Investigating the Investigators

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What is this paper about?

The increased emphasis on child protection in recent years, backed in many jurisdictions by legislation,[1] has spawned a new problem for administrators in educational institutions: how to investigate the plethora of allegations against staff and students. Administrators are mostly former teachers who have never been trained in investigative skills. Allegations of abuse are often investigated in a highly charged atmosphere with pressure being brought to bear by angry victims or their parents, anxious staff and their unions, and officious bureaucrats from government departments, children's commissions or ombudsmen's offices. The result is frequently less than perfect.

In my presentation, I will be examining the factual situation considered by Young CJ in Eq in *Hedges v Australasian Conference Association Limited*[2] as a case study of how not to conduct an investigation in an educational institution. This case concerned an investigation by the Professional Standards Committee of the Seventh Day Adventist Church in Australia following allegations against a teacher at an Adventist school in Sydney. The investigation was put under judicial scrutiny and found to be lacking in many respects. This paper will outline the requirements for best practice investigations. It will also briefly consider the remedies available for those aggrieved by poor investigations.

Why do educational institutions investigate?

Senior executives in educational institutions do not just investigate because of a perceived legislative obligation to do so. They investigate because allegations are made against people within their community. Students allege misconduct by other students; parents allege misconduct by students other

[1] For example, in New South Wales: *Children and Young Persons (Care and Protection) Act 1998, Commission for Children and Young People Act 1998, Ombudsman Act 1974, Child Protection (Prohibited Employment) Act 1998* and *Child Protection (Offenders Registration) Act 2000*
[2] [2003] NSWSC 1107

than their own children; students and their parents allege misconduct by teachers; and teachers allege misconduct by their colleagues. There is nothing new in this. However, in days gone by, it was relatively easy for a school principal to ignore such allegations or to dismiss them as frivolous. That, fortunately, rarely happens today. Since the 1997 Royal Commission into the Police Service in New South Wales and the raft of child protection legislation which followed it, schools and school executives have been far more diligent when allegations have been made. This is because the Royal Commission had found that teachers and schools, while aware of abuse of children, had not taken appropriate action. The Commission in its report stated that, within schools, "Paedophilia was a subject best not spoken about; and if forced to be confronted, it was dealt with in a way that was based upon denial and protection of institutional reputation rather than regard for the welfare of children".[3]

The law has always required school executives to investigate allegations of the kind mentioned above. The common law imposes a duty of care on schools and teachers to take reasonable care for their students' safety.[4] If a student alleges that another student is engaging in conduct which is likely to bring about harm to that student or to some other student, it is probably reasonably foreseeable that there is a risk of injury to a student. There may well be a significant probability of harm occurring and a reasonable person is likely to conclude that a teacher should take steps to minimise the risk. It follows that the school and its teachers ought to investigate allegations to see if they disclose situations in which students might be at risk of harm.

Likewise, if students, their parents or teachers allege misconduct by teachers, the same duty of care requires that investigation be made to see if, once again, students are likely to be at risk of harm.

Schools as employers also have a common law duty of care to ensure that reasonable care is taken of their employees. Under occupational health and safety legislation, employers have an even more onerous duty to ensure the health, safety and welfare of employees and others at the place of work.[5] Once again, where allegations are made of misconduct against employees, this must be investigated.

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[3] *Royal Commission into the New South Wales Police Service: Final Report*, Volume IV, page 562

[4] *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258 at 269 per Mason J

[5] *Occupational Health and Safety Act 2000 (NSW)*, s 8

The *Education Act 1990 (NSW)* sets out the requirements for independent schools to be registered. These include:

> *a safe and supportive environment is provided for students by means that include:*
>
> > *(i) school policies and procedures that make provision for the welfare of students, and*
> >
> > *(ii) persons who are employed at the school being employed in accordance with the Child Protection (Prohibited Employment) Act 1998, and*
> >
> > *(iii) school policies and procedures that ensure compliance with relevant notification requirements imposed in relation to persons employed at the school by Part 3A of the Ombudsman Act 1974 and Part 7 of the Commission for Children and Young People Act 1998*[6]

Section 27 of the *Education Act* ensures that government schools have to comply with the same requirements. Good policies and procedures will definitely include provision for investigation of allegations.

