

A SCHOOL'S DUTY OF CARE AND THE MANAGEMENT OF ILLICIT DRUG RELATED INCIDENTS¹

EOLA BARNETT & NOELEEN MCNAMARA[†]
UNIVERSITY OF SOUTHERN QUEENSLAND, AUSTRALIA

Illicit drug related incidents occurring in schools or in areas under school supervision are a legal minefield for schools, principals and other school staff. They can potentially expose a school to civil liability and the student to criminal sanctions. Staff therefore need to understand correct procedures for interviewing students, searching students' property and notifying parents and police. Yet often the guidance provided to staff in dealing with such incidents is inadequate and may expose the staff to liability.

This article considers the tensions that can arise for a school when discharging their duty of care to the drug affected student and the student body as a whole. Using Queensland as an example, it also reviews the current Department of Education and Training's guidelines for the management of drug related incidents in schools, and raises several concerns with the adequacy and generality of these guidelines. It suggests some areas where the guidelines could better align with criminal legislative standards.

I INTRODUCTION

Illicit drugs use is endemic in Australia,² as are the pressures on high schools (and to some extent, even primary schools) regarding the management of illicit drug related incidents (DRIs) in the school yard.³ A survey of secondary school students indicated that 18% had tried cannabis and 5% other illicit substances, with 4.7% of students reporting use of cannabis within the last week and 2% other illicit substances.⁴ In line with these statistics, the chances of school staff having to deal with DRIs are high. It is imperative then that consistent Drug Incident Management Policies and Procedures (DIMPPs) are created and implemented in all schools and are appropriate to the seriousness of the legal issues concerned.

Each DRI creates a tension between the school's duty of care regarding the protection of the health, safety and welfare of the whole school - students and staff - and the individual students concerned. Each DRI also creates a tension between schools and law enforcement, because drug use by adolescents often involves the criminal justice system. In these contexts school staff can find themselves walking, sometimes blindly, a fine line through a range of competing interests.

As such it is imperative that schools have access to, implement and follow appropriate policies and procedures in the management of DRIs, and that these policies and procedures align with appropriate legal standards. Policies and procedures will need to cover many areas including: the paramount and immediate concerns regarding the taking of drugs on the health and safety of the students concerned; risks to the wider school community; and the manner in which different levels of DRIs are dealt with. This latter aspect is the primary focus of this article as it presents

[†]Address for correspondence: Dr Noeleen McNamara, Lecturer, School of Law, University of Southern Queensland, PO Box 4196, Springfield, Queensland 4300, Australia. Email: noeleen.mcnamara@usq.edu.au

serious implications for the students concerned, regarding future proceedings within the criminal justice system, and for staff, regarding legal consequences if DRIs are inappropriately managed.

Any procedures that are created should be for the protection of all concerned: comprehensive; simple to follow; and consistent with the best interests of the child as a primary consideration.⁵ Accordingly they must be aligned to current legal requirements that apply to police in the investigation of youth offenders. Additionally any usurping of the police role should be strictly avoided and any investigation of a DRI should be done with the uttermost of confidentiality.

Whilst in Queensland the Department of Education and Training (DEAT) has provided some guidance regarding the management of DRIs in Queensland schools,⁶ this article argues that what is provided is wanting. It is also questionable whether school personnel are being trained in the management of DRIs in accordance with existing guidelines and whether these guidelines are being followed.

Using Queensland as an example, this article will consider the extent of a school's duty of care; current DEAT guidelines relating to the management of DRIs; and the tensions between the two.

II SCHOOL'S DUTY OF CARE

A school's duty of care to students arises independently of any contract. It is settled law that schools owe a duty of care to students attending their school.⁷ The duty of care can extend beyond the 'school gate' and can include off campus school activities or events which are under school supervision.⁸ Further it is a legislative requirement that students attend school⁹ so the standard applied must reflect this.

The nature of the duty is to take reasonable care and ensure staff and students are provided with a safe environment. In the context of this article, the question is whether a school is liable to students for its failure to protect them from illicit drugs. That is, is the education system exposing children to drugs who would not otherwise be exposed to drugs had it not been for attending school? Specifically, the law imposes a duty on a school to take care for a student's interests and safety. This duty arises due to their 'immaturity and inexperience ... and their propensity for mischief'.¹⁰

The courts have found that this duty of care is non-delegable and this extends to intentional torts as well as negligence.¹¹ In *Lepore v New South Wales* the issue was whether a non-delegable duty of care owed to school students was breached by the intentional misconduct (sexual assault) of an employee teacher where negligence of supervisors and system is negated.¹² 'Non-delegable duty' was explained by Mason P as 'the person cannot avoid liability by relying on the delegation, even to a competent delegate', rather than meaning that a person cannot delegate a duty.¹³ Justice Gummow, in discussing the significance of the court characterising a duty as 'non-delegable' stated that 'the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty'.¹⁴ It is more stringent than a duty to take reasonable care. It is a duty to ensure that reasonable care is taken by others.¹⁵ Alternatively, schools are generally vicariously liable for the careless actions of their employees;¹⁶ 'consequently, it will be the school authority that will bear any legal liability in the event that the duty is breached'.¹⁷

