

# STUDENT SEARCHES IN AUSTRALIA: A CONSIDERATION OF ROLES, RESPONSIBILITIES AND RIGHTS OF STUDENTS, SCHOOL STAFF AND POLICE

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*In the U.S., courts consider the extent to which school staff can search students' persons for suspected drug or weapon possession without violating the Fourth Amendment of the Constitution, and the reliability of student informants as a basis for such searches. In Queensland and New South Wales, the policy for government schools is that school staff may not search students' persons in such situations but must seek police assistance. This article considers the practicality of such an approach, whether it is the most appropriate for our schools and students, or whether the professional judgment of school principals and teachers should be enhanced to address such situations to allow searches by staff. It also considers what guidelines would need to be in place if such a policy change were considered of merit.*

## I INTRODUCTION

In 1964, Donald Horne termed Australia 'the lucky country' to reflect the degree to which Australian well-being was the outcome of good fortune rather than good management. When we make comparisons in many areas of schooling between Australian and the United States of America (U.S.), Australia may still be operating as a lucky country, either failing to recognise some serious issues facing school administrators, or choosing to deal with the same in a framework of policy that may not accommodate real areas of risk, an appearance of good management but one where any current success may be due to good fortune. The specific focus of this paper is how Australian schools are to deal with suspected student misbehaviour through possession of illegal substances such as drugs or, potentially more dangerous, weapons. The discussion draws on relevant legislation and policy from Queensland and New South Wales, taken as indicative of, but not necessarily representative of, the policy response of Australian states.<sup>1</sup>

The authors have undertaken a number of comparisons of matters in education law between Australia and the United States of America (U.S.), including high stakes assessment, discrimination and educational negligence. Invariably in these comparative analyses, we explore a considerable body of case law from the U.S. — where litigation in education produces some 2000 cases a year<sup>2</sup> — and overarching U.S. federal or state statute law or constitutional rights. From the Australian perspective, given the absence of individual rights in the *Constitution*, and very limited case law,

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the analyses tend to focus on the considerable legislation and policy at the state and federal levels that guide educational processes. Australia is still a fortunate country in many areas of education in comparison to the U.S.. It has more equitable funding of schools through federal and state allocations — schools are not dependent on the wealth of surrounding communities and regions cannot vote down education taxes. All schools have trained and qualified teachers with equity of payment and appointment, and incentives to entice teachers to less-populated rural areas. Curriculum and syllabuses are developed at state, and increasingly national, levels involving both education professionals and parent representatives. On the face, few schools might be considered dangerous environments, and possibly proportionately fewer students than in the U.S. engage in drug or potentially violent behaviours.

It may be that this environment of perceived low threat is the basis of our good fortune in avoiding a major incident — for, while on the one hand the Australian development of educational policy at systemic levels and legislation appears to have positive outcomes and to provide more equity of educational provision and outcomes than across the U.S. as a whole, as well as preventing mass litigation and resultant diversion of resources to legal challenges, on the other hand, such policies can neutralise major issues and reduce the professional discretion of those involved in educational practice. Education legislation and policies to address a range of issues can be developed on the basis of sound research. However, such legislation and policy development are increasingly introduced as political response to perceived public concern. They risk becoming a vehicle for rhetoric, rather than real reform. For example, children use drugs, the system response is development of a drug education policy and materials,<sup>3</sup> the system has provided a response, and the problem has been addressed.

Policies can also make the roles of those responsible for their implementation difficult, on the one hand relying on the professionalism of educators to make judgments about implementation while on the other hand reducing their discretion to act in potentially key areas. The area at issue in this paper is the right of teachers and principals to undertake searches of children's property and person when drug or weapon possession is suspected.<sup>4</sup> The Fourth Amendment of the U.S. *Constitution* provides individual rights and protections regarding search of property and person,<sup>5</sup> the Australian *Constitution* provides no such right.

Drug use among Australian students is known to occur.<sup>6</sup> The carrying of weapons is less common, especially guns, but incidents with knives are more frequent. Australian student culture has many similarities to U.S. student culture. In a recent paper,<sup>7</sup> we have considered both the extent of the involvement of principals and teachers in schools in the U.S. in searches of students suspected of possessing illegal substances (drugs) or weapons, and the reliance of schools on student informants to provide reasonable suspicion as the basis for a search. The discussion arose from a recent U.S. case on strip searches of students. The case considered two aspects: the acceptable extent of a search based on reasonable suspicion without violating the Fourth Amendment of the U.S. *Constitution*,<sup>8</sup> and the establishment of reasonable suspicion based on the advice of school students as informants. The nature of the search by school staff was extensive, and regardless of how discreetly managed, clearly intrusive. As observed by a dissenting justice in the U.S. case

Thirteen-year-old Savana Redding, an honor roll student with no prior disciplinary problems, was required to strip, exposing her breasts and pubic area, in a fruitless search for — at worst — prescription strength ibuprofen.<sup>9</sup>

The argument presented in the case was that several drug-related activities had been observed, and the student, Savana, had admitted to possession of a number of items related to the allegations. No illicit drugs were found. Further the search was conducted on the basis of the ‘uncorroborated evidence’ of one student.<sup>10</sup> The student was not allowed to phone her mother or have her mother present during the search.<sup>11</sup>

## II AN OVERVIEW OF THE STATUS OF STUDENT SEARCHES IN U.S. CASE LAW

The U.S. *Constitution’s* Fourth Amendment prohibits ‘unreasonable searches and seizures’ except where government employees have sufficient evidence to support ‘probable cause’.<sup>12</sup> However, in *New Jersey v T.L.O. (T.L.O.)*,<sup>13</sup> the U.S. Supreme Court carved out, for students in public schools, a new reasonableness standard midway between two competing views regarding the protection of privacy — the State of New Jersey’s position in *T.L.O.* that the Fourth Amendment regulated only searches by law enforcement officers, and the student’s (T.L.O.’s) position that the Fourth Amendment’s probable cause standard applied to searches by school officials as well as those by law enforcement officers.<sup>14</sup> The reasonable suspicion standard, although requiring that searches be reasonable both as to their inception and scope, does not require individualised suspicion for all student searches,<sup>15</sup> allowing as well for the constitutionality of group<sup>16</sup> and suspicionless<sup>17</sup> searches. Reasonable inception assesses, by looking at the reliability of informants and their information, whether ‘reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school’.<sup>18</sup> Reasonable scope, on the other hand, examines the intrusiveness of a search in light of evidence concerning the nature of the infraction and, while strip searches, the most intrusive of searches, are discouraged by U.S. courts, they have not been invalidated in individualised suspicion situations where the nature of the contraband represents a safety risk to the school.<sup>19</sup>

No constitutional challenges to date have been raised either as to the employment function of the persons engaging in a search or the place where the search occurs. Thus, student searches conducted by school administrators, classroom teachers, school nurses, and even teachers’ aides in a variety of venues, including school classrooms and locker rooms, as well as student vehicles in a school parking lot, have been upheld as falling within the Fourth Amendment’s reasonableness requirement. Generally, searches conducted by law enforcement officers on school premises are governed by the reasonable suspicion standard, as long as the officers are on the premises at the invitation of school officials and are accompanied by school personnel during the search.<sup>20</sup>

However, this constitutional reasonableness test does not prohibit states and local school districts from imposing additional and more restrictive search requirements.<sup>21</sup> Worth noting, though, is that while challenges under these state and local restrictions can raise claims under state common law, state employment law, and state constitutional and statutory provisions, they do not change the Fourth Amendment’s reasonableness standard nor do they create violations that can be pursued under federal remedial damages statutes, such as s 1983 of the *Civil Rights Act of 1964*.<sup>22</sup>

