national origin
- Sex
- Marital status
- Disability, including HIV/AIDS
- Homosexuality
- Transgender
- Age.” (pg 2)

4.5 states: “The principal must also ensure that the implementation of these procedures takes into account factors such as the age, individual needs, any disability and developmental level of students.” (pg 2)

Legal Issues Bulletin No. 5 describes how the obligations under discrimination legislation and work health and safety legislation operate concurrently. It states: “Disciplinary action can be taken against a student with a disability but the above factors\* need to be taken into account before a decision is made.”

\* These factors relate to ‘reasonable adjustments’, Legal Issues Bulletin No. 5, pg 3.

[https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number\\_05.pdf](https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_05.pdf)

In *Barry Johnson (General Secretary, NSWTF) V State of New South Wales (Department of Education and Training) 2006*, Justice Kavanagh explained that the legal obligations on the Department are not competing.

“In the circumstances, his attendance at school did not create a competing obligation to the defendant’s obligation to provide a safe working environment. The obligations were concurrent obligations, not obligations in conflict or competition.” (Item No. 185, pg 54)

<http://www.austlii.edu.au/au/cases/nsw/NSWIRComm/2006/109.html>

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Is suspension a punishment?

No.

5.1 states: “Suspension is not intended as a punishment. It is only one strategy for managing inappropriate behaviour within a school’s student welfare and discipline policies. It is most effective when it highlights the parents’ responsibility for taking an active role, in partnership with the school, to modify the inappropriate behaviour.” (pg 3)

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## What is the purpose of the time on suspension?

5.2 states: “Suspension also allows time for school personnel to plan appropriate support for the student to assist with successful re-entry. This may include access to appropriate support staff such as an Aboriginal community liaison officer or learning and support teacher. In some cases, suspension from school allows the school and government school system time to put measures in place to ensure the safety of students and staff.” (pg 3)

Suspension also provides time to consult relevant staff in terms of identifying and assessing the risks and determining the strategies to minimise or eliminate the risks.

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## How do the suspension procedures relate to managing the risks of physical and/or psychological injuries that staff and/or students may suffer as a result of violent behaviour, intimidation etc?

5.10 states:

“If the behaviour that has resulted in consideration being given to the suspension or expulsion of a student may represent a risk to the student himself or herself, other students or staff (for example the incident relates to violent behaviour), the principal must ensure that steps are taken to assess that risk and develop any strategies consistent with departmental policies. This process should be commenced at the same time that any disciplinary action commences.” (pg 4)

Behaviours that pose a risk to the student displaying the behaviour could include self-harm. The risks posed by this behaviour need to be addressed in terms of the individual student and the students or staff who may be affected by witnessing this behaviour.

6.1.4 (pg 5) also deals with immediate suspension. It indicates that the grounds for discrimination set out in 4.4, 4.5 and 4.6 of the procedures must be considered and then states (in part):

“Principals must suspend immediately and consistently with these procedures (including procedural fairness) any student who:

- is physically violent: Any student who is physically violent, resulting in injury, or whose violent behaviour seriously interferes with the safety and wellbeing of others, is to be suspended immediately. The matter must also be reported to the School Safety and Response hotline on 1300 363 778, where advice will be provided on managing and reporting the incident
- is in possession of a firearm, prohibited weapon, (as defined by Schedule One of the Weapons Prohibition Act), or knife (without reasonable cause) \*
- uses, supplies, or is in possession of, a suspected illegal substance (not including alcohol or tobacco) or supplies a restricted substance\*
- engages in serious criminal behaviour related to the school\*

\*More detail provided in the procedures

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## In what circumstances is an immediate suspension considered?

When there is a significant risk that staff or students will be injured, 6.1.3 states: “In some circumstances, the principal may determine that a student should be suspended immediately. This will usually be due, but not limited, to reasons such as the safety of students or staff.” (pg 5)

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## Can continued disobedience pose a WHS risk?

Yes.

Disobedience, disruption, and failing to follow instructions could pose risks that the student could injure himself or herself or others. Continued disobedience, or challenging or other inappropriate behaviour may create a risk to physical or psychological health and safety of staff or other students. Strategies outlined in 6.1.2 relate to these behaviours and should be used prior to suspension.

