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When it matters

Student Discipline

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David has presented at conferences in the United Kingdom, South Africa, Belgium, the Czech Republic, New Zealand and throughout Australia, and published numerous papers on topics as varied as student rights; teachers' liability; school discipline, tort law reform; investigations; risk management; teachers, school counsellors and confidentiality; bullying and cyber bullying; outdoor education; multiculturalism in education; discrimination; and child protection. He regularly presents in-school seminars for both teachers and administrators on education law matters.

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Student Discipline

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What is this paper about?

School days, school days; dear old golden rule days.

This paper is about student discipline at school. Student discipline, or student management as some schools refer to it, generally is aimed at providing a safe, caring and happy school environment in which students can learn and grow. Schools use discipline not only to demonstrate that there are consequences for unacceptable behaviour but also to help their students to become self-disciplined. The consequences of breaking the rules can range from minor punishments (such as detentions) through to suspension and expulsion.

I will consider the need for school rules and discipline policies. I will also consider the extent to which schools should afford students procedural fairness, particularly when contemplating suspension and expulsion. I will examine the ability of schools to discipline students for misconduct occurring "beyond the school gate" or outside normal school hours. Finally, I will consider when school leaders should contact the police.

The origins of school discipline in Australia

The first school in Australia was established in 1789 and, by 1793, there were three, all founded under the guidance of Rev Richard Johnson. In 1809, Governor Macquarie sought to re-establish social order and community discipline after the tumultuous regime of the rum corps. A school system was seen as an important element to achieve his goal. In 1812, he wrote that schools were intended to improve the "morals of the lower orders and develop religious principles in the young" and make them "dutiful and obedient". Not surprisingly, given the nature of a penal colony, school discipline was almost entirely physical and reflected the treatment given to convicts and other prisoners.

What is the source of power to discipline students in Australian schools?

I suspect little thought was given by Governor Macquarie or his successors in the young New South Wales colony about the basis for a teacher's power to exercise corporal punishment or any other discipline. However, some 50 years before Macquarie arrived in Sydney, Sir William Blackstone wrote in Chapter 16 of his *Commentaries on the Laws of England*:

> *[A father] may also delegate part of the parental authority during his life to the tutor or school master who is then* ***in loco parentis*** *and has such a portion of the power of*

> *the parents committed to his charge (such as that of restraint and correction) as may be necessary to answer the purposes for which he is employed.*

The law has long seen that the principle of *in loco parentis* conferred powers upon teachers, especially the power to punish their students while under their control. In *Hutt v Governors of Haileybury College*[1], an 1887 English case, a 15 year-old student was expelled from school for allegedly committing theft. Field J emphasized that all aspects of school discipline could be grounded in the delegation of parental authority.

In *Hole v. Williams*[2], a student was hurt as a result of a teacher's carelessness. In 1910, the NSW Court of Appeal asserted that, in performing the whole function of imparting instruction and maintaining discipline, a teacher exercised an authority committed to him personally by the parents. The Court decided that the NSW Government was not liable for a breach by a teacher of his duty of care for the safety of the students in his charge because the breach was committed within the scope, not of the authority which the teacher derived from the Crown, but of an authority which he derived by direct delegation from the parents of the pupils.

In 1964, the High Court of Australia overturned this decision in *Ramsay v Larsen*[3]. Kitto J said:

> *The doctrine of a delegation of authority by the parent has often been stated as the ground upon which the principle rests that reasonable chastisement of a child by his schoolmaster is justified in law. It necessarily asserts a delegation to the particular person who relies upon the principle as making his action lawful. But the duty to take care of a pupil is not normally the personal duty of the teacher alone. In the absence of a special arrangement to the contrary, it is, I think, the necessary inference of fact from the acceptance of a child as a pupil by a school authority, whether the authority be a Government or a corporation or an individual, that the school authority undertakes not only to employ proper staff but to give the child reasonable care. The particular teacher who performs the tasks of care and tuition in a State school therefore performs them as a civil servant of the Crown and not on his own account only. It may be suggested … that a schoolmaster's power of reasonable chastisement exists, at least under a system of compulsory education, not by virtue of a delegation by the parent at all, but by virtue of the nature of the relationship of schoolmaster and pupil and the necessity inherent in that relationship of maintaining order in and about the school.*

This final statement is today the accepted basis for a school's power to discipline students in Australia.

[1] (1887) 4 TLR 623
[2] (1910) 10 SR (NSW) 638; 27 WN 160
[3] (1964) 111 CLR 16

Are there limits to school discipline?

I noted earlier that school discipline is aimed at providing a safe, caring and happy school environment. The emphasis on corporal punishment of years gone by has ended. When corporal punishment was available, the law required it to be administered reasonably in all the circumstances. In my view, the requirement to administer discipline reasonably applied not only to corporal punishment but also to other means of disciplining students. The prohibition on corporal punishment has not affected the need for teachers to administer discipline reasonably today.

A more difficult question is whether the common law requires the teacher to act not only reasonably but also in a way which is procedurally fair.

What is procedural fairness?

Procedural fairness (or natural justice, as it is sometimes called) refers to a body of principles that have evolved to provide fairness to people who are being investigated or charged or who are the subject of administrative action which may adversely affect them. While these principles are generally becoming better known, it seems that, almost as a result of this familiarity, people are losing sight of the fact that procedural fairness usually means simply observing practical fairness. In other words, as Young CJ in Eq said in *Hedges v Australasian Conference Association Limited*:

> *Different situations will give rise to requirements of satisfying the general principle of natural justice in different ways.*[4]

Gleeson CJ of the High Court of Australia put it this way:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*[5]

Mason J, in the High Court's decision in *Kioa v West,* said:

> *The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case*.[6]

[4] [2003] NSWSC 1107 at [121]
[5] *In re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502 at 511
[6] (1985) 159 CLR 550 at 585

He also said:

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*[7]

In *R v Governors of Dunraven School, ex p B,* Sedley LJ of the English Court of Appeal said:

> *It is a proposition too obvious to require authority that what fairness demands in a particular situation will depend on the circumstances.*[8]

All these judges are underlining the importance of the particular situation when determining the content of procedural fairness. This is especially important in schools where the circumstances may relate to very trivial allegations or to very serious ones.