These duties carry implications for schools, and staff, in the management of DRIs and in the context of criminal justice and schools. Rebecca Neil states:

... In the writer's view it is conceivable that schools could face legal liability if they negligently fail to alert a student to their legal rights and the student suffers a detriment. It follows that schools, which take on a law enforcement role, face a potential conflict of interest. Their primary responsibility is to act according to their duty of care.¹⁸

In his review of a report into how Catholic schools in Australia address substance use by school students,¹⁹ Fr Peter Norden notes that a school has a duty of care for individual students and also for the total student body. Further, this duty of care differs for students at the lower end of secondary school (12 years) from those at the higher end (18-19 years).²⁰

Fr Norden further notes that issues of confidentiality will also be affected by whether the drug use has been a matter raised by the student seeking assistance, or whether the drug use is one that is related to school activities or occurs outside of school activities. He concludes that:

Given the duty of care of school personnel to the health and safety of the whole student body, there are necessarily limits to the assurance of confidentiality that can be offered in the school setting. It is clearly important that where there is a serious issue affecting the health or welfare of a student the principal needs to be informed, at least on a general level. Consequently, school staff, including teaching staff, need to know when it is appropriate to warn students about the limits of confidentiality when discussing matters of this nature.²¹

The courts have yet to decide this issue, however given the foregoing, it is conceivable that actions taken in the management of DRIs could breach a school's duty of care. An analogous issue, that of a school's duty to protect students from illicit material on the internet, was considered by Dr Tronc. He concluded that just as the school has a duty of care to take reasonable precautions to prevent physical injury to students arising from foreseeable risks in the school environment, so too can the school reasonably be expected to take steps to intercept, filter and screen out offensive pornography on the net.²² Parallels can also be drawn with 'the high point of the nursemaid theory'²³ of employer's liability which is arguably more applicable to a school environment where attendance by minors is compulsory.

It is relevant to consider what a reasonable school, confronted with a student possessing illicit drugs, should do to satisfy its standard of care. Education Queensland produces Codes of Practice and other Guidelines. A few of these guidelines relate to the management of DRIs. It has been stressed time and again by both the courts and commentators that guidelines are precisely that, and ought not to be confused with steadfast rules of law.²⁴ However the utility of such guidelines is that they can be adduced as evidence of best practice of a 'reasonable school/ principal' and hence assist a court in deciding whether the duty of care has been breached and where they are appropriate, may provide grounds for a defence.

In accordance with a school's duty of care towards individual students, where a student is observably under the influence of drugs, the immediate concern is for the physical wellbeing of the student. The appropriate immediate response is to take reasonable care and precaution by taking the student to a safe place for observation and to contact an appropriate care giver, away from other students and staff, who can remove the student from the school premises. School staff should not be asked to supervise a student believed to be under the influence of drugs for any period longer than is necessary for this to happen. The longer the student remains on school premises the more exposed to legal risk those supervising the student become in that supervision and the more the potential risk of harm to the student concerned and to the whole of school.

In other circumstances there are different levels of appropriate responses to DRIs, which shall now be considered in the context of current DEAT guidelines.

III CURRENT DEAT GUIDANCE FOR THE MANAGEMENT OF DRIS IN QUEENSLAND SCHOOLS

Current primary documentation providing 'support and guidance to school principals' accessed on the Education Queensland Website: CRP-PR-005: *Drug Education and Intervention in Schools*,²⁵ comes by way of responsibility statements. The statements most relevant to duties of care regarding, and the management of, DRIs appear below.

School staff

- have legal and professional responsibilities to respond to information about, and incidents involving, student use or possession of legal and/or illicit drugs at schools or during school activities;
- ... who *reasonably suspect*²⁶ that a student is in possession of an illicit substance:
 - accompany the student, together with the student's bag, to a safe place;
 - immediately inform the principal;
 - arrange for the local police to be contacted, where possible;
 - organise for a second staff member to be present until police attend (where possible²⁷ at least one staff member will be of the same gender as the student present); and
 - pass a found substance believed to be an illicit drug to the principal.²⁸

To support staff, principals have the responsibility to

- develop a range of responses to drug-related incidents that take into account:
 - the nature of the incident;
 - the circumstances of the student(s) involved, including relevant age, development, gender, cultural and social considerations; and
 - the needs and safety of others in the school;

Principals must also

- determine that an appropriate approach to conducting investigations into drug-related incidents is maintained;
- communicate to all school staff the acceptable process to follow;
- inform local police when an illicit substance is found by school staff and arrange for police to collect the substance as soon as possible;
- protect the health and safety of the student(s), other students, school staff and the wider community involved in drug-related incidents; and
- consider the role of the parent and their right to be involved in discussions and plans for follow up action in regard to a drug-related incident.²⁹

Whilst forming a skeleton of practical guidance it is submitted that the level of guidance is insufficient and legally tenuous and should be reviewed, especially with a view to ensuring consistency and legislative compliance. The following sections will review some of the main issues arising from the current CRP-PR-005.