## III AUSTRALIAN POLICY RESPONSE AND PRACTICE FOR SUSPECTED DRUG OR WEAPON POSSESSION BY SCHOOL STUDENTS

Could the types of searches of students discussed in the U.S. context be conducted by school staff in Australia? What would be the grounds required and the procedures put in place? How would the public, and the courts, respond? While little information is available about practices

before current policies were established, newspaper reports in 2000 recording a teacher strip search of students in a Queensland school for stolen money reported public outrage with the event.<sup>23</sup> However, more recently, three young children (10 and 11 years old) took pills suspected to be ecstasy at school, which led to some parents reportedly urging schools to undertake more searches and searches of school and student property. The pills, brought to school from home by one of the children, were reportedly believed by them to be sweets. The children told the school administration office that they felt ill, that they had eaten the ‘lollies’, and they were then taken to hospital for treatment. The police, who were naturally involved, commended the school on the response to the incident and for the obvious presence of trust in the school that provided an environment in which the children were comfortable in telling the teachers what had happened and seeking assistance.<sup>24</sup> In another recent event in Brisbane, a teenager took a gun to school, although it was not clear from the reports which of the two students involved, an underage 15-year-old or legally adult 18-year-old, had brought the gun.<sup>25</sup> While possession of handguns in Australia is rare under our strict gun laws, reports of students with knives in schools are increasing.

Drug and weapon possession are addressed in Queensland and New South Wales schools through a range of behaviour management plans and policies guiding administrative procedures. Under legislation, schools in Queensland and New South Wales are expected to have a range of policies in place to address many student management issues including student substance abuse.<sup>26</sup> This applies to both government and non-government schools, as the accreditation of schools is managed by each state government. For example, to be registered as a non-government school in Queensland, schools complete documents about planned student health and welfare policies. In the past, checklists for such policies have included a ‘Substance Abuse/Drug policy’.<sup>27</sup> In New South Wales, the Board of Studies indicates similar requirements.<sup>28</sup> Procedural policies issued by the government also indicate to school principals that students in Australian schools have rights of natural justice (due process in the U.S.) or procedural fairness, and the right to ‘fair and equitable practice’ with opportunity to respond to any allegations in the implementation of such school policies.<sup>29</sup> While a protection such as the U.S. Fourth Amendment does not exist, the commitment to natural justice, combined with Australia’s adherence to the principle of the ‘best interests of the child’,<sup>30</sup> has led to advice to school principals that policies related to ‘police action in schools, suspension and expulsion of school students, and searches of students and bags must be followed to *protect the student’s interests*’.<sup>31</sup>

Considerable guidance is provided to schools in developing a school’s policy but with capacity to modify policies to individual school contexts.<sup>32</sup> The underpinning principles of such policies are the engagement of positive and supportive behaviour by schools, including identification of students at risk, provision of intervention strategies to keep children at school, and use of appropriate external support services.<sup>33</sup> Preventative drug education is endorsed and would be present in most if not all schools. Many of the policy procedures relating to drug management are for an incident where a student appears to have already consumed an illicit (or prescription) drug and is suffering ill effects. A teacher may confiscate any drugs that appear to be present in this context. Parents or carers are to be informed. In terms of school punishment for such activity, a school has the option to suspend the student, although this is not automatic or automatically seen as in the student’s best interests.

However, in conjunction with these actions, the principal is also required to notify the police immediately about a student’s possession of a suspected illicit drug. When possession of drugs or weapons is suspected, police assistance should also be requested. Police are then expected

to undertake any further investigation.<sup>34</sup> To maintain a positive approach to engagement of external organisations in student matters, schools are expected to develop effective partnerships with community organisations and resources, including police, to assist in developing positive behaviour management plans.<sup>35</sup> Queensland has a school-based police officer plan, with currently 37 high-school based police serving schools and clusters of schools around the state.<sup>36</sup> In New South Wales, schools are encouraged to develop memorandums of understanding for information exchange between police and schools.<sup>37</sup>

### *A Searches of the Personal Belongings or Persons of Students by Principals and Teachers*

School desks and lockers (unless a payment is made by the student for the locker) are school property and may be searched by school staff, if the school has reserved the right to such a search.<sup>38</sup> However, staff are advised to have students' permission to search their personal property or to turn out their bags, and such searches should be discreet and undertaken by a person of the same sex as the student.<sup>39</sup> School staff may be able to ask students to remove outer layers of clothing or to turn out their pockets. However, the policy guidelines in Queensland and New South Wales clearly state that any search of the person is to be undertaken by police and, as a result, advice to teachers is very clear<sup>40</sup> — they cannot undertake searches of a student's person or touch them.<sup>41</sup>

Advice to principals is that searching a student's bag or possessions without the student's permission 'should only occur as a last resort and where the immediate safety of students is at risk'.<sup>42</sup> A grey area exists about school staff's rights to search a student's person, if there is a perceived threat to the safety of other children.

### *B Police Powers to Search School Students at Schools*

In NSW and Queensland, police have the right to search a person whom they reasonably suspect of having any prohibited plant or drug or dangerous implement in his or her custody.<sup>43</sup> In New South Wales, under the *Summary Offences Act 1998* (NSW) it is an offence for a person to have custody of an offensive implement in a public place or school.<sup>44</sup> The *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW) provides police with specific powers to search for knives and other dangerous implements in schools<sup>45</sup> — in 'a search of a person under this section, a police officer must, in the case of a search of a student in a school and if reasonably possible to do so, allow the student to nominate an adult who is on the school premises to be present during the search'.<sup>46</sup> A police officer may conduct a strip search of the person 'if the police officer or other person suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out'.<sup>47</sup> The search is to be conducted by a police officer of the same sex or by a person of the same sex under the direction of the police officer.<sup>48</sup> In New South Wales, a strip search cannot be conducted of a child under 10 years of age, leaving an assumption that a strip search of a child over 10 years of age, in a school, would be permissible.<sup>49</sup> Such a strip search can require removal of all clothes. In Queensland, the *Police Powers And Responsibilities Act 2000* states that 'unless an immediate and more thorough search of a person is necessary, (police should) restrict a search of the person in public to an examination of outer clothing',<sup>50</sup> with similar directions regarding the sex of the person doing the searching.<sup>51</sup> However, police are able to ask for removal of all items of clothing,<sup>52</sup> with children 'who may not be able to understand the

purpose of the search' to be searched in the presence of a support person unless delay may cause destruction of evidence or for safety purposes.<sup>53</sup> The phrase 'not able to understand' leaves room for interpretation that older students might be searched without a support person, and again could be asked to remove all items of clothing.<sup>54</sup>

### *C Practical and Legal Issues that Arise under Policy and Legislation*

The Queensland and New South Wales policies and laws identify a possible stand-off in managing incidents where students are suspected of possession of drugs or weapons on their bodies. School staff may search student property with permission, but may not search property without permission except if other students are perceived to be at 'imminent risk',<sup>55</sup> and may not search a student's person at all but must involve police.

The current policy and legislation raise three related points of contention or ambiguity: firstly, what degree of reasonable suspicion do school staff need or want before contacting police and requesting their involvement; secondly, would school staff have differing enthusiasm for engaging police according to the prior standards of character and behaviour of the suspected student(s) (considering the same of the student accused in the U.S. case cited);<sup>56</sup> and, thirdly, is it feasible to expect police involvement in every incidence where drug or weapon possession is suspected in a school. Two further issues that arise from a legal perspective are how police determine the meaning of reasonable suspicion when compared with a higher standard required by empowering legislation before they conduct a body or property search, and whether both school disciplinary actions and criminal charges might follow as consequences of illegal activity by a student.