What do the Australian courts say?

There is no doubt that there is an obligation to afford procedural fairness to students in government schools when disciplining them.[9] The Department of Education policy on procedural fairness states:

> *All members of the education community have a basic right to expect they will receive procedural fairness in their dealings with authority. Similarly, it is appropriate that they will act fairly when dealing with others.*[10]

The position is not as clear in non-government schools. In the New South Wales case of *Bird v Campbelltown Anglican Schools Council*, the Court said that there was no principle of law to the effect that (a) a principal of a non-government school acts in a judicial or quasi-judicial capacity or (b) has an obligation to apply the principles of procedural fairness in making disciplinary decisions concerning students at the school.[11] That first proposition has since been endorsed by the Supreme Court of the Australian Capital Territory.[12]

I note that Einstein J in *Bird* said that, where the source of power was contractual, the decision was not subject to judicial review (citing *Whitehead v Griffith University* [2003] 1 Qd R 220 at [14]). The underpinning of the reasoning in *Bird* was that the relationship between the parties was in contract law as opposed to public law. This is a reminder that the enrolment contract between independent schools and parents often states that the principal will afford procedural fairness when disciplining students. Where that is the case, a school

[7] (1985) 159 CLR 550 at 585
[8] English Court of Appeal, Civil Division, 21 December 1999, at [18]
[9] *CF (by her Tutor JF) v State of New South Wales (Department of Education)* (2003) 58 NSWLR 135; see also *McMahon v Buggy* (NSWSC unreported, December 1972).
[10] NSW Department of Education Legal Issues Bulletin No 3, 17 December 2019, reviewed 1 April 2021 - https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-3-procedural-fairness-in-the-department-of-education
[11] [2007] NSWSC 1419 at [11 ii.]
[12] *Brennand v Hartung* [2012] ACTSC 132 at [53] – [55]

may be in breach of the enrolment contract if procedural fairness is not observed.[13] My understanding is that Catholic systemic schools are required to afford procedural fairness when considering suspension or expulsion.[14]

What does the *Education Act 1990* (NSW) require?

There are many views by judges around the world about whether schools must afford students procedural fairness when meting out discipline. To a large extent, this is now academic for New South Wales schools as the State Government has decided that schools should do so.

The New South Wales Government is responsible for school education in this state. School education is provided by government schools run by the Department of Education and non-government schools run by a range of organisations.

The Minister has a direct say in school discipline in government schools. Section 35 of the *Education Act* deals with discipline in government schools. It reads:

> *(1) The Minister may control and regulate student discipline in government schools.*
>
> *(1A) Subsection (1) extends to the conduct of a student that significantly affects, or is likely to significantly affect, the health or safety of students or staff of any school, regardless of whether that conduct occurs on or outside school premises or within or outside school hours.*
>
> *(2) The Minister may prepare guidelines for the adoption by government schools of fair discipline codes that provide for the control and regulation of student discipline in those schools (except for the suspension or expulsion of students).*
>
> *(2A) The guidelines and codes must not permit corporal punishment of students attending government schools.*
>
> *(2B) The guidelines and codes may permit other reasonable forms of punishment or correction of those students, including requiring students to perform any reasonable work or service for the school.*
>
> *(3) The Minister may, on the recommendation of the Secretary, expel a child of any age from a government school. The Secretary may suspend any child from a government school.*

[13] *Gray v Marlborough College* [2006] All ER (D) 145 (Sep); [2006] EWCA Civ 1262 at [54]-[57] is a decision of the English Court of Appeal in which a student challenged his expulsion, essentially on the basis that it was in breach of the contractual arrangements in place between the school and his parents.

[14] See, for example, Catholic Education Diocese of Wollongong *Suspension, Expulsion and Exclusion of Students Policy* (May 2015)*;* Catholic School Office Diocese of Lismore *Suspension and Expulsion Standard Operating Procedure* (May 2017)

> *(4) The Minister may establish programs to assist any child who has a history of non-attendance at a government school or who has been expelled from a government school to adjust more successfully to school life or to improve his or her behaviour so as to be able to return to school.*
>
> *(5) The Secretary may, with the consent of the child's parent, arrange for a child who has been expelled from a government school to be admitted to and attend another government school (unless the child is refused admission under section 34 (4)) or to participate in a program referred to in subsection (4).*

Consistent with this, the Department has a policy called *Student Discipline in Government Schools* which states that schools must have a School Discipline Policy which, among other things, must incorporate the principles of procedural fairness.[15]

The Government has chosen to control discipline in non-government schools indirectly through the registration process administered for the Government by the New South Wales Education Standards Authority (NESA). Section 47 of the *Education Act* sets out the requirements for registration of a non-government school. The first example of using the registration requirements in relation to discipline came in 1995 when the *Education Reform Amendment (School Discipline) Act 1995* added section 47(f) which then read:

> *For the purposes of this Act, the requirements for the registration of a school are as follows:*
>
> *…*
>
> *(f) official school policies relating to student discipline that do not permit corporal punishment of students attending the school.*

The amendment Act commenced on 21 December 1996, a year after it was passed by the Parliament. The new section 47(f) was stated specifically to extend to any school registered before the commencement date.[16]

The *Education Act* was again amended in relation to discipline by the *Education Amendment (Non-Government Schools Registration) Act 2004* which commenced on 1 May 2004. This followed recommendations by the Grimshaw Report 2002. Warren Grimshaw proposed that:

> *schools should demonstrate that they have in place policies and procedures that provide for student welfare in all its aspects, including child protection. These policies should be readily available to parents and students and those that relate to student discipline should be based on the principles of procedural fairness. The ban*

[15] NSW Department of Education, 'School Discipline in Government Schools Policy', reviewed 1 April 2021 - https://policies.education.nsw.gov.au/policy-library/policies/student-discipline-in-government-schools-policy
[16] *Education Reform Amendment (School Discipline) Act 1995* Schedule 1 [6]