“Before a suspension is imposed, with the exception of the cases outlined in 6.1.4 or other serious instances of misbehaviour that impact on the safety or welfare of students or staff, the principal will:

- ensure that appropriate personalised learning and support strategies and discipline options have been applied and documented
- ensure that appropriate support personnel available within the school system and externally have been involved
- ensure that discussion has occurred with the student and parents regarding specific misbehaviour which the school considers unacceptable and which may lead to suspension
- develop, in conjunction with the school learning support team or appropriate school or departmental personnel, specific personalised learning and support to assist the student to manage inappropriate behaviour
- provide a formal written caution detailing inappropriate behaviours, as well as clear expectations of what is required of the student in future, and
- record all action taken” (pgs 4 & 5)

#### 6.2.1 states:

“In circumstances where measures detailed in 6.1.2 above have been unsuccessful in resolving the inappropriate behaviour or the circumstances in 6.1.3 apply, the principal may choose to impose a short suspension of up to and including four school days. Short suspensions may be imposed for the following reasons and will be reported in the following categories:

- Continued disobedience: This includes, but is not limited to, breaches of the school discipline code such as refusal to obey staff instructions; defiance; disrupting other students; use of alcohol or repeated use of tobacco
- Aggressive behaviour: This includes, but is not limited to, hostile behaviour directed towards students, members of staff or other persons, including damaging the property of the school or students; bullying (including cyberbullying); verbal abuse and abuse transmitted electronically such as by email, Facebook, Twitter, SMS text messages or by other electronic means.

Where the behaviour involves cyberbullying, the school’s anti-bullying programs are to be implemented. Advice should be sought from the School Safety and Response Hotline on 1300 363 778 as to whether the police should be informed.” (pgs 6 & 7)

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If a range of strategies including short suspension do not reduce the risks and the violent or inappropriate behaviours continue, what action should be taken?

#### 6.3.1 states:

“If short suspensions have not resolved the issue of inappropriate behaviour, or the misbehaviour is so serious as to warrant a long suspension, the principal may impose a long suspension of up to and including 20 school days. In determining if a student’s behaviour is serious enough to warrant a long suspension the principal must consider:

- the safety of students and staff
- the merit and circumstances of the particular case
- factors such as the age, individual needs, any disability and developmental level of students.” (pg 8)

When considering the safety of students and staff, there should be consultation around the identification and assessment of the risks, and the strategies to manage the risks.

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When are long suspensions considered?

Where other strategies including short suspension have not minimised the risk and the violent or inappropriate behaviours continue, 6.3.2 (pg 8) states (in part):

“Subject to factors outlined in 6.3.1 above, principals will impose a long suspension for:

- physical violence: Which results in injury, or which seriously interferes with the safety or wellbeing of other students

and staff (including sexual or indecent assault).

- use or possession of a prohibited weapon, firearm or knife\*
- possession, supply or use of a suspected illegal substance\*
- serious criminal behaviour related to the school\*

Subject to factors outlined in 6.3.1, principals may also impose a long suspension for:

- use of an implement as a weapon. When a student uses an implement as a weapon to assault or injure another person (including use of an offensive implement, which is any implement made or adapted to cause injury to another person).
- persistent or serious misbehaviour. This includes, but is not limited to:
  - repeated refusal to follow the school discipline code;
  - threatening to use a weapon in a way that might seriously interfere with the safety and wellbeing of another person;
  - making credible threats against students or staff;
  - behaviour that deliberately and persistently interferes with the rights of other students to learn or teachers to teach including bullying, harassment and victimisation.

Note: Incidents involving the behaviours set out above (with the exception of repeated refusal to follow the school discipline code) must be reported to the School Safety and Response Hotline on 1300 363 778 as soon as possible.” (pgs 8 and 9)

\*More detail provided in the procedures

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Can a student return from long suspension associated with violence or other inappropriate behaviours if the risks posed by the behaviours have not been addressed?

7.3.7 states: “Where a student is returning from suspension following an incident that involved violence or weapons, the principal must undertake a risk assessment in order to assess whether the return of the student will pose a risk to staff, students or other persons. This should be completed the final day for resolution of the suspension.” (pg 12)

It is important to note that risk assessments must include consultation using the school’s consultation procedures consistent with the WHS Act. Staff impacted by the behaviours should be consulted in identifying and assessing the risks, as well as determining strategies to minimise or eliminate the risks, so far as is reasonably practicable.