The extent to which school principals or staff undertake searches of students' property and external clothing, with permission, is not known, nor the extent to which they follow policy and contact police for each suspected possession whether or not such searches by staff have been undertaken. Informal consultation with a senior Queensland police officer indicated that police are regularly called to schools in some areas on multiple occasions each week to address drug and violence matters. Knives are more frequently being carried by students, and guns have been found on a small number of occasions. However, as later discussion of statistical reports and the relatively low incidence of offences shows, these visits do not all appear to result in suspension or official police records. The suggestion was made by the authors' police communicant that in practice, principals may exercise discretion in deciding whether possession of a small amount of drugs (marijuana) regarded as for personal use are reported to police or managed internally. Body searches of students for these suspicions may not be pursued by school staff to the extent of involvement of police. However, school staff may be more active in contacting police when possession of knives, and possibly other weapons, is known or suspected involved, with more likelihood of danger to other students.

Legal ambiguity may exist regarding the roles of school staff regarding the roles of school staff in contacting police and in investigating violations of school rules. In general, police called to a school undertake their own enquiry about the matter to establish whether the evidence constitutes reasonable suspicion under their legislative responsibilities — a higher standard than that that would be required for school staff and other citizens — and the appropriate resultant action. Indeed, the reasonable suspicion standard for school to contact police may be very low. In New South Wales guidelines, principals are advised not to initiate investigations of suspected illicit activities beyond establishing 'basic facts', and that investigations are the responsibility of the police.<sup>57</sup> Once activated by the school, a police enquiry would involve an interview with the

student(s) suspected of illegal activities and at least school staff, and possibly other students as witnesses.

However, the conduct of an interview of a student by police introduces a new set of policy guidelines. While guidelines indicate that the school should not send a child home before the end of the school day, unless the presence of a parent or carer at home has been established, the procedure encouraged for police interviews is that they should occur at the student's home unless exceptional circumstances apply.<sup>58</sup> If an interview is to take place at school, for children under 16, the student's parents or carers must be notified and asked to be present or the parents may consent to another adult being present, for children 16 and 17 years of age, the student may identify and consent to another adult being present. Further if the parents or carers refuse permission, and the student does not agree to the nominated adult being present,<sup>59</sup> the principal is not to allow the interview to occur at the school.<sup>60</sup> Under school policies, a principal can undertake disciplinary action if a student is uncooperative when questioned by school staff,<sup>61</sup> but could not require a student to answer questions once police are present. Hence, if all parties acted within strict policy and legislation, an impasse in the resolution of suspected, and concealed, drug (or weapon) possession at a school might occur unless the evidence, which may be contingent on reports by other students, is considered sufficiently strong for police to undertake a search at the school and without parent approval or authority.

In both New South Wales and Queensland, police acting on reasonable suspicion about possession of a drug or weapon may strip search students over 10 years of age without a warrant on the school site if they establish reasonable grounds. The conditions are that the dignity of the individual is to be respected, a support person should be present, and the search should be conducted by a police officer of the same sex, or by a person of the same sex, who could be a teacher or any other member of school staff, under the direction of a police officer. A strip search may involve removal of all clothes. The Queensland act provides some ambiguity as to whether a support person is required to be present for children over 10 years of age if the police consider that the child is capable of understanding the purpose of the search. How police are to establish the appropriate reasonable grounds in the face of an obstinate student and scant school evidence, in order to conduct such a search, is not transparent.

### *1 If Teachers Don't Act*

Teachers clearly must exhibit some professional judgment and wisdom when determining whether to intervene in an incident when children's safety may be at risk. While incidents relating to illicit and licit drugs may cause risk only to the student concerned, incidents involving weapons introduce more imminent risk to other students. In a New South Wales case, a teacher dismissed for failing to intervene in a fight between female students on school premises, and for failing to offer assistance when one girl was injured, sought reinstatement because his allegedly wrongful dismissal represented harsh treatment. He claimed as defences for his failure to act the threatening large number of students, the principal's instructions that teachers were not to touch students under any circumstances, and that he was awaiting assistance. The teacher failed in his bid to be reinstated.<sup>62</sup>

### *2 If Teachers Act Outside Policy: Implications for Evidence*

Information gained by a teacher who has not followed policy may still be allowed to be considered in making judgment about a student's conduct and consequences. While serious

consequences (institutional detention or worse) based on student possession of illicit substances or a weapon are rare, and police have the option to issue a warning to students rather than proceed further with any charges or allegations in a children's court, students under 18 years of age may be suspended or excluded from school. In the U.S., improperly-obtained evidence such as from an improperly conducted search is excluded from court considerations under the judicially-constructed 'exclusionary rule'.<sup>63</sup> However, while procedures of natural fairness are built into education acts in New South Wales and Queensland, Australian court public policy allows judges discretion to admit or reject evidence obtained outside protocol, although qualifications in the *New South Wales Evidence Act* may lead to exclusion for court purposes.<sup>64</sup> The public interest of personal safety of all students would seem to sufficiently outweigh considerations of evidence obtained through an improper search in Australia.<sup>65</sup> What may be more problematic for a teacher who searches a student without proper authority is that under both New South Wales and Queensland law, this could constitute an assault.

### 3 *Reliance on Student Informants as Grounds for Reasonable Suspicion*

The U.S. decision that prompted this discussion, noted previously,<sup>66</sup> involved consideration of reliability of student informants. It is clear from the policy documents in Queensland and New South Wales that schools rely on students to provide information to teachers, and for a system of mutual trust to be established. The credibility of information provided by the informant is therefore not necessarily an issue, given the procedures that must be followed before any criminal allegation is likely to be made against a student. The plan developed by the Proserpine State High School, in conjunction with the local police, emphasised the role that students play in providing information to 'help' their peers, but noting that '[t]wo reliable witnesses are better than one', although the nature of 'reliability' is not discussed. It is clearly not restricted to upstanding students, given advice that 'investigations need reliable sources of information from among the users and dealers themselves'.<sup>67</sup> Such a statement in itself, made a decade ago, indicates the extent of suspected drug activity present in Queensland schools.<sup>68</sup>

#### D *Incidence of Drug and Weapon Possession in Australian Schools*

Both New South Wales and Queensland publish statistics on student suspensions and exclusions. Such statistics have been available in Queensland in the Annual Reports for several years, while public availability in New South Wales is more recent. Tables 1 and 2 show reported incidence of student suspensions for drug and weapon possession.

The statistical reports indicate the low incidence of recorded drug and weapon offences in Queensland and New South Wales schools. While the proportion of reported incidents for drug and weapon offences is low for the student population as a whole, ranging from 0.1 to 0.2 per cent, reported frequency of similar offences for the Queensland population as a whole were 4144 *Weapons Act* offences, at a rate of 0.1 per cent of the population, and for drug offences, at a rate of 1.2 per cent for the Queensland population as a whole. Given the incident report for Queensland schools is based on all children from Years 1 to 12, an incidence of 0.2 per cent for the school child population may be a reflection of the incidence in our society as a whole.<sup>69</sup> However, the reported statistics do not provide information on the conversion from school suspicion to involvement of police and recorded offence.