> *on corporal punishment introduced in 1995 should be preserved as a requirement in its own right.*[17]

The *Education Amendment (Non-Government Schools Registration) Act* replaced former section 47 with new sections 47 and 47A. The former section 47 continued to apply to and in respect of any non-government school that was a registered non-government school at 1 May 2004 for a period of one year (that is, until 1 May 2005) or for the balance of its current registration (whichever was the shorter).[18] Section 47(h) deals with discipline policies and corporal punishment. Its forerunner was section 47(f) set out above. New section 47(h) read:

> *For the purposes of this Act, the requirements for the registration of a non-government school are as follows:*
>
> *…*
>
> *(h) school policies relating to discipline of students attending the school are based on principles of procedural fairness, and do not permit corporal punishment of students,*

The parliament effectively allowed schools one year to prepare for the changes to school discipline introduced in 1995 and 2004. This lead in period was achieved in different ways. When corporal punishment was banned, the change applied from commencement but commencement was deferred for 12 months from when the Act was passed. When procedural fairness was brought in, the change applied 12 months after commencement and the amending Act commenced as soon as it was passed.

In *Bird*, Einstein J said:

> *Section 47(h) … does not provide a statutory source for any obligation on the [College] to comply with the principles of natural justice…*[19]

With respect, this cannot be correct as section 47(h) effectively requires non-government schools to have school discipline policies based on principles of procedural fairness if they wish to be registered. The judge presumably meant that the College did not have an obligation to its students or their parents to afford procedural fairness. He was influenced in this view by section 47A which reads:

> *The operation of section 47 is not to be regarded as giving rise to any implication that it is a term of any contract (whether or not written) between the proprietor of a registered non-government school and a parent of any child enrolled at the school that the school comply with the requirements imposed by or under this Act for registration of non-government schools or that failure to comply with any such requirement in itself gives rise to any civil cause of action.*

[17] Review of Non-Government Schools in NSW: Report 1 page 11
[18] *Education Amendment (Non-Government Schools Registration) Act 2004* Schedule 1 [30]
[19] [2007] NSWSC 1419 at [12]

However, section 47A does not remove the obligation on independent schools in New South Wales to have discipline policies based on principles of procedural fairness. It is to be hoped that all independent schools will not only have such policies but that they will also observe the requirement in them to afford students procedural fairness.

What does NESA require?

Section 25 of the *Education Standards Authority Act 2013* allows NESA to make rules:

> *(1) The Authority may make rules, not inconsistent with the education and teaching legislation, for or with respect to the exercise of any of its functions or any other matter that is required or permitted to be prescribed under that legislation by the rules.*
>
> *(2) Without limiting subsection (1), the rules may:*
>
> *(a) set out guidelines with respect to the requirements for registration, approval and accreditation under the education and teaching legislation, and*
>
> *(b) make provision for or with respect to the conduct of proceedings of committees of the Board of the Authority or of subcommittees of such committees.*
>
> *(3) A rule does not take effect unless approved by the Minister.*
>
> *(4) A rule is to be published on the Authority's website and takes effect on the date of publication or a later date specified in the rule.*

(5) A copy of each rule must be available for public inspection at the Authority's office during business hours.

Under section 25, the *Registered and Accredited Individual Non-government Schools (NSW) Manual* and the *Registration Systems and Member Non-government Schools (NSW) Manual* (the manuals) constitute the rules set out by NESA in relation to the requirements for registration and accreditation. The following appears in both Manuals but is extracted from the former:

> **3.7 Discipline**
>
> **3.7.1 A registered non-government school must have policies relating to discipline of students attending the school that are based on principles of procedural fairness.**
>
> The Education Act requires that policies related to the discipline of students be based on procedural fairness. It is the responsibility of the school to determine incidents that may require disciplinary action and the nature of any penalties that may apply. The process that leads to the imposition of such penalties, particularly but not exclusively in relation to suspension, expulsion and exclusion, must be procedurally fair.

Suspension is a temporary removal of a student from all of the classes that a student would normally attend at a school for a set period of time.

Expulsion is the permanent removal of a student from one particular school.

Exclusion is the act of preventing a student's admission to a number of schools. In extreme circumstances, the principal of a school may make a submission to an appropriate authority, or to other schools, recommending the permanent exclusion of a student from the registration system of which the school is a member, or from other schools.

Procedural fairness is a basic right of all when dealing with authorities. Procedural fairness refers to what are sometimes described as the 'hearing rule' and the 'right to an unbiased decision'.

The 'hearing rule' includes the right of the person against whom an allegation has been made to:

- know the allegations related to a specific matter and any other information which will be taken into account in considering the matter
- know the process by which the matter will be considered
- respond to the allegations
- know how to seek a review of the decision made in response to the allegations.

The 'right to an unbiased decision' includes the right to:

- impartiality in an investigation and decision-making
- an absence of bias by a decision-maker.

Procedural fairness includes making available to students and parents or caregivers the policies and procedures under which disciplinary action is taken. It also includes providing details of an allegation relating to a specific matter or incident. This will usually involve providing an outline of the allegations made in witness statements and consideration of witness protection. As part of ensuring the right to be heard, schools could establish any need for parents/caregivers to be provided with interpreter services and, if required, make arrangements for such services to be available.

While it is generally preferable that different people carry out the investigation and decision-making, in the school setting this may not always be possible. If the principal is conducting both the investigative and decision-making stages, he or she must be reasonable and objective. To be procedurally fair, the principal must act justly and be seen to act justly. While it is difficult to combine the roles of investigator and

adjudicator, it is acceptable to do so given the nature of the principal's responsibilities. Nevertheless, it may be preferable to have another appropriate officer, such as an assistant principal or independent person, carry out the investigation where possible. The review mechanism adds to the fairness of the process.

In matters where a long suspension, expulsion or exclusion is contemplated, the gravity of the circumstances requires particular emphasis to be given to procedural fairness. This includes the offer of having a support person/observer attend formal interviews. The key points of the interview/discussion should be recorded in writing.