The NSW Ombudsman takes the view that school principals should conduct an investigation whenever they receive information that comprises an allegation of reportable conduct.[7] As indicated above, I take the same view. However, it is important to understand that the *Ombudsman Act 1974 (NSW)* does not impose a statutory duty on schools or principals to conduct investigations. Rather, the Act assumes that allegations will be investigated. For example, paragraphs (b) and (c) of section 25C (1) clearly envisage that the school principal will conduct an investigation. Section 25C states:

> *The head of a designated government or non-government agency must notify the Ombudsman of the following:*
>
> *(a) any reportable allegation, or reportable conviction, against an employee of the agency of which the head of the agency becomes aware,*

[6] *Education Act 1990*, section 47 (g)
[7] NSW Ombudsman, *Child protection in the workplace 2004*, Part 5.1

> *(b) whether or not the agency proposes to take any disciplinary or other action in relation to the employee and the reasons why it intends to take or not to take any such action,*
>
> *(c) any written submissions made to the head of the agency concerning any such allegation or conviction that the employee concerned wished to have considered in determining what (if any) disciplinary or other action should be taken in relation to the employee.*

Section 25E makes the same assumption, referring several times to "**the** investigation", not to "**an** investigation". Section 25E states:

> *(1) The Ombudsman may monitor the progress of the investigation by a designated government or non-government agency concerning a reportable allegation, or reportable conviction, against an employee of the agency if the Ombudsman considers it is in the public interest to do so.*
>
> *(2) The Ombudsman or an officer of the Ombudsman may be present as an observer during interviews conducted by or on behalf of the agency for the purpose of the investigation and may confer with the persons conducting the investigation about the conduct and progress of the investigation.*
>
> *(3) The head of the agency is to provide the Ombudsman with such documentary and other information (including records of interviews) as the Ombudsman may from time to time request with respect to the investigation.*

Section 25F also assumes that an investigation has been held by requiring the principal to "send to the Ombudsman a copy of any report prepared by or provided to the [principal] as to the progress or results of the investigation, and copies of all statements taken in the course of the investigation and of all other documents on which the report is based".[8] Section 25G also assumes that principals will investigate allegations of reportable conduct.

However, allegations should be investigated even if they do not amount to reportable conduct. Reportable conduct is defined in Section 25A(1) to be:

[8] Section 25F (2) (a)

(a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), or

(b) any assault, ill-treatment or neglect of a child, or

(c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child.

Reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or

(b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or

(c) *conduct of a class or kind exempted from being reportable conduct by the Ombudsman.*

Paragraph (b) of the exceptions is a good example of conduct which is not reportable conduct and which therefore does not have to be notified to the Ombudsman but which nevertheless must be investigated.

The Act gives some examples of conduct that do not constitute reportable conduct: touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental. Even allegations of such behaviour must be investigated because there may be more to them than is at first apparent.

Schools not only investigate when allegations are made because of their common law and statutory duties but also because their stakeholders (in particular, their parents) require it. In independent schools, parents pay substantial fees and, as a result, more and more, they are demanding a high level of accountability from those administering those schools. Parents will quickly voice their concerns if rumours are circulating about inappropriate conduct by students or teachers.

Who are the investigators?

Although fulfilment of legal duties does require educational institutions to investigate allegations, the law does not specify who the investigator should be. The task may be that of the principal, other appropriately qualified executive staff or people engaged by the educational institution for that purpose. It is appropriate to engage an external investigator where:

1. the allegation is against the principal; or
2. the allegation is against a member of staff perceived to be close to the principal (for example, a relative, long term friend or colleague); or
3. the educational institution does not have the required skills or resources to conduct a particular investigation.

Using an external investigator is not inconsistent with the *Ombudsman Act*. Although the principal is the person who must notify the Ombudsman, there is no requirement that the principal conduct the investigation personally.

What are the rules?

While thirty years ago there may have been some doubt in Australia in relation to independent schools,[9] my view is that today it is quite clear that investigations in all educational institutions must be conducted in accordance with the principles of natural justice.