Queensland police annual statistical reports on crime by age provide further evidence of involvement of children (juveniles) as young as 10 years of age and up to 16 years of age in drug

Table 1: Reported Incidence of Suspension and Exclusion of School Students in New South Wales for Illegal Substance and Weapon Matters

| Nature of suspension or exclusion   | Nature of incident   | 2005                 | 2006                 |
|---|--|----------------------|----------------------|
| Long suspension   | Illegal substance  | 467                  | 374                  |
| Long suspension   | Possession of prohibited firearm, weapon or knife              | 339                  | 361                  |
| Long suspension   | Use of an implement as a weapon or threatening to use a weapon | 160                  | 198                  |
| Expulsions  | (misbehaviour)   | 243                  | 217                  |
| <b>Total</b>  |  | 1209                 | 1150                 |
| <b>Approximate population of students</b><br>(calendar years, 2005, 2006) |  | 741500 <sup>70</sup> | 739300 <sup>71</sup> |

Table 2: Reported Incidence of Suspension and Exclusion of State School Students in Queensland for Illegal Substance\*

| Nature of suspension or exclusion   | Nature of incident           | Mid 2004 - mid 2005 <sup>72</sup> | Mid 2005 - mid 2006 <sup>73</sup> |
|---|------------------------------|-----------------------------------|-----------------------------------|
| Short suspensions (1-5 days)  | Illicit substance misconduct | 335                               | 293                               |
| Long suspension (6-20 days)   | Illicit substance misconduct | 181                               | 122                               |
| Exclusion   | Illicit substance misconduct | 102                               | 67                                |
| <b>Total</b>  |                              | 618                               | 482                               |
| <b>Approximate population of students</b><br>(calendar years, 2005, 2006) |                              | 448000                            | 450000                            |

\*While the Queensland Annual Reports indicate suspensions and exclusions due to physical behaviour, identification of weapon-related incidents is not possible.

Table 3: Offences in Queensland by Children Aged 10 to 17 Year Inclusive (Juveniles)<sup>74</sup>

|                                   | Age   |     |      |      | Total | Police action      |                      |        |                  |
|-----------------------------------|-------|-----|------|------|-------|--------------------|----------------------|--------|------------------|
|                                   | 10-14 | 15  | 16   | 17   |       | Caution (official) | Community conference | Arrest | Notice to appear |
| Drug Offences                     | 556   | 636 | 1039 | 1924 | 4155  | 804                | 39                   | 146    | 357              |
| Weapon Act offences <sup>75</sup> | 164   | 135 | 162  | 175  | 636   | 229                | 25                   | 41     | 86               |

and weapon incidents (Table 3).<sup>76</sup> The actual involvement of children in these specific activities would be greater than the number recorded as, in many cases, casual warnings by police do not lead to an offence being recorded. Further, as children under age 10 cannot be charged as offenders, statistics for children under 10 are not recorded.

#### IV DISCUSSION

The previous discussion has considered the U.S. response to suspected possession of illicit drugs or weapons by school students and allowable searches of students by school staff, the Queensland and New South Wales approaches to this issue, and evidence that school students in these states are involved in such activities. Clearly, in Australia, a tension exists regarding responsibility for behavioural management in schools of matters outside classroom learning and authorised schoolyard play, such as drug activities, weapons and violence. On the one hand, such events do occur in school and therefore schools, through their duty of care to provide a safe environment for all students, will need to monitor and intervene when such problems or suspected behaviours arise. However, on the other hand, policy appears to have developed in Australia that where behaviours fall under criminal activity, not misconduct in educational activities, schools hand responsibility over to official law enforcement authorities, that is, the police. This in turn is combined with policies of juvenile law enforcement, focusing on warnings, educative programs and restorative justice. The advantage of this system is that schools can be seen as having a role in maintaining social order as it pertains to the school context, but not as agents of the law. The main difference between the U.S. and Australia in conducting student searches is that the U.S. permits teachers and other school personnel to become involved in any search, rather than relying, as in Australia, only on police for certain kinds of searches. Should the number of incidents regarding students and criminal activity increase in Australian schools, the feasibility of police callout to schools to conduct enquiries and searches, when the available evidence and reasonable suspicion are low, needs to be reconsidered.

One must also consider whether the current policy approach is masking real incidence of drug or weapon possession in schools. At the present time, the Queensland and New South Wales policy approaches have a desirable attractiveness for schools — schools are not responsible for dealing with potentially criminal matters, and they endeavour to maintain a relationship with students of functioning in their ‘best interests’. However, the concern is that such policies make the management of suspected drug or weapon problems in schools cumbersome. In practice, it may be simpler for schools not to act. How comfortable are schools and principals to call in

police based only on student information about suspected drug activity?<sup>77</sup> The student in the U.S. case<sup>78</sup> was an Honours student, with no history of previous disciplinary problems. Where school principals in Australia are confronted with an informant's assertions involving a similar 'honours' student in their schools, how should they assess the reliability of informants and their information before calling in police to conduct a search? Would they? To what extent does maintaining the good order of the school as a whole require that school officials respond to the information that they receive, with neutral regard for the past conduct of the student? Should policy explicitly state that as soon as any information is received about possible drug, weapon or violence offences, police should be contacted, removing discretion from the school authorities and potential for claims of discrimination or bias based on a student's prior behaviours, or should the concept of 'reasonable' suspicion be further elaborated in policy and guidelines?<sup>79</sup> When, or how, should evidence of drugs or weapons be used in determining student suspensions or expulsions, regardless of police involvement?

The question that arises from this discussion is whether permitting Australian school staff to search students for incriminating evidence prior to the involvement of police would be more effective in addressing suspicion of minor drug infringements or weapon possession in schools as long as no risk of imminent danger was likely to staff or students

### *A The Fear Factor*

The previous discussion of the use of police by schools has focused on the extent to which schools may prefer to use police to enforce matters seen as outside educational behaviour management. However, through the use of such policies, schools and staff also avoid risk of claims of assault or sexual abuse from students. It is interesting that in the U.S. case law the claims by students are not about assault by school staff but the constitutionality of the search and whether reasonable suspicion had been established.

Educators in Australia have noted for some time, the fear factor of school staff in touching students and giving rise to possible assault and sexual abuse claims.<sup>80</sup> The fear of the profession is not supported by case law. For example, in Queensland, original findings of assault by a teacher who touched young girls on the buttocks to get them to move were quashed in the Court of Appeal, who argued the touching was of a non-sexual nature, stating that 'a child attending school tacitly consents to receiving from a teacher tactile expressions of encouragement'.<sup>81</sup>

However, teachers are advised in codes of conduct and by unions not 'to touch' students:

It is unfortunate that a hug or pat aimed at encouraging or comforting a student may be misinterpreted by the student, or a staff or community member as 'unwarranted or inappropriate touching'.

Apart from inevitable situations, such as first aid, a teacher should avoid touching children.<sup>82</sup>

Reaction by educators to the 'no touch' rule because of the negative impact on pedagogy and caring if teachers cannot have physical contact with children, particularly small children, has led to a softer stance on 'no touch' by employing authorities. For example, Education Queensland indicates that

[t]here are circumstances when it is appropriate for employees to touch students. It can be a normal, caring gesture to make physical contact with students when offering praise, encouragement, guidance or comfort. The key criterion in determining the appropriateness of this behaviour is the benefit to the child. ... There may be concern by many employees

to touch students in case their actions may be misinterpreted either by the student or others. Employees should use such concerns positively to help them to exercise prudent judgement when touching a student, and avoid any situation that would expose them to misinterpretation about their motivation or intentions.<sup>83</sup>

This 'no touch' policy might allow in the future for changes permitting physical contact attendant to a search to be possible, but such changes under the current reasoning, without a reassessment of the legal implications underlying a 'no touch' policy, are problematic. Hugging an unhappy student raises few, if any, of the intrusion on privacy concerns associated with a search. Without a legal reassessment of the liability of school administrators for assault if they conduct an improper search, why would school staff refuse to contact police and risk potential liability just because they would prefer to conduct student searches as part of their professional responsibility and decision-making authority to maintain good order, student safety and efficient management?

Reasonable discipline is already allowable in Queensland under s 280 of the Queensland *Criminal Code*.<sup>84</sup> Teachers may physically manage a student as is reasonable for the circumstances. This allowance for physical management of students by teachers would appear to enable physical searches under appropriate circumstances.