Evidence of compliance

A registered non-government school will have in place policies related to the discipline of students, including but not limited to the suspension, expulsion and exclusion of students, that are based on procedural fairness.

3.7.2 A registered non-government school must have policies related to discipline of students attending the school that do not permit corporal punishment of students.

Evidence of compliance

A registered non-government school will have in place and implement policies related to the discipline of students that:

- either expressly prohibit corporal punishment or clearly and exhaustively list the school's discipline methods so as to plainly exclude corporal punishment
- do not explicitly or implicitly sanction the administering of corporal punishment by non-school persons, including parents, to enforce discipline at the school.

Discipline Policies based on Principles of Procedural Fairness

What does a policy relating to discipline of students based on principles of procedural fairness look like? NESA says in its Manuals: *Procedural fairness refers to what are sometimes described as the 'hearing rule' and the 'right to an unbiased decision'.* However, there is potentially much more to procedural fairness than these two things. The principles of procedural fairness which schools must take into account in their discipline policies are:

Fully informing students of the allegations against them

Students and their parents must be told why the student is in trouble. The High Court of Australia's decision in *Kioa v West* is very important in this regard:

> *... recent decisions illustrate the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it*[20]

In *D v Independent Appeal Panel of Bromley London Borough & Another*, Longmore LJ said:

> *It is of the essence of natural justice that a party to proceedings does know what case he has to meet.*[21]

In *R v Governors of Dunraven School, ex p B,* Sedley LJ noted that, when expulsion was under contemplation, a student, through his or her parents, had a right to be heard. He then said:

> *Such a right is worthless unless the parent knows in some adequate form what is being said against the child.*[22]

A little later, he added:

> *It was right that a boy facing possible expulsion should know the nature of the accusation against him.*[23]

In *Bird*, the Court found that the school complied with the requirements of procedural fairness in part because the student and his mother were informed of the nature of the allegation of misconduct.[24]

In *R v Cobham Hall School Ex parte 'GS'*, Dyson J said that procedural fairness required that, other than in exceptional circumstances,

> *if the school is contemplating requiring the removal of a particular pupil for unsatisfactory work or behaviour, the pupil should be given a warning and an opportunity to make representations and improve before action is taken. There will be exceptional cases where a warning is not necessary, but these will be rare.*[25]

Fully informing students of the likely consequences

Just as students and their parents must be told why the student is in trouble, so too must they be told what may flow from adverse findings.

In the *Cobham Hall Case*, the school had made known to the student and her parents its concerns about the girl's academic performance and behaviour. She had been placed on

[20] (1985) 159 CLR 550 at 587 per Mason J
[21] [2007] EWCA Civ 1010 at [4]
[22] English Court of Appeal, Civil Division, 21 December 1999, at [18]
[23] English Court of Appeal, Civil Division, 21 December 1999, at [20]
[24] [2007] NSWSC 1419 at [50]
[25] [1997] EWHC Admin 1051 at [44]

detention several times and had been "on report". However, the girl had at no time been warned that, if she did not improve, her place at the school would be withdrawn. Dyson J said that the decision that she would have to leave the school came like a "bolt out of the blue". There had been no warning whatsoever. In the judge's view, this meant that the school was in breach of the rules of procedural fairness.

It is therefore important that schools inform students and parents when the student's misconduct is so serious that it may well merit suspension or expulsion. Otherwise, they may not appreciate the gravity of the matter or what procedural rights there are available to them. In *Carter's Case,*[26] not only did Ms Carter not know the nature of the proceedings against her, it seems that the Netball Association also failed to correctly identify the nature of the proceedings.[27] According to Palmer J, that compounded the injustice of the proceedings.[28]

Giving students and their parents the opportunity to provide an explanation or make representations

Once the student and his or her parents know why the student is in trouble, they must be given ample opportunity to respond.[29] While this will normally mean giving them time to consider the allegations and an opportunity to respond in person at a meeting, it may be appropriate to allow a written response.

In *Student A v Dublin Secondary School*, the Irish High Court was concerned that:

> *expulsions were put in place before either the students or their parents had an opportunity of making representations prior to the imposition of the most severe penalty to be imposed by a school. This is an essential aspect of fair procedures. It … is also, it seems to me, an essential requirement of natural justice.*[30]

In *Bird*, the Court found that the school complied with the hearing rule when the Deputy heard the student and his mother give their version of events.[31]

In *M (a minor), Re Application for Judicial Review*[32], the headmaster's decision was procedurally flawed as his investigation carried out to establish the facts was unfair. He failed to take reasonable steps to involve the student's parents before purporting to come to the serious conclusion that she was "knowingly involved in the handling and promotion" of a banned drug.

In *R v English Schools Foundation*, the Court found that the school and the Foundation, in what was apparently its anxiety to deal rapidly with the problem, failed to listen to what either the student had to say in his defence or in mitigation or what his parents had to say on

[26] [2004] NSWSC 737
[27] A similar situation arose in *Forbes v Boston* [1999] NSWSC 1217 (14 December 1999)
[28] [2004] NSWSC 737 at [120]
[29] *Carter,* [2004] NSWSC 737 at [122]
[30] [1999] IEHC 47 at [33]
[31] [2007] NSWSC 1419 at [50]
[32] [2004] NIQB 6 (04 February 2004) at [17]

his behalf. In the circumstances, "that was plainly a breach of natural justice; to put it another way, it was a failure to act fairly." [33]

Ensuring that proper investigation of the allegations occurs, that all parties are heard and relevant submissions considered

It is often correctly said that investigations within schools are not bound by the rules of evidence. Nevertheless, it must be remembered that these rules are a useful guide to any investigator. They should only be departed from "where consideration of equity, good conscience and substantial merit so justify."[34] Evatt J made the same point in *R v War Pensions Entitlement Appeal Tribunal; exp Bott*:

> *After all, [the rules of evidence] represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and solicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice".* [35]

The relevant standard of proof for investigations by schools is "on the balance of probabilities". Such investigations do not amount to criminal proceedings, no matter how serious the allegation. Accordingly, to find that an allegation is sustained requires proof on the balance of probabilities - the ordinary standard of proof required of a party who bears the onus in civil litigation in Australia. It is often suggested that this civil standard is given an extra dimension where the issue under consideration is more serious. The basis for this suggestion is found in the judgment of Dixon J in *Briginshaw v Briginshaw*:

> *The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, an inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the*

[33] [2004] HCFI 651 at [39]
[34] *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2004] NSWIRComm 65 at [322]
[35] (1933) 50 CLR 228 at 256

> *reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect reference.* [36]

It is not uncommon for schools to be required to investigate alleged behaviour which could constitute criminal activity in situations where the Police have already investigated but decided against bringing charges. The school finds itself in the invidious position of having to investigate the alleged criminal activity when the Police have decided that there is not enough evidence to prove what is alleged beyond reasonable doubt - the appropriate burden of proof in criminal matters. The decision by the Police not to charge a student cannot be relied upon by the school as being determinative of the issues which are the subject of the investigation. As the Full Bench of the Industrial Commission said in *Wang v Crestell Industries Pty Ltd* (an employment case):

> *The onus of proof in such a case is on the employer and the standard of proof must be such as to enable a positive finding that the misconduct occurred. The standard is, of course, the civil and not the criminal one, but the requisite degree of satisfaction must have regard to the seriousness of the alleged conduct and gravity of the consequences of the finding*.[37]

It is also important to consider all relevant evidence. This especially includes evidence that the accused student puts forward. The teacher investigating must speak to all the people involved, look at any relevant documents and make other relevant enquiries - all with a view to making a finding or findings on the balance of probabilities, as to what happened. While this may appear obvious, sadly, it is clearly not always obvious to experienced investigators, let alone teachers. For example, the investigator in *Carter's Case*, a former police officer, was criticised because she failed to interview any of the witnesses who could have given a contrary view of events to that put forward by those making the allegations.[38]

Ensuring that the decision-maker acts fairly and without bias

There should be a neutral investigator[39] and decision-maker. Obviously, this means that they have to be, and have to be seen to be, objective and impartial. It is not always appreciated that neutrality can be affected by a conflict of interest. For example, principals who know that they should be impartial and yet have some personal relationship with either those making the allegation or the student against whom the allegation is made necessarily have a conflict of interest. However, the circumstances of the case will determine whether a particular relationship between various parties will be important enough to amount to a denial of natural justice.

In *C.D. v. Ridley College*, the student sought to have a decision of a Discipline Committee set aside because of an apprehension of bias. The student argued that the fact that the Committee

[36] (1938) 60 CLR 336 at 361-362
[37] (1997) 73 IR 454 at 463-464
[38] [2004] NSWSC 737 at [26], [28], [33], [34] and [45]
[39] *Hedges*, [2003] NSWSC 1107 at [18]

was comprised largely of other school principals who all knew the College principal professionally and personally gave an impression of unfairness. The Court said:

> *If such a committee did create an apprehension of bias it would only be in the eyes of the applicants and the apprehension would be unreasonable. As well, it must be remembered that the test is not whether there might be an apprehension of bias but, instead, it is whether there will be, in the mind of a reasonable person, a reasonable apprehension of bias.*[40]

In an English case,[41] it was contended that a decision to expel a student was made by a biased decision-maker. Stoke Newington School had an Exclusion Panel to make expulsion decisions. A student was expelled by an Exclusion Panel which included a teacher who had been involved with the student and who was the student's Head of Year. The court said that the rules of natural justice had been breached because, while there was no actual bias, there was from the perspective of the reasonable person a real suspicion of bias as the teacher was both Head of Year and a member of the Exclusion Panel. Accordingly, the decision to expel was set aside.

Allowing a student to have an advocate

In government schools, the right to have a support person is enshrined in Departmental procedures. The main problem in *CF (by her Tutor JF) v State of New South Wales (Department of Education)* was that, before the students were interviewed, they were not informed of their right to have an independent person of their choosing present. O'Keefe J said:

> *The right of students who may be subject to the penalty of Long Suspension to have an independent person of choice present at interview is clearly intended as a safeguard for the student. By having an independent person present the students may be able to obtain advice that would prevent them from making admissions that may be detrimental to their interests. Furthermore, the presence of such a person would be an aid to ensuring that the will of the students was not overborne by aggressive or other inappropriate forms of interviewing. It could also operate to give a sense of comfort to them so that they would not feel overawed by the circumstances and perhaps, as a consequence, make admissions or statements that may be detrimental to them. It is thus a valuable right. However, unless the students are aware of the right they will not be able to exercise it. The existence and nature of the right in my opinion bespeaks an obligation on the part of the relevant school authority to inform a student who is to be interviewed in connection with his or her involvement in a matter that may sound in Long Suspension of the existence of this right.*[42]

[40] 1996 CanLII 8121 (ON S.C.) at [35]
[41] *R v Board of Governors of Stoke Newington School; Ex parte M* (unreported, 21 January 1992)
[42] *CF (by her Tutor JF) v State of New South Wales (Department of Education)* (2003) 58 NSWLR 135 at [31]

The obvious force of what O'Keefe J said suggests that non-government schools would be prudent to ensure students can have a support person present when being interviewed about serious matters or when suspension or expulsion is being contemplated.