In the United States, the Supreme Court has held that if students are to be suspended even for a short period of time then, unless they are actually disrupting the school's work or are acting or threatening to act dangerously or destructively, they must be notified that suspension action is about to be taken. The students must also be given the reason for the intended suspension and the opportunity to explain. Students are protected by the due process clause of the Fourteenth Amendment of the United States Constitution. Litigation involving student rights has changed disciplinary policy in US schools. Students must be made aware of school rules. Those

[9] For example, Blackburn J in *Seymour and anor v Swift, Shaw and ors* (1976) ACTR 1 said he doubted that the rules of natural justice applied to independent schools in the process of suspending a student. The position in government schools was more certain: Mahoney J concluded that the principles of natural justice should be applied in *McMahon v Buggy* (NSWSC unreported, December 1972). The New Zealand position is the same: *Rich v Christchurch Girls' High School Board of Governors, No 1* (1974) 1 NZLR 1.

whose conduct is to be sanctioned by some disciplinary action must be advised in writing of the grounds and the evidence on which action is being taken. Students must be given adequate time to explain their actions. Their accusers must attend the disciplinary hearing.

In one American case,[10] the court held that a junior high school student facing suspension and indefinite expulsion for possession of marijuana was entitled to "procedural due process". The boy and his parents were advised of the accusations against him prior to the hearing. The boy's father, who also served as the boy's lawyer, was present during all suspension and expulsion proceedings. At the hearing, a female student testified that the boy showed her a bag of a leafy substance identified by the boy as "weed" and "dope". The boy's teacher testified that a bag of a green, leafy substance, a rolled cigarette, and additional rolling papers were found near the boy's seat in class. Several other students gave written statements which were introduced at the hearing stating that the boy had shown them marijuana. The boy was given the names of the students and the substance of their testimony, but was not able to cross-examine the students because their parents would not allow them to testify in person at the hearing. The court held that the admission of statements of students who were not present at the hearing did not violate due process because there was no constitutional right to cross-examine witnesses at an expulsion hearing.

While the principles of natural justice are generally becoming better known, it seems that, almost as a result of this familiarity, people are losing sight of the fact that natural justice usually means observing practical fairness. In other words, as Young CJ in Eq said in *Hedges*, "Different situations will give rise to requirements of satisfying the general principle of natural justice in different ways."[11] Gleeson CJ of the High Court of Australia put it this way:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*[12]

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

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[10] *Arrington ex rel. L.Q.A. v Eberhart*, 920 F. Supp. 1208 (M.D. Ala. 1996)
[11] [2003] NSWSC 1107, para 121
[12] *In re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502 at 511

> *The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.*[13]

He also said:

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*[14]

In the Federal Court of Australia, French & Lee JJ said:

> *What constitutes procedural fairness varies according to the relevant statutory framework and, within that framework, according to the circumstances of the particular case ...*[15]

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

In the Human Rights and Equal Opportunity document, *Sexual Harassment - A Code of Practice*, natural justice is said to be the minimum standard of fairness to be applied in the investigation and adjudication of a dispute. The Code then says:

> *The substantive requirements of natural justice involve:*
>
> 1. *fully informing a person of any allegation/s made against them;*
> 2. *giving them the opportunity to state their case, provide an explanation or put forward a defence;*
> 3. *ensuring that proper investigation of the allegations occurs, that all parties are heard and relevant submissions considered;*
> 4. *ensuring that the decision-maker acts fairly and without bias.*

I will now examine each of these requirements in the context of investigations in educational institutions.

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[13] (1985) 159 CLR 550 at 585
[14] (1985) 159 CLR 550 at 585
[15] *Appellant WABZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 30 (18 February 2004)

Fully informing people of any allegations made against them

First, people under investigation must be told correctly the nature of the proceedings against them. This must include references to the statutes, rules or policies under which the investigation is proceeding and to the possible penalties or disciplinary action which could follow. Otherwise, they may not appreciate the gravity of the matter or what procedural rights there are available to them. In *Carter v NSW Netball Association*,[16] not only did Ms Carter not know the nature of the proceedings against her, it seems that the Netball Association also failed to correctly identify the nature of the proceedings.[17] According to Palmer J, that compounded the injustice of the proceedings.[18]