A key element to broadening school staff capacity to search a student would be the establishment of 'reasonable suspicion'. The student search cases discussed from the U.S. were undertaken in contexts of considerable suspicious activity observed and reported by students and on occasion staff. The examples documented in Australia such as the Tupperware production, occurred in similar contexts, as the description in the case study demonstrates.

Abraham had a number of close friends, Michael, John, Dominic, John-Paul, Peter and Mark. At morning tea, they always met at the smokers tree. At that location they could be easily observed to watch changes in the group. They had many girlfriends on the fringes of the group. All of these boys have since been excluded.

Mark was about number three in the hierarchy. All of the others did break-and-enters for money, alcohol and cigarettes. Mark was *cool*. I don't think he ever got caught doing those things.

On a Wednesday in November around 11am, a girl on the fringes of the group came and saw me privately. I'd helped her on other matters recently. She was scared. She'd just seen Mark passing around a joint among the group and she knew he'd done this before.<sup>85</sup>

In a New South Wales challenge against student suspension near examination time,<sup>86</sup> students alleged lack of procedural fairness in that the suspension timing was bad for their educational activities, that the principal had acted in a 'complete absence of credible evidence' on the basis of 'uncorroborated evidence from other students', and that none of the students had been found 'to be in possession of an illegal substance or was observed actually consuming an illegal substance by the Principal or by any other person in authority at the school'.<sup>87</sup> An affidavit provided by the Principal stated that

a member of the school staff was informed by a named student that certain students had been smoking cannabis during school hours on 28 May 2003 in an area that constituted part of the site of the school farm, which in turn formed part of the school grounds and facilities (the site). As a consequence of this information, the Principal and Deputy Principal visited the site and found clear evidence of recent occupation and of a bong (ie a plastic container with a hose attached commonly used for smoking cannabis).

On the same day the Principal and Deputy Principal interviewed three more students who had been identified as being present when cannabis was smoked. On 2, 3 and 4 June 2003 a substantial number of other students, who were identified as having been at the site at the relevant time, were interviewed. A number of the students so interviewed identified the plaintiffs as being at the site and ‘smoking dope’.<sup>88</sup>

The Supreme Court noted that students interviewed were not advised of their right to have an adult present, as stated in policy, and that reference to police involvement if the student did not cooperate with school administration enquiries could have been regarded as intimidatory.<sup>89</sup> The court did not find that this failure to follow policy was detrimental as the students interviewed did not make ‘admissions detrimental to their interests’.<sup>90</sup>

The fact that none of the plaintiffs was found to be in possession of an illegal substance or observed by the Principal or any other person in authority at the School to consume an illegal substance ... does not render the finding by the Principal that this occurred a nullity or an abuse of power or otherwise inappropriate. If only cases that involved direct observation by a Principal or other person in authority at a school could result in disciplinary action, the effectiveness of discipline would be significantly reduced and the interests of the school community prejudiced. There are occasions when complaints are made about the behaviour of students by a person who is not on the school staff or a student at the school. There are occasions when the relevant material is made available by another student or students. ... It could hardly be expected that a student would take illegal drugs whilst the Principal or other school authority was watching. The submission to the contrary is, in my opinion, not well founded. This basis of attack on the actions of the Principal therefore fails.<sup>91</sup>

The appeal by the student against the suspension failed. Here, then, the court has held that school staff may both act on reasonable suspicion and on the basis of student informants, the advice from one student, subsequently corroborated by informants who may have been engaged in the activity themselves. The Principal could enact an administrative penalty without a clear evidential link to the student. Further, despite his failure to follow policy and ensure the presence of a supporting parent or adult during the interviews, the professional judgment of the Principal in order to ‘consider[ed] the interests of the plaintiffs and the wider interests of the general student body at the School’ was endorsed.<sup>92</sup> In this case

[n]o drugs were found on any of the plaintiffs. However, the only search carried out was related to the school bag of the first plaintiff. This was carried out without objection and because she had her bag with her since her class was about to end at the time she was called in to the interview.<sup>93</sup>

The police do not appear to have been involved in this incident, given the failure by school staff to find drugs in the search of the student’s possessions. If the Principal, given the reasonable suspicion created by the student informants and physical evidence, had been able to conduct a personal search of the student concerned, in the presence of another adult, drugs may have been found. In a case study previously mentioned, a student volunteered drugs he had hidden on his body.

Mark then, of his own accord, produced a hand-sized moulded Tupperware container from the front of his underpants which contained a large quantity of cannabis.<sup>94</sup>

Such evidence would have led to police involvement, and protection of the school community and the individual students, reinforcing the underlying principles that informed the school staff in

their actions, the maintenance of good order and safety in the school. A further interesting aspect of this case was the court endorsement of the disciplinary action taken by the school, despite the lack of physical evidence of drugs on the student, and reliance on the reports of several students. Such a standard of evidence would be unlikely to lead to a police conviction. The court indicated that failure to act by the principal to ensure the safety of the school and other students could lead to liability from expected standards of the community and, hence, possible negligence claims.<sup>95</sup> Not only is the standard of evidence for school disciplinary action lower than for criminal law, but the lower standard reflects judicial encouragement for school officials to exercise a duty of care commensurate with their responsibility under negligence law to protect the safety of students.

A concern that arises from the accounts to date is that while the policy directives and intentions in Queensland and New South Wales are to create positive school-police liaisons, schools appear to use involvement of the police as a threat to obtain more information from the students rather than as a strategy to promote productive relationships with the police in the best interest of the child.<sup>96</sup>

Therefore, in the best interests of all students and promotion of a safe school environment, and respecting the professional judgment of school staff, it may be time to move from the ‘no touch’ or ‘caring touch’ advice, to provide more discretion to principals and other school staff in Australia and to accord them the right to investigate further for suspected drug or weapon possession, that is, to search students’ persons. Clear policy guidelines would need to be given about when and how personal searches could be conducted, and the required standard for reasonable suspicion and action reliant on information provided by other students. However, both Queensland and New South Wales, and other Australian states and territories, are highly skilled at developing policies to address a range of issues.

Issues that policy would need to address, working from the U.S. experience, if the responsibilities of school staff in student searches were to be extended include:

1. reasonable suspicion and risk, what constitutes ‘reasonableness’ in the context — in the U.S., in *T.L.O.*, the Court found that a ‘reasonableness’ standard would spare teachers and school administrators ‘the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense’,<sup>97</sup> but noted that a reasonable suspicion standard ‘depends on the context within which a search takes place’.<sup>98</sup>
2. who would be authorised to conduct a search and how, including standards that such a person should be a member of the same sex and that at least one other person should be present.
3. for what suspicions could a search be undertaken —U.S. case law differentiates between searches for concealable weapons and drugs versus searches for money or other concealable property.
4. the reliability of informant(s), whether a single informant is sufficient, and, as a corollary, how to ensure that harassment of a student by other students or staff does not occur.
5. student characteristics — who could be searched, what age and when, any qualification regarding intellectual capacity of the student to make informed decisions on their own behalf.
6. requirements for notification of parents or other carers for permission and presence during the search.
7. requirement for student permission and cooperation to conduct searches.
8. protection of staff from assault charges and vicarious liability of an employer is a school administrator is overzealous.

The Australian policy approach may still encapsulate the ‘lucky country’ approach — our policies and legislation appear comprehensive and systematic to address matters of serious concern and consequences for our young people. However, in practice, does the current reliance on police presence to conduct searches really address the best interests of each child? Is the standard of the community changing, given the expressed concerns in the recent and serious children’s hospitalisation due to swallowing ecstasy or concern that more knives, and on occasion, guns, are being carried by students? Will it take a serious incident before the effectiveness of the current policies is examined? This is not an attempt to create panic but to develop more practical policies that allow education professionals to be professional in all contexts of student schooling. While this article was being finalised, an incident in a Sydney school demonstrated the different climate that schools may be facing. A boy, already attending a behavioural school and on bail for common assault and possession of a knife at school, bragged to a classmate about possession of a homemade bomb at school. The classmate advised staff. Newspapers reported that

The principal allegedly searched the boy’s bag while he was in physical education class and discovered the device along with a lighter and matches.