A *Acting on Information, a Reasonable Suspicion or Belief?* *Levels of Appropriate Response*

There are real and practical differences between staff responsibility to respond to information about a DRI and responding to a DRI based on a reasonable suspicion, as opposed to a reasonable belief. Pursuing investigations in circumstances where, for example, there are unsubstantiated

allegations by another student or investigating students who are suspected by association, is entering muddy waters. In accordance with a document produced by the Department of Education in 1996, in circumstances where there is insufficient information, the appropriate action is to inform the student's parents or guardian and to monitor the student.³⁰ Putting aside the fact that the development of a range of appropriate responses to DRIs should be the responsibility of the Department of Education for reasons stated in this article, such a response in these circumstances would sit comfortably with a principal's current responsibility under DEAT guidelines.

However, in circumstances where there is a more immediate and apparent need for a heightened response, for example where a student is suspected to be in the possession of illicit substances, the threshold requirement urging staff action on the basis of 'reasonable suspicion' may not always be appropriate.

There is a difference between a reasonable belief and reasonable suspicion and this has been the subject of judicial consideration by the High Court: 'suspicion is a state of conjecture or surmise where proof is lacking. The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief'.³¹ What grounds reasonableness, consistent with the concept of reasonableness in criminal and civil law, would be objectively assessed.

By analogy, legislative requirements for a citizen's arrest are usually based on the more stringent criteria of a reasonable belief³² as opposed to a reasonable suspicion, which is the basis upon which police can generally act.³³ Unless the criteria are met, any subsequent action can be tainted with illegality. It is on this basis that the same requirements for a reasonable belief should apply to school staff in the management of a DRI, for their own protection as well as the protection of the student involved.

Appropriate DIMPPs should be developed to reflect different levels of management depending on the circumstance of each DRI be it responding to information or a reasonable belief. If there is a reasonable belief of a DRI it begs the question whether school staff should play any more of a role in its management other than to supervise the student concerned until appropriate contacts are made and to minimise whole of school risk in accordance with the school's duty of care. Minimisation of such risk does not necessarily entail further questioning and searches unless there is a patent danger, where for example syringes have been used and not accounted for.

B *Adequacy of Existing DEAT (Qld) Guidelines*

The CRP-PR-005 requires that the school principal 'develop a range of responses to DRIs' and 'determines that an appropriate approach to conducting investigations into drug related incidents is maintained' and communicated to school staff.³⁴ The document provides brief policy statements, some procedural guidance as outlined, and a number of cross references and links to legislation and regulations, and related documents.³⁵ The GVR-PR-001: *Police Interviews and Police or Staff Searches at State Educational Institutions*; SMS-PR-012: *Student Protection*; SMS-PR-037: *Disclosing Student Personal Information to the Queensland Police Service* are the most relevant in the context of this article. These related documents in turn consist mainly of brief policy statements and links to Acts, regulations and related documents. Some of the documentation linked on the DEAT Website failed to provide vital information and some of the references to legislation are out of date.³⁶

A complete, practical, simple and clear outline of procedures, consistent with the links to legislation and or regulations, which should be followed by school staff in the management of different level DRIs does not appear to exist. In fact the approach of the Department is that, as

stated in the CRP-PR-005: *Drug Education and Intervention in Schools*:³⁷ 'principals develop a range of responses to drug-related incidents'.³⁸ The Department also advises in *Dealing with Drug Related Incidents: A school-based decision* that schools address the issue from one of two possible standpoints: passively or actively.³⁹

Providing such a scope for response gives little practical guidance to schools. It relies perilously on a school-based interpretation of a series of documents, legislation and regulations.

Some schools have independently drafted somewhat more detailed policies and procedures, whilst others incorporate basic policy and procedures into their behaviour management policies.⁴⁰

For an issue as significant as this it is not unreasonable to expect that DIMPPs should be centrally provided; legislatively compliant; up-to-date; and be complete, simple, clear and practical, so that they can be applied across all schools consistently. It goes without saying that legal advice should be sought when drafting the DIMPPs. One would suspect that it would be reasonable practice that all senior school staff, and school staff who are likely to be called upon to act as a support person for a student believed to be involved in a DRI, be trained in the implementation of DRI procedures. It is also interesting to note that in *Managing drug related incidents: Suggestions for Schools* (issued May, 1996) the Department of Education recommended the appointment of an incident manager,⁴¹ which does not seem to have been followed through in current guidelines.

Putting the above issues aside, the current guidance provided in the CRP-PR-005 has some gaps requiring immediate attention. These will be addressed in the following sections.