Apart from the obvious protection for the student, having a support person present will assist schools to show that any admissions made by a student were not obtained improperly. In *Bovaird's Case*, Keane J noted that:

> *If the child does not admit the misbehaviour freely, or positively denies it, and there is no compelling eye witness, the principal should not then seek an admission. The parents should be consulted. Any admission should be sought in their presence or that of a nominee…. An admission in the absence of an adult can be a breach of natural justice.*[43]

A little later in his judgement, Keane J said that there had been a breach of fair process when two executive teachers, acting on the report of the teachers supervising a camp and the complaints of four fellow students, invited those accused to make immediate admissions. The judge said that the executive teachers should instead have notified the parents affected and interviewed the students in their parents' presence.[44]

School teachers recognise the impracticability of a requirement to involve parents every time an incident occurs. Fortunately, when Bovaird was appealed to the New Zealand Court of Appeal, the judges agreed saying:[45]

> *[54] We therefore respectfully disagree with the conclusion reached by Keane J on this aspect of the case. In our view, he was wrong to require parental involvement in the investigation and questioning of students where misconduct that potentially could lead to suspension is alleged. Imposing such a requirement is not necessary ... .*
>
> *[55] What is required is the fair treatment of students. Overbearing behaviour by a teacher undertaking an investigation would compromise the fairness of the process. Parental involvement may be desirable where that can be provided for without compromising the effectiveness and promptness of the investigation. Such involvement may reduce the risk of later challenge, or the likelihood of such a challenge succeeding. But we do not consider that a failure to involve parents in an otherwise fair process breaches the principles of natural justice or compromises the basis of a decision to suspend a student.*
>
> *[56] … Rather the requirement to engage with parents arises after the stand-down or suspension decision is made.*
>
> *[63] We conclude that there is no legal requirement to consult with parents before a stand-down or suspension decision is made. It may be that in some circumstances*

[43] [2007] NZHC 560 (7 June 2007) at [67] and [68]
[44] [2007] NZHC 560 (7 June 2007) at [77]
[45] [2008] NZCA 325 (27 August 2008)

> *where the school has limited information about a student, consultation with a parent will be necessary for a principal to inform himself or herself about the student. In other cases it may be good practice to involve a parent and, indeed, the Guidelines contemplate that there will have been some previous involvement with parents if there is a continuing situation of misconduct or disobedience. But we do not see this as a black letter requirement in all cases, and we do not believe that the failure to consult with the parent would, without move, invalidate a decision to suspend. The obligation of a principal is to act fairly. What is required to meet that obligation will depend on the facts of the particular case. But there is no rule of law that a principal must involve parents prior to making a decision to suspend in every case.*

In *R v Governors of Dunraven School, ex p B*, the student B was interviewed by the head teacher without an adult present. Sedley LJ said:

> *Without doubt an admission made to a head teacher who has told a child that he will be kept in until he confesses, or who has untruthfully told a child that he has been seen committing the offence, would be worthless.*[46]

Brooke LJ also said that if the head teacher has secured an admission through conduct tantamount to oppression it would be unfair to rely upon it. However, both judges found that the head teacher had not behaved in an improper way.

In some cases, procedural fairness will dictate that people under investigation be allowed legal representation. In *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs*, Drummond J referred to various cases on the circumstances in which a right to legal representation is an element of natural justice and said:

> *The effect of the cases is that in the absence of statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers; but the circumstances of the particular case may be such that a refusal to allow legal representation may constitute a denial of natural justice. This is likely to be so where complex issues are involved or where the person affected by the decision is not capable of presenting his or her own case. In this sense, it may be said that in certain circumstances the 'right to legal representation' is an element of natural justice.*[47]

In *C.D. v. Ridley College*, the Court said:

> *The common law principles of natural justice essentially all flow from the concept of procedural fairness. That fairness is absent here and is characterized primarily by the following:*
>
> > *(a) C.D. is a minor. An expulsion hearing should never have been convened without notice to one of his parents. Had such notice been given, I regard it as*

[46] English Court of Appeal, Civil Division, 21 December 1999, at [31]
[47] *Li Shi Ping v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 557 per Drummond J at 570

> *highly probable that either or both of the parents would have been on the next plane from the Cayman Islands to Ontario and, failing that, I regard it as a virtual certainty that they would have arranged for C.D. to be represented at the hearing.*
>
> *(b) The entire case against C.D. rested on the evidence or word of other students. He, his parents or his legal or other representative should have been permitted the opportunity to test the evidence or word of his accusers by means of cross-examination.*[48]

Nevertheless, legal representation is unlikely to become common in the school situation. In the United States, a court in Illinois said that "due process" did not mean that a boy's lawyer had the right to cross-examine other student witnesses.[49] In an Irish case, the Court was not persuaded that it was necessary (or desirable) to arrange for the cross-examination by lawyers of student witnesses.[50]

If parents do ask that their lawyer attend a meeting where suspension or expulsion is to be discussed, a school should listen to the reasons advanced by the parents in support of their request before making a decision to agree or not. If the school agrees, it should consider whether its own lawyer should also be present.

Ensuring that the student is given a chance to deal with matters adverse to his or her interests

Brennan J pointed out in *Kioa v West* that:

> *A person whose interests are likely to be affected by the exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise. The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance…*
>
> *Nevertheless, in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it.*[51]

In *R v Governors of Dunraven School, ex p B*, Sedley LJ made the same point saying:

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[48] 1996 CanLII 8128 (ON S.C.) at [32]
[49] *Brown v Plainfield Cmty. Consol. Dist. 202* 2007 WL 4180358 (N.D. Ill. Nov 2007)
[50] *Wright v. Board of Management of Gorey Community School* [2000] IEHC 37 (28th March, 2000); see also *Smullen v Duffy* [1980] ILRM 46
[51] (1985) 159 CLR 550 at 629

> *… it is unfair for the decision-maker to have access to damaging material to which the person at risk here the pupil through his parent has no access.*[52]

This case involved an allegation against three boys, D, M and B (the applicant in the case), that they had stolen a teacher's handbag from the staff room. A committee of the school's governing body had to consider the case for expulsion in each case. The committee heard from D first. They then heard B's case but without telling B or his parents what D had said about B's involvement. Sedley LJ said that it was unfair for the committee to take into account D's written statement which B had not seen and D's oral evidence which B had not heard.[53] Brooke LJ concluded that what the committee did in this regard changed a fair procedure into an unfair procedure which could not stand.[54]