She then locked herself in her office with the bag and a colleague, the documents stated.

“The young person attended the principal’s office and began to bang on and kick the door while yelling at the principal to return his bag,” the papers said.<sup>99</sup>

The principal then called the police. The boy pleaded guilty in the Children’s Court. Evident in this report is the apparent action of the principal in an potentially critical and dangerous situation to search the student’s possessions without permission, in accordance with policy when imminent risk is identified,<sup>100</sup> and to retain the contraband objects in a safe and secured environment until the police arrived. The context was a school where children were already known to have behavioural problems, and a student with known previous weapon possession. The source of information appears to have been one student who may have had a similar background. In this context, grounds for ‘reasonableness’ for a search are apparent. The discretion to the principal or other school staff member to conduct the search immediately, prior to contact with the police and without student permission was also reasonable on the grounds of potential danger. However, in the context, granting the principal discretionary authority to conduct the search worked to advantage of both the student and the school. From the standpoint of the student, had no bomb been discovered, a serious allegation would have been defused without contacting the police. From the school’s perspective, the principal’s action located a dangerous object and prevented it from causing harm to students and school property. If discretion is available in the most dangerous circumstances, should it not also be available when the evidence is weak, to assist in the next course of action and protect the interests of all staff and students.

It is time to revisit policies on student searches and address these complex but serious issues for school staff and students.

## V CONCLUSION

The comparison between the U.S. and Australian approaches to student searches reveals some fundamental differences. In the U.S., school officials have authority under a reasonable suspicion standard to assess the reliability of information in determining whether to conduct student searches. While these searches must be reasonable both as to inception and scope, no court to date has challenged the authority of a wide range of school personnel to conduct such searches involving a wide range of venues. Whether student searches have intruded upon a

student's expectation of privacy is determined solely by this inception and scope reasonableness, although states and individual school districts are free to set standards that are more protective than required under the Fourth Amendment.

Australian policy regarding student searches in the two states considered appears to require, at present, the involvement of the police although no clear policy seems to exist as to how reliability of information about suspected illicit possession affects, or should affect, that involvement. While some cases concerning school officials' liability for conducting searches exist, little attention appears to have been directed to liability of those officials where they have failed, or refused, to contact the police. The use by school officials of threats against students of police involvement in order to gather information raises interesting questions not addressed directly in this article as to whether this might amount to unlawful intimidation or bullying.

In addition to this legal analysis, Australia's approach to the permissibility of searches is shaped by the best interest of the child principle, a standard that is not a factor in the U.S.. Although Australia's considerably fewer incidents of drugs and weapons in school may still qualify it as a 'lucky country', one must query whether the current standoff between school staff and students on matters of suspected drug and weapon possession, in addition to its practicality, really addresses the best interests of each child. Increased indications that students are distributing drugs in schools and bringing weapons to school suggest that best interest of the child needs to include all students in schools who may be the victims of such illegal items. In the best interests of students, and respecting the professional judgment of school staff, it may be time to move from the 'no touch' or 'caring touch' approach, to provide more discretion to principals and other school staff in Australia and to accord them the right to investigate further for suspected drug or weapon possession, that is, to search students' persons.

*Keywords:* school; student search; policy; law.

#### ENDNOTES

1. The policy discussion centres also on public, or government, school policies in these states. Non-government schools are likely to follow similar policies albeit with less tolerance in regard to consequences for students.
2. For an example of the number of education cases reported each year, see Charles Russo (ed), *The Yearbook of Education Law 2006* (2006).
3. This is not to discount the educational soundness of this approach.
4. While many U.S. cases on strip search also relate to searches for stolen money or goods, this discussion focuses only on drug and weapon possession, matters that have the potential to cause harm to the student concerned or other students.
5. 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'
6. Joanne Ross (ed), *Illicit Drug Use in Australia: Epidemiology, Use Patterns and Associated Harm* (2<sup>nd</sup> ed, 2007).
7. Ralph Mawdsley and Joy Cumming, 'Student Tips and School Strip Searches: Sorting Out Problems of Inception and Scope' (2008) 230 *Education Law Reporter* 1.
8. 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

9. *Redding v Safford Unified School District # 1*, 504 F 3d 828, 2007 WL 2743594 (9<sup>th</sup> Cir, 2007) (Thomas, J., dissenting).
10. *Ibid* 837, (Thomas, J., dissenting).
11. *Ibid* (Thomas, J., dissenting).
12. U.S. *Constitution*, Amendment 4.
13. 469 U.S. 325 (1985). Justice White’s majority opinion was joined by Chief Justice Burger along with Justices Powell, Rehnquist and O’Connor. Justice Powell, joined by Justice O’Connor concurred in the opinion and the holding. Justice Blackmun concurred in the judgment. Justice Brennan, joined by Justice Marshall concurred in part and dissented in part. Justice Stevens, joined by Justice Marshall, and by Justice Brennan in part concurred in part and dissented in part.
14. *T.L.O.*, 469 U.S. 325, 334-338.
15. *Ibid* 342, fn 8, quoting from *United States v Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976) (‘some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, [but] ... the Fourth Amendment imposes no irreducible requirement of such suspicion.’).
16. See *Watkins v Millenium School*, 290 F Supp 2d 890 (S D Ohio, 2003).
17. See, eg, *Pottawatomie City Board of Education v Earls*, 536 U.S. 822 (2002) (upholding random drug testing for all students in extracurricular activities).
18. *T.L.O.*, 469 U.S. 325, 341.
19. See *Cornfield v Consolidated High School District No. 230*, 991 F 2d 1316 (7<sup>th</sup> Cir, 1993) (upholding strip search based on reasonable suspicion that student had drugs on his person).
20. See *T.S. v State*, 863 N E 2d 362, 367-71 (In Ct App, 2007); *J.A.R. v State*, 689 So 2d 1242, 1244 (Fla Dist Ct App, 1997)
21. See, eg, *State v K.L.M.*, 628 S E 2d 651 (Ga Ct App, 2006) (requiring under state constitution that all searches by law enforcement officers of students be subject to the probable cause standard).
22. 42 U.S.C. 1983. Section 1983 is a remedial statute permitting damages for ‘the deprivation of any rights, privileges, or immunities secured by the Constitution and laws’.
23. Colin Bantick, ‘Tearing a Strip Off Unjustifiable School Practices’, *The Courier Mail* (Brisbane), 9 May 2000, 15: retrieved through Factiva, 13 November 2007. This newspaper report was cited in B. Fields, ‘Managing Disruptive Student Behaviour: The Involvement of Law Enforcement & Juvenile Justice in Schools’ (Paper presented at the Annual Australian Association for Research in Education, Brisbane, Australia, 1-5 December 2002) which also noted that the matter was reported to the Criminal Justice Commission in Queensland, but no charges laid against the teachers or school.
24. Andrew Drummond and Simon Kirby, ‘Police to Probe Ecstasy Case at School’ 16 October 2007 <<http://stmarys.yourguide.com.au/news/breaking/general/police-to-probe-ecstasy-case-at-school/1070399.html>> at 1 November 2007.
25. ‘Boy “Took gun to school”’, *Brisbane Times* (Brisbane) August 17 2007 <<http://www.brisbanetimes.com.au/news/queensland/student-took-gun-to-school/2007/08/17/1186857742569.html>> at 1 November 2007. The age of the student would affect the charges laid and court of any hearing.
26. See, eg, New South Wales Department of Education and Training, *Student Discipline in Government Schools*, (2006) <<https://www.det.nsw.edu.au/policiesinter/category.do?level=Schools>> at 12 November 2007.
27. See Non-State Schools Accreditation Board (Qld), <http://www.nssab.qld.edu.au/> at 30 November 2007. See also, *Education (Accreditation of Non-State Schools) Regulation 2001* (Qld) s 10 requiring policies for health, safety and conduct of staff and students.
28. See Board of Studies (NSW), *Registration Systems and Member Non-government Schools (NSW) Manual* (2007) <<http://www.boardofstudies.nsw.edu.au/manuals/index.html#regaccreditsystemsmanuals>> requiring documentation of pastoral care and student well-being policies, including risk management for critical incidents. See also *Education Act 1990* (NSW) ss 49-51.
29. Department of Education and the Arts, Qld, *SMS-PR-021: Safe, Supportive and Disciplined School Environment* <<http://education.qld.gov.au/strategic/eppr/students/index.html>> at 12 November 2007.