C *Protecting Youth Offenders; Aligning with Legislative Standards Requiring Support Persons to be Present and Parental Involvement*

The CRP-PR-005 makes limited reference to parental involvement in a DRI, requiring only that a principal *consider* the role of the parent and their rights regarding their role, and does not prescribe the need for a support person. It requires only that 'where possible, a second staff member be present until police attend'.⁴²

Australia has embedded in legislation new directions in youth justice systems that are protective of adolescents and that seek to divert adolescents from processing through the criminal justice system for minor offences, including minor drug-related offences.⁴³ The systems apply in all Australian states, other than Queensland, to individuals up to age of 18 and as such comply with Australia's international obligations under the *Convention on the Rights of a Child*.⁴⁴ In Queensland the youth justice system applies to individuals up to the age of 17. On the basis of the Convention, and in line with the rest of Australia, it is suggested that it should apply when dealing with all school aged children including 17 year olds.⁴⁵

Youth justice system diversionary mechanisms include cautioning, conferencing, and drug diversion assessment programs,⁴⁶ as alternatives to initiating court proceedings. Police play a critical role in determining appropriate criminal justice pathways in adolescent offending. Early research on the outcomes of diversion is showing positive results in terms of offender rehabilitation and reducing recidivism amongst adolescent offenders.⁴⁷

An aim of diversionary youth justice systems is to protect the child and, in line with this, safeguards are embedded in legislation particularly because children are vulnerable in their dealings with persons in authority.⁴⁸ Safeguards within the youth justice system include but are not limited to the right to: remain at liberty unless arrested; communicate, in private, with a support person of choice; have a support person of choice present whilst being questioned; and

parental involvement.⁴⁹ It is also noteworthy that in Queensland in proceedings for an indictable offence,⁵⁰ a court must not admit into evidence against a child defendant any statement (usually a recorded interview) made to police by the defendant, unless satisfied a support person was present at the time and place the statement was made.⁵¹ Similar safeguards operate under the *Police Powers and Responsibilities Act 2000* after arrest: A police officer must not question the child unless – (a) before questioning starts, the police officer has, if practicable, allowed the child to speak to a support person chosen by the child in circumstances in which the conversation will not be overheard; and (b) a support person is present while the child is being questioned.⁵²

These safeguards are consistent protective themes running through all legislation dealing with the investigation of criminal offences whether committed by an adult⁵³ or a child, and there is an argument, based upon level of vulnerability alone, that they should operate where a child is being dealt with in any circumstance which has the potential to trigger the operation of the criminal justice system.

School DRIs present such a circumstance and, as authority is inherent in the school environment, it is critical that safeguards similar to those under the youth justice system are put in place in school DIMPPs.

Accordingly it is essential that a support person be present for any school ground investigation of a DRI, as distinct from a requirement that only a second person be present 'where possible'. In line with the *International Convention on the Rights of a Child*,⁵⁴ the support person should preferably be a parent or a guardian,⁵⁵ and if not possible an independent support person, who has no prior knowledge of the DRI in question. In the absence of a parent or guardian, the role could be filled by trained school chaplains, counsellors or legal studies teachers.

IV PROTECTION OF SCHOOL STAFF

Whilst legislative safeguards are there to protect an alleged offender, what is wanting is any real protective mechanism for school staff who are caught between competing duties of care and are legally exposed in any action they take in the management of DRIs.

Some protection is provided to school staff regarding detention and physical restraint,⁵⁶ however any such action has to be reasonable under the circumstances. Accordingly, any action regarding the management of a DRI that is founded upon a threshold criterion of a reasonable belief would be more likely to protect school staff under the law.

Having said this, school staff are able to make requests to students within a school setting; however students cannot be forced to follow them. Any forceful action by school personnel that would indicate to the student that they are no longer free to go may be unlawful. The authority naturally attendant in school environments complicates the issue somewhat as students often feel compelled to follow requests and view them more as directives. This means that students may be acting under duress and in these circumstances any conversations between the staff and student may be considered unreliable and staff need to take account of that in making decisions regarding DRI management.

For their own protection, the best policy, and subject to their duty to minimise whole of school risk, would be for staff to act on the basis of a reasonable belief, and follow the criminal legislative requirements that police are required to follow in the investigation of youth offenders. Better still, staff should not venture into what is appropriately a police role. Additionally staff should not under any circumstances place themselves in a position where they are alone with a student believed to be involved in a DRI - it is critical that a support person be present throughout.

Outside a lawful arrest, any detention without consent could constitute deprivation of liberty, or false imprisonment, and any application of force which includes touching without consent could constitute an assault, leading to criminal/civil action. If a student refuses to comply with a request, the only available option for school staff is to wait for a parent, guardian or contact person and or police, and to keep the student under observation at all times.

If these basic safeguards are incorporated in appropriate DIMPPs then, as a corollary, school staff will more likely be protected.

V GOVERNMENTAL STRATEGIC RESPONSES AND THE ROLE OF SCHOOLS IN DRUG EDUCATION, PREVENTION AND INTERVENTION

We previously raised the issue of the school's duty of care to provide a safe environment. Part of that duty can be arguably extended to providing an optimal environment in order to reduce risk of student exposure to or propensity to surrender to drugs. DEAT implicitly recognises this in identifying a principal's responsibility to 'facilitate a process for identifying and supporting students who are at risk of using drugs'.⁵⁷ The duty to provide an optimal school environment will necessarily entail consideration of education philosophy; benchmarking and appraisal; and adequate resourcing and funding.