This raises the difficult issue often faced by schools of how to protect the identity of other children who have made statements about an incident. Normally, copies of relevant statements should be provided to the student whose misconduct is being examined and to his or her parents. However, this is not mandatory as there may be issues of fear of intimidation, peer pressure or other negative factors that may make the giving of statements and the revealing of the names of witnesses inappropriate.[55] The English Court of Appeal wrestled with this in *R v Governors of Dunraven School, ex p B*. There was a legitimate need to protect D from exposure as the informant and from consequent reprisal. Drawing analogies from criminal and employment matters, the Court recognised that a careful balance had to be maintained between protecting students who feared reprisal and providing a fair hearing for those accused of misconduct.[56] In some cases, the solution is to get the other students to prepare written statements, then to remove anything from the statements that could identify those who made them, and finally to give these anonymised statements to the accused student and his or her parents. In other cases, it will be enough to provide an outline of the material in the statements. If neither of these options is possible, the school must either seek to make findings without the benefit of the evidence of the other students or "drop the case" against the accused student. The Department of Education has taken a similar approach in its *Procedures for Suspension and Expulsion of School Students*:

> *Should principals be of the view that it is not appropriate to provide copies of statements, for example, because of a fear that witnesses may be intimidated, full details of the allegation(s) outlined in the statements should be provided.*

[52] English Court of Appeal, Civil Division, 21 December 1999, at [19]
[53] English Court of Appeal, Civil Division, 21 December 1999, at [23]; see also *R v Governors of Bacons College, ex parte W* [1998] ELR 488 where Collins J said in similar circumstances that "to rely on something by hearsay without seeing any of the material and without giving the parents the opportunity to see that material is unquestionably unfair."
[54] English Court of Appeal, Civil Division, 21 December 1999, at 20 of Westlaw report
[55] *CF (by her Tutor JF) v State of New South Wales (Department of Education)* (2003) 58 NSWLR 135 at [13]
[56] English Court of Appeal, Civil Division, 21 December 1999, at [22]

Providing an appeal process in some situations

NESA notes that the "hearing rule" includes the right of a student to know how to seek a review of the decision made in response to the allegations. This suggests that a discipline policy based on principles of procedural fairness should include a right of review or appeal. The Department of Education Legal Issues Bulletin No. 3 also says that procedural fairness requires a right to an appeal.

However, the better view is that procedural fairness does not always require there to be a right to an appeal. As mentioned earlier, one must consider all the circumstances when deciding what is fair. A school would not function if all disciplinary actions, no matter how minor, were subject to appeal. Indeed, the Department itself has recognised this in its Procedures for Suspension and Expulsion of School Students:

> *Though the right to appeal is not necessarily an essential element of procedural fairness, it is considered appropriate to incorporate such rights in respect of suspensions and expulsions from government schools.* (Appendix 2)[57]

Can schools discipline students for misconduct occurring "beyond the school gate" or outside normal school hours?

These questions have been around for years. For example, in 1893, a teacher in England physically reprimanded a student after the student got into a fight with another student while they were going to school. It was held that the teacher had the authority to do this.[58] In an earlier New Zealand case, the Chief Justice held that teachers could administer discipline "even for acts done out of school if prejudicial to its order and discipline".[59] However, the issue has become more prominent in recent times as we have entered the cyber-age. For example, the US Supreme Court is currently hearing argument about whether schools may discipline students for off-campus speech.[60] In this case, Brandi Levy was upset when she discovered that she did not make the senior cheerleading team for the next school year and would remain in the junior squad. One weekend, she vented on Snapchat: "F*** school f*** softball f*** cheer f*** everything". As a result, the coaches decided to remove Levy from the cheerleading team for the next season. The Supreme Court will decide if such action was permissible.

In *Leah Bradford-Smart v West Sussex County Council*[61], the English Court of Appeal was dealing with a situation where the school was not aware of any bullying taking place within the school (indeed, it was found that no bullying was taking place at school) but was aware of bullying taking place on the bus to and from school and in Leah's neighbourhood. The Court

[57] Department of Education & Communities, Suspension and Expulsion of School Students – Procedures 2011, updated April 2015 - https://policies.education.nsw.gov.au/policy-library/associated-documents/suspol_07.pdf
[58] *Cleary v Booth* [1893] 1 QB 465
[59] *Hansen v Cole* (1891) 9 NZLR 272 at 279
[60] *Mahanoy Area School District v. B.L.* (No. 20-255) is set for argument on 28 April 2021, with a decision expected by the end of the court's term in June 2021.
[61] [2002] EWCA Civ 7

of Appeal agreed with the trial judge that the school was not liable for the injury to Leah caused by the bullying outside of school. Although the case was about the school's duty of care and its liability for the injury to Leah, the Court of Appeal observed:

> *But the school cannot owe a general duty to its pupils, or anyone else, to police their activities once they have left its charge. That is principally the duty of parents and, where criminal offences are involved, the police.*[62]

While it is recognised in Australia that the school's duty of care may extend to doing something where students are at risk of harm beyond the school campus or outside school hours,[63] there is clearly no duty to discipline students for misconduct beyond the school campus or outside school hours. Perhaps the more important question for schools relates to their ability to discipline students for such misconduct.

In *Bradford-Smart*, the Court of Appeal recognised that teachers could use their disciplinary powers against a student who had attacked another child outside school, saying:

> *In **R v London Borough of Newham ex parte X** [1995] ELR 303, at 306-7, Brooke J (as he then was) rejected the argument that a head teacher could not use his disciplinary powers against a pupil who had attacked another boy outside school. We agree.*[64]

The Department of Education *Student Discipline in Government Schools Policy* states:

> *The school discipline policy may apply outside of school hours and off school premises where there is a clear and close connection between the school and the conduct of students.*

Independent schools mostly take a similar approach. To avoid doubt, these schools ought to ensure that their enrolment contracts specifically give them the right to discipline students in respect of behaviour that is outside of school hours or off school premises.

When should school leaders contact the police?

There is a *Memorandum of Understanding for Information Exchange between Schools and NSW Police* for guidance of both government and independent schools. The Memorandum provides that principals should disclose information to the Police when:

(a) disclosure of the information is necessary to assist the Police to investigate an offence; or

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[62] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 32
[63] *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) ATR ¶81-399 at p 63,589
[64] *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7 at para 34

(b) the principal has grounds to believe that an offence may have been committed which impacts upon the safety and security of the school; or

(c) disclosure is necessary to maintain a safe and disciplined learning environment; or

(d) disclosure would assist Police to make any decision, assessment or plan or initiate or conduct any investigation relating to the safety, welfare or well-being of a child or a young person.