30. Australia is a signatory to the United Nations *Convention on the Rights of the Child*, where 'the best interests of the child' is a guiding principle for activities involving children. This is most elaborated in Australian law by recent legislative and policy developments in family law in the *Family Law Reform Act 1995* (Cth).
31. New South Wales Department of Education and Training, *Drugs in Schools. Guidelines for Managing Drug Related incidents in Schools* (2006) DET Directorate <<https://www.det.nsw.edu.au/policiesinter/category.do?level=Schools>> (wellbeing/drugs) at 12 November 2007, 18.
32. Ibid.
33. Ibid 5.
34. Ibid 13-14.
35. Schools and police may also be operating under a restorative justice approach, involving conferencing among parties involved, and confrontation with the nature of the wrongful action, seeking to establish awareness of the problems that led to the action, consequences, and remorse. See, eg, G Palk, H Hayes and T Prenzler, 'Restorative Justice and Community Conferencing: Summary of Findings from a Pilot Study' (1998) 10 (2) *Current Issues in Criminal Justice* 138. If such a proceeding is not undertaken, children (persons under the age of 18) accused of criminal charges, or found guilty, are dealt with under juvenile laws such as the *Children (Criminal Proceedings) Act 1987* (NSW) or the *Juvenile Justice Act 1992* (Qld) and brought before a children's court for proceedings that are not a serious indictable offence. Children's courts will still endeavour to provide alternative punishments such as community service orders, fines or probation, according to the offence. For drug offences below certain limits, and assuming their possession is for personal use, drug assessment and education are preferred.
36. Department of Education and the Arts (Qld), *School-based Police Officers* (2007) <<http://education.qld.gov.au/studentsservices/protection/community/police.html>> at 12 November 2007.
37. New South Wales Department of Education and Training, *Memorandum of Understanding for Information Exchange Between Schools and NSW Police* <<https://www.det.nsw.edu.au/vsearch/wwwdet/?refine=new&QueryText=+police&Go.x=0&Go.y=0&Go=submit>> at 11 November 2007.
38. NSW DET, above n 31, 19.
39. Ibid.
40. Ibid 'Appendix 4: Searching Students or Students' Possessions for Drugs', 32.
41. A complicating factor is that some protection of children is only available until they turn 17 years old, in school settings, and principals are advised to follow police directions when students are 17 years old: *GVR-PR-001: Student Tips and School Strip Searches: Sorting Out Problems of Inception and Scope*. Provided by Legal Services Unit, Department of Education, Training and the Arts (Qld).
42. NSW DET, above n 30, 'Appendix 4: Searching Students or Students' Possessions for Drugs', 32.
43. *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW) s 21 (1) (c), (d) including s 21A to open mouth and shake hair; *Summary Offences Act 1988* (NSW) (s 11B); *Drug Misuse and Trafficking Act 1985* (Qld); *Police Powers And Responsibilities Act 2000* (Qld) s29, s 30(a) (i), (ii)); *Summary Offences Act Qld* (s 15) (possession of weapon to do harm).
44. *Summary Offences Act 1988* (NSW) s 11B.
45. *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW) s 26.
46. *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW) s 26 (4).
47. *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW) s 31.
48. *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW) s 32(7).
49. *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW) s 34.
50. *Police Powers And Responsibilities Act 2000* (Qld) s 624(1)(c).
51. *Police Powers And Responsibilities Act 2000* (Qld) s 624(2).
52. *Police Powers And Responsibilities Act 2000* (Qld) s 629(1).
53. *Police Powers And Responsibilities Act 2000* (Qld) s 631 (1). If a person to be searched is a child, or a person with impaired capacity, who may not be able to understand the purpose of the search, the police officer must conduct the search in the presence of a support person. (2) However, the police officer may search the person in the absence of a support person if the police officer reasonably suspects (a) delaying the search is likely to result in evidence being concealed or destroyed; or (b) an immediate

search is necessary to protect the safety of a person.

54. Body cavity searches by a medical doctor of children, although presumably not at school, are also within police powers, if an appropriate order is obtained: *Police Powers And Responsibilities Act 2000* (Qld) s 458.
55. New South Wales Department of Education and Training, *Drugs in Schools. Guidelines for Managing Drug Related incidents in Schools* (2006) 32 <<https://www.det.nsw.edu.au/policiesinter/category.do?level=Schools>> (wellbeing/drugs) at 12 November 2007.
56. *Redding v Safford Unified School District # 1*, 504 F 3d 828, 2007 WL 2743594 (9<sup>th</sup> Cir, 2007).
57. Advice from senior police officers through informal communication; see also New South Wales Department of Education and Training, *Drugs in Schools. Guidelines for Managing Drug Related incidents in Schools* (2006) 14 <<https://www.det.nsw.edu.au/policiesinter/category.do?level=Schools>> (wellbeing/drugs) at 12 November 2007.
58. See, eg, *GVR-PR-001: Student Tips and School Strip Searches: Sorting Out Problems of Inception and Scope*. Provided by Legal Services Unit, Department of Education, Training and the Arts (Qld); New South Wales Department of Education and Training, *Drugs in Schools. Guidelines for Managing Drug Related incidents in Schools* (2006) 18 <<https://www.det.nsw.edu.au/policiesinter/category.do?level=Schools>> (wellbeing/drugs) at 12 November 2007.
59. See above n 30. This case brings to mind a U.S. case where a student alleged violation of constitutional rights by a strip search. The student was suspected of ‘crotching’ drugs on suspicion of appearing ‘too well-endowed’ to teachers. No drugs were found in the strip search. However, the rationale and nature of the search were found justifiable: *Cornfield by Lewis v Consolidated High School Dist. No. 230* 991 F 2d 1316 (1993).
60. Advice provided by New South Wales Department of Education and Training Legal Services Unit, *Legal Issues Bulletin No. 13*, ‘Interviews of Students and Staff by Police and Officers from the Department of Community Services in Schools and TAFE NSW Institutes’ (November 2000). Further, in New South Wales, interviews of persons under 16 years of age should be recorded electronically (*Evidence (Children) Act 1997* (NSW), including interviews at schools).
61. Education Queensland, *The Code of School Behaviour* (undated) 2,3<<http://education.qld.gov.au/student-services/behaviour/bm-codebehav.html>> at 14 January 2008.
62. *P Moran v Department of Education and Training* - PR946470 [2004] AIRC 503 (28 May 2004) [27]. The teacher also alleged that students ‘had been caught with knives and drugs’ in the school previously, that teachers had ‘searched the bags of students for weapons and drugs’, and the principal ‘made a clear and emphatic policy statement that teachers could not physically touch the students or their property’: at [50]. The commissioner interpreted this to mean the principal was advising no ‘body searches’: at [51]-[52]. In this case, several professional performance issues appear to have been involved while procedural fairness in the dismissal process was also considered. While the commissioner found the standard of professional care during this event to be ‘improper’, procedural issues did arise. While not finding for reinstatement or reappointment, damages of 14 weeks’ pay were awarded to the teacher.
63. See *Mapp v Ohio*, 367 U.S. 643, 656 (1961).
64. See D. Osborn, ‘Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia’ (2000) 7(4) *Murdoch University Electronic Journal of Law* 40, for a considerable analysis of admission of evidence.
65. See below n 76 for discussion, *CF (by her tutor JF) v New South Wales* [2003] NSWSC 572, regarding court consideration of information gained outside policy guidelines.
66. *Redding v Safford Unified Sch. Dist. # 1*, 504 F 3d 828, 2007 WL 2743594 (9<sup>th</sup> Cir, 2007). See above n 9-11.
67. See above n 57. Suggestions include ‘There will often be a student on the fringes who can be trusted who will provide information pertinent to an investigation’ and ‘The success of the process depends on building trust with students and assuring them that resulting actions will result in good outcomes for individuals involved and the school.’: at 5, 13.
68. *Ibid.*