Whilst the Australian,⁵⁸ and many state governments, including Queensland,⁵⁹ have implemented strategic policies, primarily by way of drug education aimed at combating drug use amongst youth, one can question whether governments are missing a more important basic point – the connection between the school macro environment, particularly relating to student achievement and sense of connection and school size, and drug use amongst students.

Key factors linking substance abuse amongst school aged children, particularly high school students, to the school environment need to be considered. One such factor is school size.⁶⁰ International research argues that the optimal high school size ranges from between 600 to 1000 students taking into consideration the benefits of economies of scale and student achievement and sense of connection.⁶¹

There is a body of literature, much of which is based on empirical research, which argues that larger schools have negative impacts on students on many levels, including achievement and behaviour leading to increased risk of substance abuse,⁶² particularly as a result of disengagement: School size and classroom management are two factors among many which have a direct impact on a student's sense of belonging.⁶³ 'Increasing evidence shows that when adolescents feel cared for by people at their school and feel like a part of their school, they are less likely to use substances, engage in violence, or initiate sexual activity at an early age. ... Students who feel connected to school in this way also report higher levels of emotional well being'.⁶⁴ Where these feelings are absent it can lead to increased reliance on peer acceptance and susceptibility to peer influence, sometimes leading to a gang mentality, and/or a propensity to surrender to destructive activities such as drug use.⁶⁵ In a world where there is a significant divorce rate and an increasing egocentricity, there is a greater need for youth access to nurturing. Schools are perfectly placed to provide this if adequately resourced. An increased sense of care and belonging, and excellence in education, are the best possible means that we as a society have for turning the tide regarding drug use in our society, and indeed even more broadly the incidence of crime relating to drug use and crime generally.

Teachers are not untouched by this either. There is a correlation between school size and/or ratio of students and teacher dissatisfaction and attitudes, with consequential effects on student achievement.⁶⁶

VI CONCLUSION

In the interests of consistent and appropriate management of DRIs in the school yard, Departments of Education should review existing documentation supporting schools in this context to ensure that appropriate DRI management policies and procedures:

- exist, and if not be created, for consistent implementation in all schools and be easily accessible to the community;
- be aligned to legislative requirements regarding police investigation of drug related, or in fact any, youth offences and as such support the aims of youth justice systems in Australia;
- comply with a school's duty of care to provide a safe environment; and
- all school have trained DRIs management response and support person(s).

Finally, it goes without saying that directing appropriate funding into education now will reap rewards, including fiscal rewards from a government perspective, in the long run. Governments should review the current state of education in line with international experience, research and recommendations regarding optimum school environments in which children can be nurtured, inspired and have the best possible opportunity to make the delicate transition from child into adulthood. There should be no compromises when it comes to funding education, or in fact youth justice systems, to give our children the 'flying start'⁶⁷ they deserve, and one never knows appropriate funding may mean that future governments will not have to take 'tough' action to 'tackle youth crime'.⁶⁸

Keywords: drug related incidents; secondary schools; duties of care; management; procedures; funding.

ENDNOTES

- 1 The authors would like to thank Professor Reid Mortensen for his comments on an earlier draft of this article.
- 2 Australian Institute of Health and Welfare, *Statistics on Drugs use in Australia 2004* (2005) <<http://www.aihw.gov.au/publications/phe/sdua04/sdua04.pdf>> at 5 February 2010. 38% of the Australian population aged 14 years and over had used any illicit drug at least once in their lifetime, and 15% had used any illicit drug at least once in the previous 12 months. See also consistent findings from the 2007 National Drug Strategy Household Survey. Drug and Alcohol Service South Australia, *Statistics on Illicit Drug Use in South Australia* <<http://www.dassa.sa.gov.au/site/page.cfm?u=204>> at 5 February 2010. Almost 40% of the South Australian population aged 14 and over have used drugs and 14.7% of the South Australian population aged 14 years and over had used *any* illicit drug in the last 12 months.
- 3 Both Primary and High School.
- 4 Drug and Alcohol Service South Australia, above n 2.
- 5 This complies with the *International Convention on the Rights of the Child*, Article 3.1. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (entered into force 16 January 1991) <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1991/4.html?query=%22Rights%20of%20a%20Child>> at 5 February 2010.