If there are concerns about whether or not the risks posed by the behaviour have been addressed, then Federation members can meet and decide to raise their concerns as a WHS issue using the WHS Issue Resolution Procedures.

7.3.8 states:

“The student should not be re-admitted to the school until the issues identified in the risk assessment have been addressed. See the Department’s website address: [https://detwww.det.nsw.edu.au/adminandmanage/ohands/SafeWorklearn — risk manage/stdnt\\_behaviour/index.htm](https://detwww.det.nsw.edu.au/adminandmanage/ohands/SafeWorklearn—riskmanage/stdnt_behaviour/index.htm)

If the issues cannot be addressed before the final day of the suspension, the principal must refer the matter to the Director, Public Schools NSW, who will consider a range of measures to resolve the issues. While this is occurring it may be necessary to impose a second long suspension.” (pg 12)

Teachers should be provided with the opportunity to be consulted on risks and strategies to minimise or eliminate risks. Note the Department’s Fact Sheet 110-V1 Health and Safety Directorate states: “consult with all stakeholders at each stage of the process and concerning the process as a whole” and “communicate relevant information to staff.” (pg 1)

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What happens if a student continues to exhibit violent or inappropriate behaviours after two long suspensions?

6.3.9 states:

“If, after two long suspensions, the matter has not been resolved, other strategies must be considered, including alternative educational placements, expulsion from the school or expulsion from the school with a recommendation to the Minister that the student not be re-admitted to all or any government schools. Alternative educational placements which could be considered for the student should be discussed with the Director, Public Schools NSW or nominee.

Where violent behaviour is involved, a direction on enrolment under Part 5A of the Education Act (1990) may also be an option where a risk assessment indicates the student cannot be safely accommodated at the school selected by his or her parents.” (pg 10)

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Do we need to keep records of the behaviour and the suspensions?

Yes.

6.2.6 states: “The principal must ensure that the suspension is recorded in ERN and that all relevant documentation is retained on a file at the school. All documentation must be made available to the Director, Public Schools NSW on request.” (pg 7)

This statement is repeated in 6.3.10 and 7.3.5. (pgs 10 and 12)

7.3.6 states: “A full record should be made of the outcomes of the suspension resolution meeting. This should be retained on a file at the school. A copy should be provided to the student and the parents.” (pg 12)

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Why is the information retained?

It is essential that information about risks, injuries and illnesses that result from inappropriate or violent behaviour are retained, so that the information is used as part of a risk assessment and any strategies to eliminate or minimise the risks.

If the “Student Support Behaviour Plan” and other strategies to minimise risks have been effective, it is important to record this, so that the risks continue to be controlled.

If the behaviours recur, there must be a further assessment of the risks posed, so that an effective plan can be put in place. The information on ERN, as well as all other relevant information related to the previous occurrences will be needed to properly assess and minimise the risks.

In *NSW Teachers Federation Barry Johnson (General Secretary, NSWTF) V the State of New South Wales (known as the Department of Education and Training)* in the *Chief Industrial Magistrates Court*, Chief Industrial Magistrate Hart said:

“The defendant was clearly on notice that CW potentially constituted a risk to Occupational Health and Safety. The written record establishes that conclusively. However, the fact that the defendant held such information was of no value, without that information being brought to the attention of those who were unable to conduct a risk assessment without it.” (Item No. 59, pg 27)

This shows the importance of providing all relevant information.

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What legal advice does the Department provide about risks in relation to abusive, aggressive, violent or inappropriate behaviour by students which poses a risk to staff?

The Department’s Legal Issues Bulletins provide information about relevant legislation and some practical advice. This information identifies some strategies that may minimise risks associated with abusive, aggressive or violent behaviour by community members.

The information below provides a summary of the material covered in a range of Legal Issue Bulletins in relation to violent, abusive, threatening, harassing and other behaviour posed by students. This is a summary only and should not be relied on without considering how a complete Legal Issue Bulletin addresses the matter of concern. Legal Issue Bulletins can be accessed on the Department website at <http://www.dec.nsw.gov.au/about-us/information-access/legal-issues-bulletins>.

## Legal Issues Bulletin No. 27 (reviewed June 2012): Offences and other related changes relevant to the safety and security of schools, staff and students

Legal Issues Bulletin No. 27 provides the following definitions:

What is meant by the term “assault”?