Second, the substance of the allegations against a person must be put to them in as much detail as possible. Young CJ in Eq describes this as "putting to the person against whom action is to be directed a clear statement of the matters he or she must answer".[19] By comparison, in *Hedges*, the investigator's policy was that "Perpetrators aren't told the allegations prior to interview."[20] Clearly, people against whom allegations are made must be given every opportunity of knowing what has been alleged against them and by whom.[21] This is particularly important in educational institutions where broad descriptions like "professional misconduct" are used. Where such expressions are used, natural justice requires that sufficient particulars be given.[22]

Giving people the opportunity to state their case, provide an explanation or put forward a defence

Once the substance of the allegations has been put to the people being investigated, they must be given ample opportunity to respond.[23] This may mean giving them time to consider the allegations and opportunity to respond in writing as well as in person. This is often referred to as "the right to be heard". The elements of this right will vary from case to case but will generally include all or some of:

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[16] [2004] NSWSC 737
[17] A similar situation arose in *Forbes v Boston* [1999] NSWSC 1217 (14 December 1999)
[18] [2004] NSWSC 737 at para 120
[19] *Hedges*, [2003] NSWSC 1107, para 124
[20] *Hedges*, [2003] NSWSC 1107, para 32
[21] *Carter*, [2004] NSWSC 737 at para 121
[22] *Plenty and Plenty v Seventh-Day Adventist Church of Port Pirie* [2003] SASC 68 (10 March 2003)
[23] *Carter*, [2004] NSWSC 737 at para 122

1. a reasonable opportunity and adequate time to make submissions, give evidence and call witnesses in support;
2. notice of:
    a. the time, date and place of the hearing;
    b. the subject matter and potential adverse consequences of the decision;
    c. the case to be answered;
3. disclosure of material to be relied on by the decision-maker;
4. disclosure of any adverse conclusion not obviously open on the known material.[24]

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

It is often correctly said that investigations within educational institutions are not bound by the rules of evidence. Nevertheless, it must be remembered that these rules are a useful guide to any investigator. They should only be departed from "where consideration of equity, good conscience and substantial merit so justify."[25] Evatt J made the same point in *R v War Pensions Entitlement Appeal Tribunal; exp Bott*:

> *After all, [the rules of evidence] represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and solicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice".*[26]

Young CJ in Eq was critical of the investigator in *Hedges* for accepting gossip and hearsay. At one point, he said: "The bizarre allegation that was also put to the investigator as fact based on hearsay that the plaintiff had had

[24] See the cases supporting the existence of these elements listed by McClellan J in *Hall v University of New South Wales* [2003] NSWSC 669 (15 August 2003) at para 68
[25] *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2004] NSWIRComm 65 at para 322
[26] (1933) 50 CLR 228 at 256

a love child with the lady which the lady categorically denied, was another feature which should have registered a red light with the investigator."[27]

In some cases, procedural fairness will dictate that people under investigation be allowed legal representation. This is more likely to be the case where complex issues are involved, where the consequences to them of a finding against them are serious or where they are not capable of presenting their own case.[28]

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

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

[27] [2003] NSWSC 1107, para 63
[28] *Li Shi Ping v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 557 per Drummond J at 570

> *satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references.* [29]

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

> *The onus of proof in such a case is on the employer and the standard of proof must be such as to enable a positive finding that the misconduct occurred. The standard is, of course, the civil and not the criminal one, but the requisite degree of satisfaction must have regard to the seriousness of the alleged conduct and gravity of the consequences of the finding.*[30]

The High Court made similar comments in *Neat Holdings Pty Limited v Karajan Holdings Pty Limited*:

> *... the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*[31]

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[29] (1938) 60 CLR 336 at 361-362
[30] (1997) 73 IR 454 at 463-464
[31] (1992) 67 ALJR 170 at 170-171

Ensuring that the decision-maker acts fairly and without bias

There should be a neutral investigator.[32] Obviously, this means that investigators have to be, and have to be seen to be, objective and impartial. It is not always appreciated that neutrality can be affected by a conflict of interest. For example, investigators who know that they should be impartial and yet have some personal relationship with either the party making the allegation or the party against whom the allegation is made necessarily have a conflict of interest. However, as seen earlier, the circumstances of the case will determine whether a relationship between, say, the investigator and the person against whom the allegation has been made will be important enough to amount to a denial of natural justice. In schools, many investigations will be carried out by principals who necessarily have a professional relationship with all their staff. This may not matter except in cases involving alleged conduct of a very serious nature.[33]