- 6 Queensland Government: Department of Education and Training, *Policy and Procedures Register* <<http://education.qld.gov.au/strategic/eppr/>> at 5 February 2010. Specifically CRP-PR-005: *Drug Education and Intervention in Schools* <<http://education.qld.gov.au/strategic/eppr/curriculum/crppr005/>> at 5 February, 2010 and GVR-PR-001: *Police Interviews and Police or Staff Searches at State Educational Institutions* <<http://education.qld.gov.au/strategic/eppr/government/gvrpr001/>> at 5 February 2010.
- 7 *Commonwealth v Introvigne* (1981-82) 150 CLR 258. The position is similar in England *Van Oppen v Clerk to Bedford Charity Trustees* [1990] 1 WLR 235 at 250.
- 8 See for example *Beck v New South Wales* [2001] NSWSC 278; *El-Sheik v Australian Capital Territory Schools Authority* (1999) 151 FLR 397, 403 (Miles CJ).
- 9 *Education (General Provisions) Act 2006* (Qld) ss 9, 176.
- 10 *Lepore v New South Wales* [2001] NSWCA 112 at [33], where Mason P cited *Introvigne* (1982) 150 CLR 258, 271.
- 11 *Lepore v New South Wales* [2001] NSWCA 112.
- 12 Ibid.
- 13 Ibid.
- 14 *Scott v Davis* [2000] HCA 52, [248] (Gummow J).
- 15 Law Book Company, *Laws of Australia*, 'The Law of Torts', Chapter 33, [33.2.980], Lawbook Company, Sydney.
- 16 In *Lister v Hesley Hall Ltd* [2001] 2 All ER 769, the House of Lords found a school vicariously liable for the actions of its employee where the employee's torts were so closely connected with the employment that it was fair and just to hold the employer vicariously liable.
- 17 Marilyn Campbell, Des Butler and Sally Kift, 'A schools duty to provide a safe learning environment: Does this include cyber bullying?' (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 21, 7.
- 18 Neil Rebecca, 'Teaching Law and Order: Criminal Justice and Schools in NSW' [2000] *AJHR* 12.
- 19 Norden Peter, 'Keeping them connected – reducing drug-related harm in Australian schools from a Catholic perspective' (July 2008) 27 *Drug and Alcohol Review* 451.
- 20 Ibid 455.
- 21 Ibid.
- 22 Tronc Keith, 'A Plaintiff's lawyer's guide to internet dangers for children and schools' (2003) 57 *Plaintiff* 37, 39.
- 23 Justice David Ipp, 'Themes in the law of torts' (2007) 81 *ALJ* 609, 610. The case His Honour was referring to was *McLean v Tedman* (1984) 155 CLR 306, where an employer was held liable for failing to provide a safe system of work when one of its employee garbage collectors ran across the road without looking. The employee was not found guilty of contributory negligence.
- 24 R Heywood R and P Charlish, 'Schoolmaster tackled hard over rugby incident' (2007) 15 *Tort L Rev* 162, 167.
- 25 Queensland Government: Department of Education and Training, CRP-PR-005: *Drug Education and Intervention in Schools* <<http://education.qld.gov.au/strategic/eppr/curriculum/crppr005/>> at 5 February 2010.
- 26 Authors' emphasis.
- 27 Authors' emphasis.
- 28 Queensland Government: Department of Education and Training, CRP-PR-005: *Drug Education and Intervention in Schools* <<http://education.qld.gov.au/strategic/eppr/curriculum/crppr005/>> at 5 February 2010.
- 29 Ibid.
- 30 Department of Education Queensland, *Managing drug related incidents: Suggestions for Schools* (1996) <http://education.qld.gov.au/health-safety/promotion/drug-education/docs/m_incidents.doc> at 5 February 2010.
- 31 *George v Rockett* (1990) 170 CLR 104
- 32 See for example *Criminal Code* (Qld) s 564