“Courts have defined assault to mean any act which intentionally or recklessly causes another person to perceive immediate and unlawful violence. While in most cases an assault will involve actual physical contact, such contact is not necessary to establish that an assault has occurred.” (pg 3)

What are meant by the terms “stalking, harassing and intimidating”?

“The terms “harassment” and “stalking” are not defined in the legislation and so the ordinary dictionary meaning will apply. While “intimidation” is also not defined in the legislation, courts have previously determined it means behaviour that actually induces fear or affects the conduct of the person subject to the behaviour. There can be no intimidation until the person is affected in some way.” (pg 3)

### Reporting incidents to the police

Legal Issues Bulletin No. 27 states

“If members of staff are assaulted or believe they are being harassed, intimidated or stalked, they may report the matter to the police. They must also report the matter to the principal.

Any incident involving an assault or threat of an assault at school or during school activities must also be reported to the School Safety and Response Hotline on 1300 363 778.” (pg 2)

[https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number\\_27.pdf](https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_27.pdf)

## Legal Issues Bulletin No. 42 (reviewed April 2012): Legal issues arising for staff subject to cyber bullying and related behaviour

This bulletin defines cyber bullying and cyber stalking as follows:

“Cyber bullying is a form of bullying using text or images posted on personal websites or sent by mobile phone or email. Depending on the nature of the material posted or transmitted, people who engage in cyber bullying may be committing a criminal offence.” (pg 1)

“Stalking involves a person following another person or watching or frequenting places where the other person goes, such as his or her home, work or places of recreation. NetAlert Limited, an internet advisory body established by the Commonwealth Government, describes cyber stalking as occurring when a person is stalked or harassed by another person using an email service or other electronic message system in a frequent or intrusive manner. The stalking can involve threats or sexual innuendo. Stalking is generally for the purpose of inducing fear or intimidation.” (pg 1)

Legal Issues Bulletin No. 42 describes what criminal and/or civil legal action might be taken in relation to these matters.

If a teacher is subjected to cyber bullying or stalking as a result of his/her employment, he/she should “immediately report the matter to the principal or institute manager or office manager” and “if the offender is a school or TAFE student, the principal or institute manager should take appropriate action under the relevant student discipline policy. School principals should report the matter to the School Safety and Response Hotline.” (pg 3)

**Note:** Cyber bullying is specifically dealt with in the Suspension and Expulsion of School Students Procedures at

[https://education.nsw.gov.au/policy-library/associated-documents/suspol\\_07.pdf](https://education.nsw.gov.au/policy-library/associated-documents/suspol_07.pdf)

[https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number\\_42.pdf](https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_42.pdf)

# Legal Issues Bulletin No. 5 (reviewed February 2016): Student discipline in government schools

This Bulletin deals with a wide range of matters regarding student discipline.

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Is there a conflict between obligations under the Commonwealth Disability Discrimination Act 1992, the Commonwealth Disability Standards Act for Education 2005 and duties under the Work Health and Safety Act 2012?

No.

“The obligations under disability and other legislation related to discrimination operate concurrently with the obligation to ensure the safety of staff and students, so far as reasonably practicable. In terms of violent student behaviour, suspension or expulsion is not intended as a punishment, but can allow the school and government school system to put measures in place to meet obligations under work, health and safety legislation.” (pg 2)

Obligations under the disability discrimination legislation would require that any action taken in relation to a student would not discriminate on the basis of their disability.

The Bulletin refers to the “obligations to consider reasonable adjustments to the student’s learning and support needs and (to) consult with the student or their parent/carer about those adjustments. It is also necessary to consider whether it would be reasonable to make an adjustment to the way a policy applies for a particular student. For example, it would be reasonable to consider making an adjustment to a school discipline policy that imposes sanctions on students that swear in class if a student had Tourette’s Syndrome (though it is likely to also be necessary to implement strategies to lessen the potential disruption to other students caused by this behaviour)”. (pg 2)

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Does the disability legislation mean that no disciplinary action can ever be taken in relation to a students’ with a disability?

No.