In emphasising the importance of the appearance of impartiality in an investigation, Young CJ in Eq in *Hedges* suggested that it would be better not to use terms like "victims" and "perpetrator" or even "alleged perpetrator or offender" as they give a suggestion of bias against the person being investigated.[34] The way an investigation is carried out may also lead to a perception that the investigator is biased. Palmer J formed this view in *Carter*,[35] noting that the investigator "did not have the open mind of an investigator; rather, she had taken on the role of prosecutor."

In an English case,[36] it was contended that a decision to expel a student was made by a biased decision-maker. Stoke Newington School had an Exclusion Panel to make expulsion decisions. A student was expelled by an Exclusion Panel which included a teacher who had been involved with the student and who was the student's Head of Year. The court said that the rules of natural justice had been breached because, while there was no actual bias, there was from the perspective of the reasonable person a real suspicion of bias as the teacher was both Head of Year and a member of the Exclusion Panel. Accordingly, the decision to expel was set aside.

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[32] *Hedges*, [2003] NSWSC 1107, para 18
[33] NSW Ombudsman, *Child protection in the workplace 2004*, Part 5.15.1
[34] *Hedges*, [2003] NSWSC 1107, para 58
[35] [2004] NSWSC 737 at para 42
[36] *R v Board of Governors of Stoke Newington School; Ex parte M* (unreported, 21 January 1992)

What are findings?

Findings ought to be "what is found to be the case" following an investigation. Where allegations are made, the findings ought to be whether, on the balance of probabilities, the allegations are sustained or not sustained. It may also be important to have findings as to whether the allegations were false, vexatious or misconceived.[37] I mean by these expressions:

Sustained: the evidence supports a finding that the alleged conduct did occur

Not sustained: there is insufficient evidence to establish whether the alleged conduct did or did not occur

False: the evidence supports a finding that the alleged conduct did not occur

Vexatious: the evidence supports a finding that the allegation was made without substance and with the intent of being malicious or to cause distress to the person against whom the allegation is made

Misconceived: the evidence supports a finding that, even though the allegation was made in good faith, it was based on a misunderstanding of what actually occurred

In New South Wales, it is often also necessary to make a finding as to whether or not the alleged behaviour amounted to reportable conduct.

My earlier discussion of the burden of proof is a useful reminder that the object of any investigation is to make findings of fact. Once an allegation is made, the educational institution must obtain information upon which one can reliably decide whether what is alleged actually happened and, if so, what consequences ought to flow for the person against whom the allegation was made. An investigator's task is to discover, or find out, what happened; hence, the expression "findings". These are findings of fact. Sometimes, it is quite clear what happened. For example, there may have been an event witnessed by many people who all give identical or near identical testimony about the event. On the other hand, unfortunately, there are many situations

[37] There is no duty to notify the Commission for Children and Young People where there is a finding that the alleged reportable conduct did not occur (Section 39 of the *Commission for Children and Young People Act 1998*) or that the allegation was vexatious or misconceived (Reg 8 of the *Commission for Children and Young People Regulation 2000*).

where what happened is not nearly as clear. An investigator must speak to all the people involved, look at any relevant documents and make other relevant enquiries - all with a view to making a finding or findings on the balance of probabilities, as to what happened. While all of this may appear obvious, sadly, it is clearly not always obvious to investigators engaged by educational institutions. For example, the investigator in *Carter*, a former police officer, was criticised because she failed to interview any of the witnesses who could have given a contrary view of events to that put forward by those making the allegations.[38] By way of further example, Young CJ in Eq observed in *Hedges* that the investigator never found any facts.[39]

Who is the decision-maker?