- 33 See for example *Police Powers and Responsibilities Act 2000* (Qld) s 365
- 34 Queensland Government: Department of Education and Training, above n 28.
- 35 Some of which are archived.
- 36 See for example the references to the *Police Powers and Responsibilities Act 2000* (Qld) in the Queensland Government: Department of Education and Training, GVR-PR-001: *Police Interviews and Police or Staff Searches at State Educational Institutions* <<http://education.qld.gov.au/strategic/eppr/government/gvrpr001/>> at 5 February 2010. The document is supposed to 'outline circumstances in which police interviews of students, whether as victims, witnesses, or possible offenders, might occur at schools and actions Principals can take' and 'also outlines information for property searches by police and staff at State educational institutions'. However the document only refers readers to Legislation and Regulations and has a statement of intent. The document refers to s 44A and 257B of the PRA which no longer exist and s 288 which appears to be irrelevant; Approval for creation of birth certificate for assumed identity. The document was set for review on 1 July 2008.
- 37 And confirmed verbally with Department staff.
- 38 Queensland Government: Department of Education and Training, above n 28.
- 39 Department of Education Queensland, *Dealing with Drug Related Incidents: A school-based decision* <<http://education.qld.gov.au/strategic/eppr/curriculum/crppr005/drugincidents.html#27>> at 27 December 2010.
- 40 Some examples of school based policies and procedures publically available include Mt St Michael's College, <<http://www.msm.qld.edu.au/pdfs/policies/Management%20of%20Drug%20Related%20incidents%20v2%20.pdf>> at 9 December, 2009; Pomona State School (May 2009) <<http://pomonass.eq.edu.au/Curriculum/Drug%20Awareness/Pomona%20State%20School%20Drug%20Awareness%20Education%20and%20Intervention%20Strategy.pdf>> at 9 December 2009; Corinda State High school <<http://www.corindashs.eq.edu.au/forms/Drug%20Policy.pdf>> at 9 December 2009; St Ursulas College Yeppoon (2006) <http://www.stursulas.qld.edu.au/publications/policies/Use_of_illegal_and_unsanctioned_substances_by_students_Nov_2006x.pdf> at 9 December 2009 *Responsible Behaviour Plan for Students* based on *The Code of School Behaviour – Appendix 5*; Dalby State High School <<http://www.dalbyshs.eq.edu.au/web/assets/docs/RBP.doc>> at 9 December, 2009; Centenary State High School, *Responsibilities of the School Community*, <<http://www.centenaryshs.eq.edu.au/forms/Responsible%20Behaviour%20Plan.pdf>> at 9 December 2009.
- 41 Department of Education Queensland, above n 30.
- 42 Queensland Government: Department of Education and Training, above n 28.
- 43 See for example *Juvenile Justices Act 1992* (Qld), which applies to offences other than a serious offence which is defined in s 8 as an offence carrying a sentence of 14 years or life. An offence which can be dealt with summarily under the *DMA* s 13 is excluded under that definition, meaning that minor drug related offences can be diverted.
- 44 Defines a child as a person under the age of eighteen, unless under the law applicable to the child, majority is attained earlier. *International Convention on the Rights of a Child*, Article 1, above n 5.
- 45 Others support the need for review. See for example Terry Hutchinson, 'When is a child not a child' (2006) 30(2) *Criminal Law Journal* 92. It is also noteworthy that other Australian states have implemented young adult, that is 18 -25 year old, diversionary schemes (NSW and Victoria).
- 46 For example under the *Juvenile Justices Act 1992* (Qld) cautioning is a principle method used refer to Part 2 Division 2 and specifically s 11 (1) unless otherwise provided under this division, a police officer, before starting a proceeding against a child for an offence other than a serious offence, must first consider whether in all the circumstances it would be more appropriate to do 1 of the following— (a) to take no action; (b) to administer a caution to the child; (c) to refer the offence to a conference; (d) if the offence is a minor drug offence within the meaning of the *Police Powers and Responsibilities Act 2000* (Qld) and the child may be offered an opportunity to attend a drug diversion assessment program under section 379 of that Act—to offer the child that opportunity in accordance with that section. *Note*— s 134, a police officer must consider offering the same opportunities for diversion from the court system as apply to a child to a person who committed an offence as a child but is now an adult.

- 47 For example: Susan Dennison, Anna Stewart and Emily Hurren, 'Police cautioning in Queensland: the impact on juvenile offending pathways' (2006) 306 *Trends & issues in crime and criminal justice* at 3 <<http://www.aic.gov.au/documents/B/4/E/%7BB4E2379D-3557-4252-8C5D-CAC44459D97E%7Dtandi> 306.pdf> at 5 February 2010; Teresa Cunningham, 'Pre-court diversion in the Northern Territory: impact on juvenile reoffending' (2007) 39 *Trends & issues in crime and criminal justice* <<http://www.aic.gov.au/documents/7/A/A/%7B7AA18C68-AADD-4C54-9F4E-EB5AC911B91B%7Dtandi> 339.pdf> at 5 February 2010; Sumitra Vignaendra and Jacqueline Fitzgerald, 'Reoffending among young people cautioned by police or who participated in a youth justice conference' [New South Wales] (2006) 103 *Crime and Justice Bulletin* <[http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB103.pdf/\\$file/CJB103.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB103.pdf/$file/CJB103.pdf)> at 5 February 2010; The Hon Wayne Martin Chief Justice of Western Australia, *Protecting the Future Youth and the Justice System* (Paper presented at the *Rotary District 9450 2007 Conference*, Radisson Observation City, 31 March 2007) <http://www.supremecourt.wa.gov.au/publications/pdf/ProtectingTheFuture_310307.pdf> at 5 February 2010. K Polk, C Adler, D Muller and K Rechtman, *Early intervention: diversion and youth conferencing. A national profile and review of current approaches to diverting juveniles from the criminal justice system* (2003) <[http://www.crimeprevention.gov.au/www/rvpattach.nsf/viewasattachmentPersonal/E848941E8EB9BD63CA256E1A001C5B78/\\$file/0%20Diversion%20Report.pdf](http://www.crimeprevention.gov.au/www/rvpattach.nsf/viewasattachmentPersonal/E848941E8EB9BD63CA256E1A001C5B78/$file/0%20Diversion%20Report.pdf)> at 5 February 2010.
- 48 See for example, Schedule 1 *Juvenile Justices Act 1992* (Qld) charter of youth justice principles.
- 49 See for example *Juvenile Justices Act 1992* (Qld)
- 50 All drug offences are indictable, although some are able to be determined summarily before a Magistrate, see the *Drugs Misuse Act 1986* (Qld) s 13.
- 51 *Juvenile Justices Act 1992* (Qld) s 29.
- 52 Authors' emphasis. *Police Powers and Responsibilities Act 2000* (Qld) s 421.
- 53 In Queensland after arrest under the *Police Powers and Responsibilities Act 2000* (Qld) and *Regulations* or under the *Judges' Rules*.
- 54 The Convention applies to administrative measures, and my analogy to schools.
- 55 *International Convention on the Rights of the Child*, Article 3.2.2, above n 5. Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
- 56 For example under s 280 *Criminal Code* (Qld): Domestic discipline.
- 57 Queensland Government: Department of Education and Training, above n 28. As an aside it would be interesting to know what, if any, effective measures are being funded to implement such responsibility.
- 58 Australian Government, Department of Education, Employment and Workplace Relations, *National School Drug Education Strategy* <http://www.dest.gov.au/sectors/school_education/policy_initiatives_reviews/key_issues/drug_education/nsdes.htm> at 10 December 2009.
- 59 Queensland Government, Department of Health, *Queensland Drug Strategy 2006-2010*, <<http://www.health.qld.gov.au/atod/documents/31976.pdf>> at 10 December 2009.
- 60 It is arguable then that the current Queensland government direction of rationalisation and consequent effect of increasing school sizes requires reconsideration, 'Figures show Queensland has about 70 fewer state schools than 10 years ago, despite a population increase of 750,000'. Peter Michael, 'Queensland schools on death row under amalgamation by stealth', *Courier Mail* (Brisbane) 17 September 2009 <<http://www.news.com.au/couriermail/story/0,23739,26087495-3102,00.html>> 10 December 2009. Note also a community perspective on the general discussion forum 'How much bigger can NLSC get?' (North Lakes State School, Mango Hill Queensland) <<http://www.northlakes.com.au/Forums/afv/topic/aff/4/aft/3079.aspx>> at 10 December 2009.
- 61 See for example K Leithwood and D Jantzi 'A Review of Empirical Evidence About School Size Effects: A Policy Perspective' (2009) 79(1) *Review of Educational Research* 464; M Andrews, W Duncombe, and J Yinger, 'Revisiting Economics of Size in American Education: Are We Any Closer to a Consensus?' (2002) 21(3) *Economics of Education Review* 245; V Lee and J Smith, 'Which works best and for whom?' (1997) 19(3) *Educational Evaluation and Policy Analysis* 205.