The understanding reached in the Memorandum is always subject to the law. Apart from child protection legislation, the main statutory provisions to keep in mind in New South Wales are sections 316 and 316A of the *Crimes Act 1900* (NSW). Section 316 reads:

(1) An adult –

(a) who knows or believes that a serious indictable offence has been committed by another person, and

(b) who knows or believes that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and

(c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force or other appropriate authority,

is guilty of an offence.

Maximum penalty – Imprisonment for –

(a) 2 years – if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or

(b) 3 years – if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or

(c) 5 years – if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.

(1A) For the purposes of subsection (1), a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force or other appropriate authority if –

(a) the information relates to a sexual offence or a domestic violence offence against a person (the "alleged victim"), and

(b) the alleged victim was an adult at the time the information was obtained by the person, and

(c) the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police or another appropriate authority.

(1B) Subsection (1A) does not limit the grounds on which it may be established that a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force or other appropriate authority.

(2) A person who solicits, accepts or agrees to accept any benefit for the person or any other person in consideration for doing anything that would be an offence under subsection (1) is guilty of an offence.

Maximum penalty – Imprisonment for –

(a) 5 years – if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or

(b) 6 years – if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or

(c) 7 years – if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Director of Public Prosecutions if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

(6) In this section –

"domestic violence offence" has the same meaning as in the Crimes (Domestic and Personal Violence) Act 2007 .

"serious indictable offence" does not include a child abuse offence (within the meaning of section 316A).

Note : Concealing a child abuse offence is an offence under section 316A. A section 316A offence can only be committed by an adult.

"sexual offence" means the following offences –

(a) an offence under a provision of Division 10 of Part 3 where the alleged victim is an adult,

(b) an offence under a previous enactment that is substantially similar to an offence referred to in paragraph (a).

Section 316 was introduced into the *Crimes Act* in 1990 and has received little detailed judicial analysis. For a person to be convicted of an offence under section 316, the prosecution would have to prove beyond reasonable doubt that:

(a) a person had committed a serious indictable offence (that is, an offence punishable by imprisonment for 5 years or more but not a child abuse offence, which is dealt with under Section 316A); and

(b) the person being prosecuted:

i. knew or believed that the offence had been committed; and

ii. knew or believed that he or she had information which might be of material assistance in securing:

A. the offender's apprehension; or

B. the offender's prosecution; or

C. the offender's conviction for the offence; and

iii. failed **without reasonable excuse** to bring the information to the attention of the NSW Police or other appropriate authority.

In *R v Crofts*[65], the Court of Criminal Appeal in New South Wales was considering an appeal by Mr Crofts against the severity of his sentence. Mr Crofts had pleaded guilty to a charge under section 316. Mr Crofts knew that either or both of his stepbrother and another man had murdered someone because his stepbrother had told him. The maximum sentence under the *Crimes Act* is two years. The trial judge sentenced Mr Crofts to six months, taking into account his dislocated family background and his unstable mental state.

Meagher JA said:

> *This section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words "without reasonable excuse", difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.*

[65] Unreported (BC9508235), NSW Court of Criminal Appeal, 10 March 1995

Gleeson CJ added:

> *... it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was "without reasonable excuse".*

Because Mr Crofts had pleaded guilty, the Court did not have to decide what might amount to a reasonable excuse. However, it is obvious that the judges of the Court of Criminal Appeal in NSW are concerned at the difficulties thrown up by section 316.

Although one cannot be definite about it, I suggest that reasonable excuses could include:

(a) doubt as to whether a person has committed an offence;

(b) the contrition of the person who has committed the offence together with restitution of property where theft is involved;

(c) the age, health and family circumstances of the person who has committed the offence, particularly if the person with the knowledge or belief is the person wronged.

In my view, a principal or teacher who fails to disclose information obtained during the course of their work in a school is unlikely to be charged with this offence where there are reasonable grounds for seeking to deal with the situation within the school. Sub-sections 316 (4) and (5) of the *Crimes Act* make it necessary for the Attorney General to give approval before a principal or teacher (who obtained the information in the course of teaching and a section 60E offence is involved[66]) can be prosecuted for this offence. This makes the likelihood of a charge even more remote.

However, even if the risk of being prosecuted under section 316 is low, principals should normally involve the Police at their Local Area Command where serious offences are involved. As the Memorandum concludes:

> *Honest and frank exchange of information between Principals and the NSWPF provides a cornerstone for successful management of the incidents that occur in or near schools, or while students are travelling to and from school. Effective and professional exchanges of information result in quality relationships between senior school staff and members of the NSWPF.*

[66] Section 60E sets out offences including assaults at schools. The first offence is in section 60E(1): *A person who assaults, stalks, harasses or intimidates any school student or member of staff of a school while the student or member of staff is attending a school, although no actual bodily harm is occasioned, is liable to imprisonment for 5 years.* However, section 60E(5) makes it clear that nothing in subsection (1) applies to any reasonable disciplinary action taken by a member of staff of a school against a school student.

So what must a school do?

Put very simply, schools in New South Wales must ensure that they have discipline policies which are based on the principles of procedural fairness. Hopefully, it is clear that it is not enough to include a statement like: *This policy is based on principles of procedural fairness.* Rather, the principles discussed in this paper must be woven into the fabric of a school's discipline policy. And then, like all other school policies, the discipline policy must translate into action when students are disciplined.

Further, independent schools should ensure that their enrolment conditions spell out clearly how discipline operates in the school. This should include reference to the extent to which the school will discipline students for off campus or after hours activities.

Finally, schools should seek to develop a good working relationship with their NSW Police Local Area Command.

A Word of Encouragement

It is entirely proper that the senior leadership teams in schools, who have been tasked with the upholding of standards, ethos and discipline, should be afforded a wide margin of appreciation by the Courts in respect of their decision making.[67]

[67] *In the Matter of an Application By JR 129 (A Minor) for Leave To Apply For Judicial Review* [2020] NIQB 71 per Humphreys J at [24]