The investigator is not usually the decision-maker. Indeed, it is important to separate the investigation role from the decision-making role.[40] However, as the Ombudsman acknowledges, small educational institutions may not have the people necessary to separate the two roles.[41] In *Hedges*, the Professional Standards Committee acted both as the authority which authorised the investigation and as the adjudicator. Young CJ in Eq said:

> *This is bad practice and usually this fact alone will amount to a denial of natural justice as a person whose ability to earn a living is jeopardised by an adjudication is entitled to have that adjudication performed by an independent group of people: Carver v Law Society of NSW (1998) 43 NSWLR 71.*[42]

The investigator ought to present the decision-maker with preliminary findings of fact. In fairness to people against whom serious allegations have been made, they ought to be shown the preliminary findings and be given opportunity to respond to them direct to the decision-maker. The decision-maker ought not simply to adopt the investigator's views but must put his or her mind to the matter and to all the evidence. In *White v Ryde Municipal Council*, the Court of Appeal said:

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[38] [2004] NSWSC 737 at paras 26, 28, 33, 34, and 45
[39] [2003] NSWC 1107, para 57
[40] [2003] NSWC 1107, para 43
[41] NSW Ombudsman, *Child protection in the workplace 2004*, Part 5.2.4
[42] [2003] NSWC 1107, para 100

> *As a general proposition, it is plain enough that he who decides must hear. However, this must be understood in the sense that the decision maker has before him the evidence and submissions of those entitled to be heard. It is by no means a universal requirement that the decision making body must see and hear witnesses, much less actually hear submissions or representations ...*[43]

It is, of course, necessary that the decision-maker be appraised of all relevant material in order to evaluate the recommendation and to understand the force of the representations.[44]

In *Hedges*, Young CJ in Eq was critical of the decision-making body (the Professional Standards Committee) because they had nothing before them other than the investigator's report, because they apparently did not turn their minds to the underlying issues but simply adopted the report and because they appeared to have acted in ignorance of the evidence apart from the investigator's inadequate summary of it.[45]

What can you do if you don't like the decision?

Declarations

In New South Wales, if the Supreme Court has jurisdiction to intervene in a matter and the claim of denial of procedural fairness is made out, the Court has the power to declare a decision invalid. The Court may make orders:

1. which quash the legal effect or consequences of the decision (in the nature of certiorari);
2. which prohibit the decision-maker from proceeding towards, taking or implementing the unlawful decision (in the nature of prohibition); and
3. which compel the performance of a public duty (in the nature of mandamus).[46]

The Court's power to grant such relief is a discretionary one which "(i)t is neither possible nor desirable to fetter ... by laying down rules as to the

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[43] (1997) 2 NSWLR 909 per Reynolds JA at 923-4
[44] *Jeffs v New Zealand Dairy Production and Marketing Board* (1967) 1 AC 551 at 566-569
[45] [2003] NSWC 1107, para 80. See also *Carter*, [2004] NSWSC 737 at para 49, 97-99
[46] Section 69 of the *Supreme Court Act 1970 (NSW)*. The prerogative writs (of certiorari, prohibition and mandamus) are still available in the original jurisdiction of the High Court of Australia: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576-577.

manner of its exercise."[47] However, it is limited to a proper exercise of judicial power. Accordingly, declaratory relief must be directed to the determination of real issues and not to dealing with hypothetical questions.[48] The person seeking relief must have "a real interest".[49] Relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that (have) not occurred and might never happen"[50] or if "the Court's declaration will produce no foreseeable consequences for the parties".[51]

A significant issue in all cases where educational institutions are involved is whether or not their decisions affecting students and staff are amenable to judicial review. This issue has been raised recently in relation to the Universities of Sydney and of New South Wales.

In *Hall v The University of New South Wales*,[52] Professor Hall, the Professor of Medicine at the University of New South Wales, had allegations made against him of scientific misconduct. The University established an Inquiry to investigate these allegations. Professor Hall challenged the validity of the Inquiry's Report in the Supreme Court of New South Wales claiming that the Inquiry had denied him procedural fairness. He sought by way of relief appropriate declarations. McClellan J had no difficulty in accepting that a person denied procedural fairness by a person or a body exercising statutory power could apply to the Court for judicial review. The relevant question, however, was whether the University was exercising statutory power. The University was created by statute but that, of itself, did not mean that the University when supervising its staff was exercising a statutory or public power. McClellan J canvassed the authorities.[53] In the end, he decided that he did not need to determine whether or not the Inquiry process was amenable to judicial review because he found that the Court could intervene and make appropriate declarations on the basis that:

1. the University engaged in a process which could have very severe consequences for Professor Hall; and

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[47] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, per Gibbs J at p 437
[48] See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257
[49] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, per Gibbs J at p 437; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Ltd* (1921) 2 AC 438, per Lord Dunedin at p 448
[50] *University of New South Wales v Moorhouse* (1975) 133 CLR 1, per Gibbs J at p 10
[51] *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180, per Mason J at p 188; see also per Aickin J at p 189
[52] [2003] NSWSC 669 (15 August 2003)
[53] [2003] NSWSC 669 (15 August 2003), paras 77 to 116

2. the formality of the Inquiry, the nature of the persons who conducted it and the allegations being investigated were such that the Inquiry was required to afford him procedural fairness.

In *Wilde v University of Sydney*,[54] Macready AJ dealt with a claim by a student that she was not accorded natural justice in respect of certain charges of misconduct against her by virtue of behaviour said to be in breach of the University By-laws. Macready AJ considered similar authorities to those considered by McClellan J in *Hall's Case* and concluded, relying on the High Court's decision in *Ainsworth v The Criminal Justice Commission*,[55] that the University had a duty of procedural fairness because the power involved was one which could "destroy, defeat or prejudice a person's rights, interests or legitimate expectations".[56] Macready A J said:

> *The case with which I am concerned differs in that it arises out of a private investigation conducted by a University to see whether allegations made against its officers had substance. The investigation was conducted in the course of the proper governance of the University, which no doubt wished to ascertain whether the conduct of its officers had been appropriate. There is no evidence before me to suggest that the internal report was published elsewhere than to the plaintiff. The report cannot lead to anything adverse to the plaintiff because nothing flows from it. The findings made in the report do not have any binding effect on the plaintiff.... In [the] subsequent investigative process ... there is adequate provision for the rules of natural justice to apply. The plaintiff is given appropriate notice of the charges and the chance to refute them.*[57]

So, an order quashing the decision (in the nature of certiorari) does not lie to correct the failure of investigators to comply with their duty to proceed in a way that is fair to those being investigated where their report has no legal effect and carries no direct or indirect legal consequences. Nevertheless, most investigations against staff at educational institutions will, like that involving Professor Hall, potentially affect both future employment and

[54] [2002] NSWSC 954 (15 October 2002)
[55] (1992) 175 CLR 564 at 576-577
[56] *Annetts v McCann* (1990) 170 CLR 596 per Mason CJ, Deane and McHugh JJ at 598)
[57] [2002] NSWSC 954 (15 October 2002) at para 37

reputation. Therefore, the courts are likely in most cases to exercise their discretion to intervene.[58]

The law with respect to procedural fairness has developed in spite of the technical aspects of the old prerogative writs. If those under investigation have advance notice of an investigator's intention to report adversely, the failure to observe the requirements of procedural fairness would entitle them to relief by way of prohibition preventing the investigator from reporting adversely without first giving them an opportunity to answer the matters put against them and to put submissions as to findings or recommendations that might be made.

Reinstatement following unfair dismissal

In *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*, the issue of procedural fairness arose after Mr Russell's services were terminated and he brought an application in relation to unfair dismissal. The effect of this was that the Industrial Commission of NSW reheard the investigation into Mr Russell's alleged misconduct. Harrison DP said, "the Commission is now better placed than [the investigator] to determine the central question of fact."[59] The end result was that the Commission found that Mr Russell's termination was harsh, unreasonable and unjust and, as reinstatement was not considered impractical, he was reinstated with restitution of wages and continuity of services for all purposes. This is quite a different outcome to proceedings for declaratory relief in the Supreme Court.

Damages for negligence

Poor investigations usually lead to litigation at the instance of the person whose conduct is being investigated. However, the courts have been asked to decide whether investigators owe a duty of care to those who have been the subject of the alleged misconduct. For example, in *X v Bedfordshire County Council*[60], the House of Lords held that, as a matter of public policy, it was not just and reasonable to impose a common law duty of care, either to children or to their parents, on those with the statutory duty of protecting children from suspected abuse.