The Bulletin states: “Disciplinary action can be taken against a student with a disability, but the above factors need to be taken into account before a decision is made. Further information about students with a disability is found on the Disability Programs website.” (pg 3) This matter was considered in the prosecution:

*Barry Johnson (General Secretary, NSWTF) V State of New South Wales (Department of Education and Training) 2006*, Justice Kavanagh said:

“The policies provided a range of alternative ways to accommodate the individual student with behavioural problems, so the defendant could comply with its obligation to provide education for those students with behavioural problems. The policy allowed for a risk assessment of such a student to ensure strategies were developed to allow for that student’s education within a safe environment for its teachers.” (Item No. 185, pg 54)

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How do the different obligations relating to teachers’ duty of care, the WHS Act and discrimination legislation operate?

The Bulletin states:

“All three laws require consideration of what is reasonable in the circumstances. For example, the Department must consider making reasonable adjustments for a student under discrimination law and must as far as is reasonably practicable ensure the safety of students, staff and visitors to its site (under work health and safety law) and protect students from foreseeable risk of harm (duty of care).

It is arguable that an adjustment that required, for example, the Department to place staff and students at risk of significant harm by enrolling a student with a history of violent behaviour could be a breach of its duty of care and work health and safety obligations and that such an action would not be a reasonable adjustment within the meaning of the Disability Discrimination Act (DDA) and the Standards.

It is also arguable that in view of the duties under the DDA and the Standards, it would not be reasonably practicable to refuse to enrol a student because he or she posed a low risk of harm to another student or staff member.” (pg 3)

If there is a risk of injury to staff or students, it must be identified and assessed so that appropriate strategies are in place prior to the student being enrolled.

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Does privacy legislation prevent staff being provided information about a student’s past violent behaviour?

No.

“The privacy legislation does not prevent the collection, use and disclosure of information if it is necessary to ensure so far as it is reasonably practicable the health and safety of staff and students. Under work, health and safety legislation, a worker must also be provided with information about the nature of the risks associated with their work.” (pg 4)

However, “the need to comply with privacy legislation can limit the extent and type of information that may be given to other students and/or their parents about school disciplinary action taken in relation to a student.” (pg 4)

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What happens if one of the students from my school displays threatening, harassing, cyber bullying and/or other violent behaviour towards me outside the school or before or after school?

“School discipline processes can be applied to the behaviour of students at school, on the way to and from school and while away from the school site on school-endorsed activities.

School discipline processes can also be applied in response to an incident that has taken place outside of school hours and off school premises, provided there is a clear and close connection between the school and the conduct of students. This includes a student’s use of social networking sites, mobile phones and/or other technology to threaten, bully or harass another student or staff member in relation to school-related issues.” (pg 5)

These processes should include strategies to minimise or eliminate the risks.

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If the police are taking action in relation to a student’s violent behaviour at school, does this mean the school cannot take disciplinary action?

No.

“The taking of disciplinary action against a student does not preclude the police taking criminal proceedings against him or her. Nor does it prevent another student commencing civil proceedings against the student, or seeking an apprehended personal violence order, in appropriate circumstances.” (pg 5)

## **Legal Issues Bulletin No. 40 (16 May 2006): Collection, Use and Disclosure of Information about Students with a History of Violence**

Legal Issues Bulletin No. 40 was issued following a number of prosecutions of the Department under the Occupational Health and Safety Act for breaches of the provisions in the Act.

The Federation conducted two prosecutions.

In both prosecutions, the Department had failed to provide information about particular students with a history of violent behaviour in previous schools and/or institutions. The failure to provide this information meant that it was extremely difficult to identify and assess the risks posed by the behaviours and to develop appropriate risk management strategies.

The Department is reviewing this Bulletin, as it still contains references to the Occupational Health and Safety Act rather than the Work Health and Safety Act and to positions such as School Education Director, which no longer exist. The Federation has been told that the Bulletin is still relevant, even though these references are dated. The Work Health and Safety Act imposes similar requirements about consultation and the need to provide a safe workplace, so far as is reasonably practicable.

The following answers to questions include quoted excerpts from this Bulletin. There is additional important information in the Bulletin which should also be considered. These questions and answers deal with matters consistently raised by members and if there is any confusion, reference should be made to the complete Bulletin.

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## How does the Department define 'Violence'?

"'Violence' has a wide meaning and is not restricted to physical acts. It will include any behaviour that seriously interferes with the physical or psychological safety and wellbeing of staff and students. Examples include threats to commit violence, aggressive behaviour which is non-contact in nature and may also include offensive, aggressive or abusive language directed to staff or students." (pg 1)

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## Which staff should be provided with information about a student's violent behaviour?