- 62 See for example Clea McNeely, James Nonnemaker and Robert Blum, 'Promoting school Connectedness: Evidence from the national longitudinal study of adolescent health' (2002) 72 (4) *Journal of School Health* 139; Kenneth Leithwood and Foris Jantzi, 'Review of Empirical Evidence About School Size Effects: A Policy Perspective' (2009) 79 (1) *Review of Educational Research* 464; Xin Ma, 'Sense of Belonging to School: Can Schools Make a Difference?' (2003) 96 (6) *Journal of Educational Research* 340; William Fowler, 'School size, characteristics and outcomes' (1992) 13(2) *Educational Evaluation and Policy Analysis* 189; School Size and its Relationship to Achievement and Behavior (2000) <<http://www.dpi.state.nc.us/docs/accountability/evaluation/legislative/size.pdf>> at 10 December 2009.
- 63 Clea McNeely, James Nonnemaker and Robert Blum, 'Promoting school connectedness: Evidence from the national longitudinal study of adolescent health' (2002) 72 (4) *Journal of School Health* 139, 146.
- 64 Clea McNeely, James Nonnemaker and Robert Blum, 'Promoting school connectedness: Evidence from the national longitudinal study of adolescent health' (2002) 72 (4) *Journal of School Health* 139, 146. See also Robert Blum, 'A case for school connectedness' (2005) 62 (7) *Educational Leadership* 16; United Nations Office on Drugs and Crime, *School based education for drug abuse prevention* (2004); Department of Education, Employment and Training (Vic) *Get Wise: Working on Illicits in School Education* (2000) <<http://www.eduweb.vic.gov.au/edulibrary/public/teachlearn/student/getwisepg101to200.pdf>> at 27 December 2010.
- 65 Ibid.
- 66 See for example Daniel Mont and Daniel Rees, 'The influence of classroom characteristics on high school teacher turnover' (2007) 34 (1) *Economic Enquiry* 152; Cassandra Guarino and Glenn Daley 'Teacher Recruitment and Retention: A Review of the Recent Empirical Literature' (2006) 76 *Review of Educational Research* 173; Valerie Lee and Susanna Loeb, 'School Size in Chicago Elementary Schools: Effects on Teachers' Attitudes and Students' Achievement' (2000) 37(1) *American Educational Research Journal* 3.
- 67 Department of Education and Training, *A flying start for Queensland children: Education Green paper for public consultation* (2009) <<http://deta.qld.gov.au/aflyingstart/pdfs/greenpaper.pdf>> at 6 February 2010.
- 68 Karen Struthers, Minister for Community Services and Housing and Minister for Women (Qld), 'Tough new laws to tackle youth crime' (Press Release, 2 September 2009).