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[58] *Carter*, [2004] NSWSC 737 at paras 100-109
[59] [2004] NSWIRComm 65 at para 319
[60] [1995] 2 AC 633

The High Court of Australia has also said that those exercising a statutory duty (such as to investigate or protect children from child abuse) do not owe a duty of care to those being investigated.[61] In New South Wales, Part 5 of the *Civil Liability Act 2002 (NSW)* contains provisions limiting the liability of public authorities exercising statutory duties.

There are some suggestions that there may be a remedy in damages for wrongful administrative action. Windeyer J discusses this without needing to form a view in *Forbes v Boston*[62]. Generally, it seems that a denial of natural justice by a public authority is not treated as a breach of statutory duty.[63] Likewise, the High Court of Australia has said that failure to proceed in accordance with the principles of natural justice is not evidence of negligence unless one can find, adopting normal principles, a duty of care.[64]

However, it seems to me that investigators engaged by educational institutions may owe a duty of care both to the educational institutions that hire them (both under contract and at common law) and to the parties involved in the investigation. I note that such investigations are not carried out pursuant to a statutory duty. While I am not aware of any cases on point, in principle, there would appear to be no overriding policy basis for denying the existence of a duty of care in such cases.

For completeness, I note that Section 32 of the *Occupational Health and Safety Act 2000 (NSW)* makes it clear that the statutory duty under Section 8 on employers does not confer a right of action in any civil proceedings.

Workers Compensation

In *Sinclair v Department of Education and Training*,[65] Mr Sinclair claimed compensation on the basis that he suffered a partial incapacity for work and an injury arising out of his employment as a teacher. Allegations were made against Mr Sinclair of improper conduct against as student. He was placed on alternative duties while an investigation was undertaken. He was dismissed two and a half years later. He claimed that after the initial advice of the allegation he commenced to suffer from depression. The Department argued that Mr Sinclair's injury was the result of reasonable action taken

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[61] *Sullivan v Moody* (2001) 207 CLR 562; *Tame v NSW* (2002) 76 ALJR 1348; *Heptonstall v Gaskin & 2 ors* [2003] NSWSC 693
[62] [1999] NSWSC 1217 at para 28
[63] *Dunlop v Woollahra Municipal Council (No. 2)* (1981) 33 ALR 621
[64] *The Council of the Shire of Sutherland v Heyman* (1984-85) 157 CLR 424
[65] Workers Compensation Commission Matter No 18512-03 (23 March 2004)

with respect to discipline. Because there was some doubt as to whether everything done by the Department was "with respect to discipline", the Arbitrator considered the reasonableness of the Department's actions. The Arbitrator found that it was unreasonable for the Department not to have informed Mr Sinclair at the outset that an allegation had been made by the girl's parents that he was involved in a sexual relationship with their daughter. Instead, Mr Sinclair had only been given the broadest details of the nature of the allegation. The Arbitrator said:

> *The Applicant was nonetheless left in a position where he does not know who the allegation is about, what it is that he is supposed to have done or even when he is supposed to have done it. In the absence of such information he has no ability to determine his risk and he is unable to take any steps such as the interviewing of witnesses or otherwise gathering evidence which would establish his innocence. The failure to give details of the allegation would have greatly increased the stress factor of the Applicant's situation.*[66]

The Arbitrator also found that the Department had acted unreasonably in directing Mr Sinclair not to speak to students and in removing him from the school.

Mr Sinclair was found to be incapacitated and therefore was entitled to compensation. The Department's failure to afford him procedural fairness prevented it from successfully defending his claim.

So what does it all mean?

Investigations are now a common feature of life in educational institutions. It is important to take allegations seriously as they may be well founded and investigation of them may save children and others great harm. However, investigations that are "riddled with injustice and illegality"[67] may ruin a person's health, reputation and future employment prospects. Educators must accept that they do not necessarily have the training, skills or time to investigate fairly. Where this is the case, recent court decisions suggest that these educators would serve every one well either by getting advice at each step of the investigation and decision-making process or by out-sourcing the investigation to someone with the skills to do it fairly.

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[66] Workers Compensation Commission Matter No 18512-03 (23 March 2004) at para 43
[67] *Carter*, [2004] NSWSC 737 at para 147