69. Queensland Police Service, *Annual Report 2005-06 'Crime Statistics'* (2006) 64 <www.police.qld.gov.au> at 11 November 2007.
70. New South Wales Department of Education and Training, *Annual Report Long Suspension and Expulsion Summary 2005* <https://www.det.nsw.edu.au/media/downloads/reports\_stats/stats/suspexpul/annualsummary05.pdf> at 7 November 2007.
71. New South Wales Department of Education and Training, *Annual Report Long Suspension and Expulsion Summary 2006* <https://www.det.nsw.edu.au/media/downloads/reports\_stats/stats/suspexpul/annualsummary06.pdf> at 7 November 2007.
72. Department of Education and the Arts (Qld), *Annual Report 2004-05 'Appendix 13: Summary of Queensland State School Disciplinary Absences by Absence Reason, Term 3 2004 to Term 2 2005'*, 114, <http://education.qld.gov.au/publication/reporting/annual/2005/> at 7 November 2007 (similar incidence reported for previous 2 years).
73. Department of Education and the Arts (Qld), *Annual Report 2005-2006 'Appendix 12'*, 131 <http://education.qld.gov.au/publication/reporting/annual/2006/index.html> at 7 November 2007. Some 45,000 disciplinary absences are recorded, including disruptive behaviour and conduct prejudicial to the good order and management of the school, however, information non weapon possession is not provided.
74. Ibid 141: an offence is an incident considered prima facie to be a breach of the law.
75. Other offences included assault, armed robbery. These may or may not include a charge under a *Weapons Act* offence.
76. Queensland Police Service, *Annual Statistical Review 2006-07* (2007) 73 <www.police.qld.gov.au> at 11 November 2007.
77. Rebecca Neil, 'Teaching Law and Order: Criminal Justice and Schools in NSW' (2000) 6 *Australian Journal of Human Rights* 254.
78. *Redding v Safford Unified School District # 1*, \_\_\_ F 3d \_\_\_, 2007 WL 2743594 (9<sup>th</sup> Cir, 2007).
79. Drug and weapon possession and use are not the only areas where school staff must make a judgment regarding 'reasonable suspicion'. Under Queensland legislation and policy, school staff should report reasonable suspicion of sexual abuse of a child to authorities, described as 'information that tends to show that a student ... has suffered harm or may require protection from external forces', although they 'must' report any suspected abuse of a child by a school employee to an authority: Education Queensland, *Student Protection* (2006) [14] <www.education.qld.gov.au/strategic/eppr/students/smspr012/hs-17.pdf> at 30 November 2007.
80. For an analysis of the 'fear factor' in Australian schools, see Judith Sachs and Lise Mellor, "'Child Panic', Risk and Child Protection: An Examination of Policies from New South Wales and Queensland 1' (2005) 20 *Journal of Education Policy* 125.
81. *Horan v Ferguson* [1995] 2 Qd R 490, 504. Assault under the criminal code requires an action without the consent of the other party. The case was an appeal against a finding of guilt in the Magistrates Court on several touching allegations, although a conviction was not recorded.
82. New South Wales Teachers Federation, *Protecting Teachers As Well As Students* <http://www.nswtf.org.au/journal\_extras/cpprotect.html> at 30 November 2007. Sachs and Mellor, above n 80, consider that the 'no touch' policy 'presupposes a culture of complete mistrust: parents and students cannot trust school staff, school staff can no longer trust students and parents.': at 137. The 'no touch' approach is also credited with the reduction in male teacher employment in schools, particularly primary schools. Education Queensland has softened the stance on 'no touching
83. Education Queensland, *Student Protection* (2006) <www.education.qld.gov.au/strategic/eppr/students/smspr012/hs-17.pdf> at 30 November 2007.
84. *Criminal Code 1899* (Qld) s 280 'It is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances.'. This was tested recently when an assault charge against a teacher by a student (the teacher slapped the student) was dismissed in the Magistrates Court, and the teacher's action was found to fall under s 280, 'reasonable force': Greg Stolz and AAP, 'Law Lets Teacher Slap Student', *The Courier-Mail*

- (Brisbane, Qld), 14 February 2008, <http://www.news.com.au/couriermail/story/0,23739,23215357-952,00.html> at 27 February 2008. Aspects of *Horan v Ferguson*, above n 80, were also resolved by the court as lawful under s 280, using a broad interpretation of ‘correction’.
85. See above n 57, 14.
  86. *CF (by her tutor JF) v New South Wales* [2003] NSWSC 572.
  87. *Ibid* [4].
  88. *Ibid* [25]-[26].
  89. *Ibid* [29]-[30].
  90. *Ibid* [32].
  91. *Ibid* [36].
  92. *Ibid* [43].
  93. *Ibid* [28].
  94. Proserpine State High and Proserpine Police and Health Issues Section, *No Deal — Minimising the Presence of Illicit Drugs in Schools* (1999) Appendix 1, 141 <[http://education.qld.gov.au/apps/owa/search.actionquery?P\\_TEXT=student+suspension&P\\_TEXT\\_INPUT=5&P\\_MATCH=Stem+match&P\\_LOG=211002356&P\\_REFERERER\\_URL=http://education.qld.gov.au/parents/&Z\\_START=1&P\\_RESULTS\\_PAGE=4&Z\\_ACTION=Next](http://education.qld.gov.au/apps/owa/search.actionquery?P_TEXT=student+suspension&P_TEXT_INPUT=5&P_MATCH=Stem+match&P_LOG=211002356&P_REFERERER_URL=http://education.qld.gov.au/parents/&Z_START=1&P_RESULTS_PAGE=4&Z_ACTION=Next)> at 11 November 2007.
  95. *Ibid* [38].
  96. *Ibid* [29]-[30], see also Neil, above n 77. Neil highlights cases where school staff have acted with a heavy-hand, allegedly bullying and harassing students by using the threat of police action to obtain information from students rather than following policy and their authority to engage police to determine whether inappropriate or illegal activity had occurred.
  97. *T.L.O.*, 469 U.S. 325, 343.
  98. *Ibid* 337.
  99. Kim Arlington, ‘Bomb Boy Had Assault Charge’, *The Daily Telegraph* (Sydney), 11 January 2008 <<http://www.news.com.au/dailytelegraph/story/0,22049,23037773-5001021,00.html>> at 15 January 2008.
  100. New South Wales Department of Education and Training, *Drugs in Schools. Guidelines for Managing Drug Related incidents in Schools* (2006) 32 <<https://www.det.nsw.edu.au/policiesinter/category.do?level=Schools>> (wellbeing/drugs) at 12 November 2007.