"The facts of each case will need to be considered in order to determine which staff are at risk and therefore should be provided with information. Depending on the circumstances, it may be appropriate to advise not only teaching staff, but also administrative staff and volunteer workers who may have contact with the student. It is also important to include consideration of casual staff." (pg 1)

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## What types of information about the violent behaviour should staff be provided?

"Though staff members must be told what is necessary to ensure safety, not all staff necessarily need to be given all of the available information. For example —

- The school counsellor may need to know that a student has a history of sexual abuse, while the classroom teacher need only know how the student behaves and how to manage that behaviour;
- It may be necessary to share details of a medical report with a classroom teacher, but not with all members of staff if the health issue is not one likely to lead to a playground emergency;
- If a student has a potentially violent reaction to being prevented from carrying out an obsessive compulsive ritual, this may need to be told to some or all staff, depending on who is identified as being at risk." (pgs 1 and 2)

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## If a student has a history of violent behaviour, what steps need to be taken before enrolment?

Legal Issues Bulletin No. 40 provides details regarding student transfers from public schools, private schools, interstate schools, DOCs or Juvenile Justice Institution and enrolling in a TAFE college. The details for these matters are on pages 2 and 3 of the Bulletin.

The advice concerning enrolment in a school by a student transferring from another government school states:

"Enrolment in the new school is not to be finalised (i.e. student details are not to be entered onto the admission register and the student not allowed to attend) until relevant student records from the previous school have been received and any risk assessment considered necessary is completed, and appropriate solutions, including control strategies, commenced." (pg 3)

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## When a school has the information and records about a student with a history of violence, what should they do?

"Once student or other relevant records are received, they need to be examined by the Principal/College Director, or his/her delegate, to identify any risks to safety and to assess the risks. If necessary, advice and resources should also be sought from the Region via the School Education Director.

In accordance with the Occupational Health and Safety Regulation 2001, any staff member who may be exposed to a risk must, commensurate with the risk, be informed of the risk and provided with any information necessary to ensure their safety.

In accordance with the Occupational Health and Safety Act, staff must be consulted at all stages of the risk assessment process. The staff who must be consulted are those whose safety may be affected by decisions concerning the risks, particularly concerning how the risks are to be managed. Typically, the primary measure to deal with the risk of violence from a student will be a behaviour management plan. This should be formulated in close consultation with the staff.” (pgs 4 and 5)

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If further information is provided about the “history of violence” after enrolment, what action should be taken?

“If at any time after a student is enrolled, the school becomes aware of reliable and credible information that might alter assessment of the risk to safety, the risk assessment needs to be reviewed and, if necessary, the further relevant information needs to be conveyed to staff who may be exposed to the altered risk. If no previous risk assessment has been carried out, an appropriate assessment should be completed.” (pg 5)

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If school counsellor records indicate “a history of violence” does providing this information breach privacy or professional ethics of psychologists?

“Where records that indicate a risk of harm are held by the School Counsellor, the School Counsellor must provide a copy to the principal of the school at which the student is enrolled or seeking enrolment. The provision of such records is in accordance with obligations under the Occupational Health and Safety Act and is not a breach of privacy or of professional ethics of psychologists.” (pgs 5 & 6)

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What if the school does not offer sufficient resources or work, health and safety expertise to minimise the risks of abusive, aggressive and violent behaviour which has been exhibited by some community members?

The Department’s Work Health and Safety Issue Resolution Procedures flowchart states:

“A matter concerning workplace risks/hazards/risk management becomes an issue if the matter is not resolved locally after discussions between employees and others undertaking work and workplace managers.” (pg 6)

The issue resolution procedure requires “issues” to be escalated when they can’t be resolved at the local level.

It is important to note that Work Health and Safety Issues are only resolved “when there is an agreement on actions and controls to minimise or eliminate risks to be undertaken within an agreed timeframe”.

The matter should also be discussed with the Federation Workplace Committee and/or the Organiser, where members believe there is a significant threat to their health and safety.

The Work, Health and Safety Issue Resolution procedures October 2013 are available on the Department’s intranet. The Federation cannot provide a link to the Department’s intranet. The Federation has produced a summary of the procedures.

[https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number\\_03.pdf](https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_03.pdf)